



## Chief Industrial Magistrates' Court New South Wales

Case Name: Fire Brigade Employees Union v Fire and Rescue NSW

Medium Neutral Citation:

Hearing Date(s): 7 November 2017

Date of Orders: 22 December 2017

Date of Decision: 22 December 2017

Jurisdiction: Industrial

Before: Shields LCM

Decision: Summons dismissed

Catchwords: Industrial Law – prosecution for breach of award – interpretation of award – overtime on recall - allowances

Legislation Cited: Industrial Relations Act, 1996 ss 357, 358, 399(1)(c), 403(1)

Cases Cited: *Amcor v CFMEU* (2005) 222 CLR 241, at [95]  
*Bryce v Apperley* (1998) 82 IR 448, at 452  
*King v R* (1986) 161 CLR 423  
*Kirk v Industrial Relations Commission Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* [2010] HCA 1  
*Kucks v CSR Ltd* (1996) 66 IR 182, at 184  
*Manildra Flour Mills (Manufacturing) Pty Ltd v National Union of Workers* [2012] FCA 1010, at [50] to [52]  
*Norwest Beef Industries Ltd v Australasian Meat Industries Employees Union of Workers (WA Branch)* (1984) 12 IR 314, at 331  
*Tanwar Enterprises Pty Ltd v New South Wales Industrial Relations (No 3)* [2015] NSWIC 8, at [92]

Texts Cited:

Category:

Parties: Fire Brigade Employees Union of New South Wales -  
Prosecutor  
Fire and rescue New South Wales - Defendant

Representation: Counsel:  
  
Mr J. Nolan - FBEU  
  
Mr. R. Reitano - FRNSW

Solicitors:  
  
Ms G. Lawrence – Senior Industrial officer FBEU

File Number(s): 2017/193307

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## JUDGMENT

1 By an Summons filed in the Chief Industrial Magistrates Court on 28 June 2017 the Fire Brigade Employees Union of New South Wales ('FBEU'):

(1) Alleges that Fire and Rescue NSW ('FRNSW') contravened sec 357 of the Industrial Relations Act 1996 ('the Act'), by breaching clauses 6.9.2, 9.6. 9.10 and 10.3.1.1 of the Crown Employees (Fire and Rescue NSW Permanent Firefighting Staff) Award 2017 ('the Award'), when it did not pay overtime, and meals and travel allowances to certain members who were recalled to attend an incident of flooding in Northern New South Wales in March 2017 ('the Floods');

(2) Seeks:

- (a) A civil penalty under sec. 357(1) of the Act;
- (b) An order under sec 403(1) of the Act that the penalty be paid to the FBEU as the prosecutor;
- (c) Orders under sec 358 of the Act for payment of specified amounts and interest to Messrs Harris, Baker, Forester, Brusilowicz and Furlong ('the Fire-fighter's) arising from the alleged breaches;
- (d) Interest; and
- (e) Costs.

### Evidence

2 The FBEU's evidence in support of the Summons is the contained in the following affidavits:

- (1) Leighton Drury sworn 27 June 2017, verifying the Application for the issue of the Summons;
  - (2) Gemma Lawrence sworn on 11 October 2017;
  - (3) Robert Brusilowicz sworn on 6 September 2017, concerning the circumstances of his deployment to duty arising from the Floods; and
  - (4) Glen Baker sworn, but not dated, concerning the circumstances of his deployment to duty arising from the Floods.
- 3 FRNSW did not lead any evidence, and did not cross examine the deponents of the FBEU's affidavits.
- 4 The parties have agreed certain facts set in an Agreed Statement of Facts, tendered and marked as Exhibit 1. That document records formal matters concerning the nature and role of the FBEU as the Prosecutor, the establishment of the FRNSW, the application of the award, the employment and conditions of employment of the Fire-fighters, the Floods event in Northern New South Wales and the deployment of the Fire-fighters, the terms of certain conditions in the Award and the payments for overtime and allowances made to each of the Fire-fighters for the periods when each of them was recalled to duty in relation to the Floods.
- 5 The particulars of the charge in Summons refer to each of the Fire-fighters, at [5] to [6] and [8] to [11], and payments to each of the Fire-fighters are also sought. There is however no evidence called by the FBEU from Messrs Harris, Forester and Furlong concerning the circumstances of their duty in relation to the Floods, and therefore the only material before the Court concerning them is the formal matters in the Agreed Statement of Facts. In absence of any evidence from Messrs Harris, Forester and Furlong the material before the Court is insufficient to establish any breach of the Award arising from their duty at the Floods and consequent payments to them.

## The Award

6 The parts of the Award upon which the FBEU relies are:

- (1) Clause 6.9.2, which relevantly requires that payments for overtime shall be paid within two pay periods of the date upon which the overtime was worked. This clause is relied upon only in the formal sense to make out the case that if additional payments were due to the Fire-fighters under the Award, they were not paid in time;
- (2) Clauses 9.1, 9.4, 9.6, and 9.10 concerning overtime, which are relevantly in the following terms:

9.1 Subject to subclause 9.2, overtime shall be paid for at the rate of time and one-half for the first two hours and at the rate of double time thereafter, provided that an employee who is required to work overtime shall be entitled to payment for at least 15 minutes of overtime on each occasion that the employee is called upon to work overtime. To avoid doubt, where work commences prior to the start of an employee's rostered shift and continues beyond the conclusion of that shift then the relevant rate of pay shall be determined by having regard to the entire period of overtime worked, so that any and all overtime worked in excess of two hours is paid at the rate of double time.

...

9.4 When it is reasonably necessary for an employee who has returned to the station either before or after the ceasing hour of the shift to clean up before leaving the station, and thereby justifiably leaves the station after the ceasing hour, the time so reasonably and necessarily occupied beyond the ceasing hour shall be paid for as overtime

...

9.6 Recall to Incident

9.6.1 An employee who is off duty and who is called upon, pursuant to subclause 9.6.2, to report for duty to attend an incident shall be entitled to a minimum payment equal to two hours at overtime rates.

9.6.2 Notwithstanding anything elsewhere contained in this clause, in the case of an incident, all employees off duty shall be liable to be called upon to report for duty and if called upon shall report immediately for duty

9.6.3 An employee who is on annual leave or long service leave and who reports for duty to attend an incident shall, in addition to payment pursuant to subclause 9.1, be credited with consolidated leave equal to the amount of time so worked.

9.6.4 For meal allowance entitlements when the employee remains on duty for a period of four hours or more in connection with a recall pursuant to subclause 9.6.1, see Clause 10, Meals and Refreshments.

...

9.10 When overtime work is necessary it shall, except in the case of an emergency, be so arranged that employees have at least eight consecutive

hours off duty between the work of successive shifts. Where an employee works so much overtime between the termination of the employee's ordinary work on any day or shift, and the commencement of the employee's ordinary work on the next day or shift, that the employee has not had at least eight consecutive hours off duty between these times, the employee shall be released after completion of such overtime until the employee has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

9.10.1 If on the direction of the employee's authorised supervisor, such employee resumes or continues work without having had such eight consecutive hours off duty, the employee shall be paid at the rate of double time until the employee is released from duty for such period, and the employee shall be entitled to be absent until the employee has had eight consecutive hours off duty without loss of pay for ordinary working time occurring during such absence.

9.10.2 Provided that while recalls shall be paid for at overtime rates in accordance with this Award, where the actual total time worked on a recall or recalls is less than 3 hours it shall not count for the purpose of determining whether an employee has had an eight hour break pursuant to this subclause.

(3) Clause 10.3.1, which relevantly provides for the provision of refreshments and meals, or payment in lieu, when Fire-fighters attend an incident and work overtime.

7 Other relevant provisions of the award include the definition of 'Overtime' in Clause 4 which is relevantly in the following terms:

"Overtime" means for an Operational Fire-fighter all time worked with approval or direction in excess of the employee's rostered shift.

### **Principles of Interpretation**

8 The principles governing interpretation of an Industrial Award are well established, and were summarised by Cowdroy J in *Manildra Flour Mills (Manufacturing) Pty Ltd v National Union of Workers* [2012] FCA 1010, at [50] to [52]:

[50] Interpreting an industrial award requires an approach focusing on the actual words used and their plain, ordinary English meaning: see *Bryce v Apperley* (1998) 82 IR 448 at 452. If the words of the award have an unambiguous meaning, then that is the meaning that should be ascribed to them and there is no need for the court to consider the expressed or supposed intention of the drafters of the award: see *Norwest Beef Industries*

*Ltd v Australasian Meat Industries Employees Union of Workers (WA Branch)* (1984) 12 IR 314 at 331.

**[51]** If there is a degree of ambiguity, then the court must consider the relevant clauses of the award in their context. The principles in this respect are set out in *Kucks v CSR Ltd* (1996) 66 IR 182 at 184:

It is true that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

**[52]** In construing award provisions it is also important to have regard to the nature of the document, the manner of its expression, the context in which it operated and the industrial purpose it serves: see *Ancor v CFMEU* (2005) 222 CLR 241 at [95].

### **FBEU's Case**

- 9 Counsel for the FBEU, Mr Nolan, has provided written outlines of submissions and submissions in reply.
- 10 In relation to the payment of hours for overtime the FBEU's case may be summarised in the following way:
  - (1) The Award, on its true construction, requires that Fire-fighters be paid continuously from the time they commence duty to the time that they cease duty at the specified overtime rates irrespective of whether they

were on duty and responded to the incident, or were off-duty and recalled to attend the incident;

- (2) There is no provision in clause 9 of the Award that:
  - (a) Permits the temporary suspension of a recall by standing down Fire-fighters on unpaid breaks;
  - (b) Permits FRNSW to recall a Fire-fighter at one location and to dismiss that Fire-fighter from duty at another location;
- (3) FRNSW has contravened clause 9.10 and 9.10.1 by not paying continuous overtime to Fire-fighters who during the response to the Floods did not have eight (8) continuous hours off-duty before the commencement of their rostered shift;

11 In essence the FBEU's case in relation to overtime is that, for the purposes of clause 9 of the Award, recalls are a separate and distinct species of event where the Fire-fighters are treated as on duty for the whole of the deployment starting at the time and place where they report or are recalled for duty and ending only at the time they are returned to that place, and paid at overtime rates for the whole of the period.

12 In relation to allowances for meals and travel the FBEU contends the Award requires that FRNSW provide Fire-fighters attending an incident and working overtime with refreshments after two (2) hours and a substantial meal every four (4) hours thereafter, or payment in lieu under clause 10.2. This part of the FBEU's case was argued on the basis that the claimed amounts were solely referable to the periods during the response to the Floods when the Fire-fighters were temporarily stood down on unpaid breaks because work was not able to be safely performed during the hours of darkness, and would therefore rise or fall on the resolution of the issue concerning the entitlement to payment of overtime for the latter periods.



- 13 In relation to allowances for travel, it was common ground that the allowances for travel have been paid by FRNSW, although FBEU contends outside the period specified in clause 6.9.2.

### **FRNSW's Case**

- 14 In relation to hours and overtime, the case for FRNSW is that overtime is paid under clause 9.6.1 of the Award for hours worked in excess of the ordinary shifts that each Fire-fighter was scheduled to work according to the roster referred in clause 8.2.1 of the Award which coincided with their work during the period that they were responding to the Floods. FRNSW submits that the Award, understood in that way, provides for ordinary rates of pay during the Fire-fighters' rostered shifts and overtime rates for any hours worked in excess of their rostered shifts. In essence the case is that on an ordinary reading of the Award there is no basis to treat recalls as a separate and distinct species of event and otherwise than by a customary application of the overtime provisions in clause 9.
- 15 In relation to meals and refreshment FRNSW case is that it complied with clauses 10.1, 10.2 and 10.3 of the Award during the hours that Fire-fighters were on duty at the Floods and was not otherwise required to provide them during the period when the Fire-fighters were stood down overnight.
- 16 FRNSW says that the allowances for travel were only payable, and were in fact paid, after the submission of compliant claims, and in compliance with the Award.

### **Overtime at the Floods**

- 17 The Agreed Statement of Facts does not contain any information concerning whether any of the Fire-fighters were on duty and responded to the Floods or were off-duty and recalled to respond to the Floods.

- 18 The affidavit of Glen Baker, at [2] to [4], contains evidence that on 2 April 2017 he was off-duty and at home when he was recalled to respond to the Floods.
- 19 The affidavit of Robert Brusilowicz is silent as whether he was on or off duty when he was asked by text message on 3 April whether he was available to respond to the Floods or when he reported to the College at Alexandria in the late afternoon of 5 April 2017.
- 20 There is no evidence called from Messrs Harris, Forester and Furlong concerning their circumstances or duty in response to the Floods.
- 21 For the purposes of an entitlement to Overtime under clause 9 of the Award, Mr Baker was recalled within the meaning of clause 9.6, and it is not possible to determine, on the evidence, whether Mr Brusilowicz was in a similar position and therefore recalled to duty, or simply came on-duty when he reported on 5 April 2017.
- 22 The FBEU submissions are however made on an apparent assumption that each of the Fire-fighters was recalled to duty.
- 23 The only evidence of any kind concerning the events during the response to the Floods is contained in the affidavits of Messrs Baker and Brusilowicz, and is scant. In relation to the duty hours the relevant parts of the evidence are:

- (1) Mr Brusilowicz's evidence, at [11]:

We could not perform any duties during the evening, as it was too dangerous to do so in the dark, and we were told to remain at the Base until morning

- (2) Mr Baker evidence, at [8] to [10], to the effect that during the time he was deployed to Ballina in response to the Floods there were periods when he was resting overnight, although he does not state the reason.

24 Further, the evidence of Mr Brusilowicz, at [3], sets out the text providing the details for him to report for duty concerning the Floods, which included the following:

..Also need stand down clothing for wet weather and recommend a towel and pillow  
(emphasis added)

25 It is appropriate to first consider the FBEU's submission that recalls are a separate and distinct species of event where the Fire-fighters are treated as on duty for the whole of the deployment starting at the time and place where they report or are recalled for duty and ending only at the time they are returned to that place, and paid at overtime rates for the whole of the period.

26 Counsel for the FBEU conceded during oral submissions that no part of clause 9, or any other part of the Award upon which the FBEU relies, expressly states those matters and, in that circumstance, the interpretation of the Award for which the FBEU contends can only arise by 'implication' from the Award read as a whole.

27 The FBEU's approach, and the submission, is flawed because it is simply not consistent with the principles of interpretation set out above, which firstly requires the Court to focus on the actual words used in the Award and their plain, ordinary English meaning, and if the words of the Award have an unambiguous meaning, to ascribe that meaning. It is only if there is some ambiguity that the Court moves to the next stage, where consideration is given to the expressed or supposed intention of the drafters of the Award, and the context. Clause 9 does not exhibit any relevant ambiguity, and it contains a workable set of provisions that govern the entitlement to, and calculation of, overtime, the plain and ordinary meaning of which does not provide for the approach apparently taken and submitted by counsel for the FBEU. There is simply no occasion to go further and consider the expressed or supposed intention of the drafters, of which there is no evidence or material before the Court, or the broader context.

28 Even if it was appropriate to proceed in the manner submitted by the counsel for the FBEU, the submission falls into further difficulty. Counsel refers to clauses 8.9.4 to 8.9.5 and 12 as a sufficient basis to give rise to the 'implication' that the Award should be read in the way that the FBEU contends, however those clauses do not support any conclusion that recalls are a separate and distinct species of event where the Fire-fighters are treated in the manner contended by the FBEU:

- (1) Clauses 8.9.4 and 8.9.5 are in the Part 8 of the Award that concerns 'Hours of Work' and they deal with the circumstance where a change of shift occurs during the course of a response to an incident. Clause 8.9.4 requires the off-going platoon attending the incident to remain at the incident until relieved, and clause 8.9.5 permits the officer-in-charge to hold both the oncoming and off-going platoons for the duty at the incident. Both clauses plainly deal with a circumstance where a continuous presence at an incident is required to perform work at the time that shift change occurs. It has nothing to say concerning a circumstance akin to the present case where during the response to an incident, and for reasons of safety, work was not performed during the night hours work and therefore the Fire-fighters were stood down. It expressly deals with the converse situation where work needs to be and, significantly, is continuously performed across the change of shift;
- (2) Clause 12 sets out particular provisions that deal Relieving Employees who work provide relief when other employees perform 'Outduty', as that term is defined. Clause 12A is similar and deals with interstate and international deployments. Mr Nolan submits that clause 12 is an example of the Award treating specific kinds of duty as a separate and distinct species of event and in particular way. Clauses 12 and 12A show that the drafters of the Award clearly contemplated, and separately dealt with, duty in special or particular circumstances by specific and separate provisions. For reasons unknown, and not explained in any evidence, that course was not taken in the Award in relation to overtime for recalls.

- 29 Although not part of the Award, the FBEU also relies on the document attached to the affidavit of Gemma Lawrence sworn on 11 October 2017, which is a Standing Order entitled 'Sleeping on 'N' Duty' ('the Order'). The Order permits sleeping on duty in certain stated circumstances. General Condition 1 of the Order expressly states that the permission is a concession which, if abused, will be removed in favour of a reversion to compliance with the terms of the Award; and is therefore, by its own terms, inconsistent with the proposition that the Award should be construed in way that permits Fire-fighters to be on duty and to sleep. If that were so, the Order would be otiose. The Order also deals with a completely different, and distinguishable, set of circumstances, where Fire-fighters are on specific types of duty, and able to perform work but there is no work to be done; whereas, on the facts of this case, the Fire-fighters could not perform work because of considerations of safety, and were therefore stood down.
- 30 The fact that the Award does not on its face distinguish between recalls for significant events such as the Floods and other events of lesser duration plainly supports FRNSW's contention that overtime for recalls is not a separate and distinct species of event as the FBEU contends, and therefore the entitlement to overtime, if any, falls to be determined in accordance with the general overtime provisions in clause 9 read in the ordinary way.
- 31 FRNSW points to the definition of overtime, and particularly the words '*all time worked with approval or direction in excess of the employee's rostered shift*' as supporting its primary contention that overtime is only paid under clause 9.6.1 of the Award for hours worked in excess of the ordinary shifts that each Fire-fighter was scheduled to work according to the roster which coincided with their work during the period that they were responding to the Floods, and not during any period of stand down. That submission rests on the words '*time worked*' and '*in excess of the employee's rostered shift*'. There is no ambiguity in the definition of 'overtime' and the ordinary and plain meaning of the definition is entirely consistent with FRNSW's interpretation of Award and wholly inconsistent with the case for the FBEU.

32 FRNSW further points to clause 9.10, and particularly the opening words '*When overtime work is necessary*' and '*overtime worked*' in 9.10.2 to support its case in relation to stand downs that, apart from anything else, there must be work done before overtime is paid.

33 The plain and ordinary meaning of the definition of Overtime mandates a conclusion that under the Award Fire-fighters recalled to duty at the Floods are not paid at overtime rates for the time when they were:

- (1) Rostered to work shifts which coincided with duty at the Floods; and
- (2) Stood down for reasons of safety.

34 Similarly, the plain and ordinary meaning of clause 9.10 also requires that work actually be performed before the payment of overtime is required.

### **8 hour Breaks**

35 The first sentence of clause 9.10 is as follows:

When overtime work is necessary it shall, except in the case of an emergency, be so arranged that employees have at least eight consecutive hours off duty between the work of successive shifts.  
(emphasis added)

36 The requirement for an 8 hour break on recall is therefore subject to a clear exception in the case of an emergency, and the Floods plainly were an emergency.

37 FRNSW also submits that, for the reasons set out in its submissions dated 19 September 2017, at [12] to [16], that each of Messrs Brusilowicz and Baker did in fact receive breaks of 8 hours, or more, between the periods of work that they performed at the Floods. That submission appears to be based on information at least some of which is not in evidence in these proceedings.

38 The evidence of Mr Brusilowicz on this issue is scant, and incapable of supporting any finding concerning the times at which he finished and commenced work during his duty at the Floods and therefore whether he did, or did not, receive a 8 hour break. His affidavit records:

- (1) The time on 5 April that he reported for duty at St Marys Fire Station, at [4];
- (2) What happened on his arrival at Tweed Heads, although the time of his arrival and at which he finished work is not given, at [5];
- (3) That he reported for duty at 0645 on 6 April; and
- (4) The time at which he returned to Sydney on 9 April 2017, at [12].

There is otherwise no further evidence in the affidavit concerning those matters, and the deficiencies are not remedied by the Agreed Statement of Facts, which gives no duty times for Mr Brusilowicz,

39 The affidavit of Mr Baker contains evidence, that he:

- (1) Reported for duty on 2 April 2017, transported to Ballina where he received a briefing and then a meal at 1830, and then taken to Wollongbar at 2230, where he was allocated a tent at 2330, at [4] to [8];
- (2) Attended a briefing at 0645 on 3 April 2017, and then worked until 1800, after which he cleaned up, although the time at which he finished cleaning up is not given, at [9];
- (3) Attended a briefing at 0700 the next day, 4 April 2017, although no finishing time is given, at [9];
- (4) Worked on 5 April where 'the same occurred' although he returned to base at 1700, at [10]; and

(5) Returned to Sydney on 6 April 2017, although the time of arrival is not given, at [11].

40 The deficiencies are again not remedied by the Agreed Statement of Facts, which gives no duty times for Mr Baker.

41 The evidence of Mr Baker does not support a finding that he did not receive an 8 hour break between shifts on 3 to 6 April 2017. In relation to 2 April 2017, there is no basis in the evidence to find, on the balance of probabilities, that the time at which Mr Baker was allocated a place in the tent is the time at which he ceased work on 2 April 2017, and therefore conclude that he did not receive an 8 hour break before the briefing the next morning at 0645. The evidence of Mr Baker on this issue is notable for the fact that it does not expressly state the time that he finished work on 2 April 2017. Even if you assume that Mr Baker finished work at 2330 he received a 7 hour and 15 minute break before the briefing the next morning at 0645 in the context of an emergency, which the Award expressly exempts from the requirement for an 8 hour break between shifts.

42 There is no evidence from Messrs Harris, Forester and Furlong, or agreed facts, concerning their duty in response to the Floods.

### **Meals & Refreshments**

43 The claim relating to meals and refreshments is based on clause 10.3.1 and is also dependent upon a finding that the Award should be construed in manner for which the FBEU contends set out in paragraph [10] above. Counsel for the FBEU concedes that in relation meals and refreshment, on the facts of this case, that that construction gives rise to the somewhat anomalous, and perhaps illogical, situation where FRNSW would be required to provide meals and refreshments while the Fire-fighters were asleep during the night, or pay an amount in lieu. Counsel for the FBEU dismisses the latter on the basis that in different circumstances Fire-fighters sometimes attend incidents during the night, which may well be true, but those different circumstances are not



this case, and an Award would not ordinarily be read in a way that gives rise to illogical or anomalous outcomes. The fact that the FBEU's construction does give rise to anomalous or illogical outcomes is itself a factor that militates against reading the Award in that way.

- 44 It is however unnecessary to further consider this claim in the light of the conclusions set out above concerning the overtime provisions.

### **Time of the Payments & Travel Allowances**

- 45 The FBEU's case arising from the time of the payment relates only to the payment of travel allowances; Submissions dated 5 September 2017, at [4.1] and Submissions in Reply dated 11 October 2017, at [5.1 c)].
- 46 The claim for travel allowances was advanced by the FBEU without any apparent regard to the fact that the Summons, upon which it moved at the hearing, does not allege a breach of clause 9.8 of the Award, and the Particulars of the charge(s) contains no reference of any kind to claims for travel allowances, or the time at which they were made. At its highest the Summons asserts a wholly bare and un-particularised breach of clause 6.9.2 of the Award.
- 47 The proceedings are civil in nature; *Tanwar Enterprises Pty Ltd v New South Wales Industrial Relations (No 3)* [2015] NSWIC 8, Kite AJ, at [92]. They are nevertheless a claim for a civil penalty, which is a serious matter, and in that context the prosecuting party cannot and should not be permitted to agitate claims of breach where they have not properly, or at all, particularised the breach. For that reason alone, those claims fall outside of the parameters of the matters that the FBEU is entitled to agitate in this proceeding; see *Kirk v Industrial Relations Commission Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* [2010] HCA 1; *King v R* (1986) 161 CLR 423.

- 48 Clause 6.9.2 provides in relation to overtime that Fire-fighters shall be paid *'within two pay periods after the date upon which such overtime was performed'*.
- 49 The word 'within' is a preposition the ordinary and natural meaning of which can vary according to its context. One of those meanings, and perhaps the most restrictive, is 'inside', and another is 'not more than'; although the latter seems more appropriate in the context. Reading the words 'not more than' in place of the word 'within' in clause 9.6.2 still leaves a patent ambiguity; whether not more than two pay periods after 9 April 2017 should be construed as including or excluding the pay period in which the duty at the Floods was performed, and which ended a matter of days after that duty concluded. In that context is it significant that the drafters of the Award expressed the time frame in *'pay periods'*, and not in the number of days that equate to a pay period. On that basis the plain and ordinary meaning of 'two pay periods' is whole pay periods which necessarily excludes the pay period in which the duty was performed, because, given that it ended a matter days after the duty concluded, is not a complete pay period after the date on which the work was performed.
- 50 The affidavit of Mr Brusilowicz, at [13], refers to, and annexes, his payslip dated 11 May 2017 covering the period 28 April 2017 to 11 May 2017. The payslip records payments for overtime and travel the period 5 April to 9 April when he performed recall duty at the Floods. The affidavit contains no evidence concerning the form of, or the date on which, Mr Brusilowicz submitted his claim travel allowance.
- 51 The affidavit of Mr Baker records, at [5], that on 2 April 2017 he was flown to the area of the Floods, and at [11], that he was returned to Sydney on 6 April 2017, although he does not say how. Notably, his affidavit does not contain any evidence to establish that he was entitled to, made a claim for, or was therefore paid, any travel allowance. In contrast paragraph [24] of the Agreed Statement of Facts records that Mr Baker was paid \$72.50 for 'Recall Kilometres', although the date on which that amount was paid is not given,

and the payment is not apparent in any of the documents attached to his affidavit. On the evidence it is not possible to make any finding about the date on which the amount was paid.

52 Paragraph [23] and [25] of the Agreed Statement of Facts respectively record that Mr Harris was paid \$41.25 and Mr Forester was paid \$47.50 for 'Recall Kilometres'; although again the dates of the payments are not given. The Agreed Statement of Facts does not record that Mr Furlong was paid any amount for travel or recall kilometres.

53 On the basis of the FBEU's evidence and the Agreed Statement of Facts it is not possible to find on the balance of probabilities that there has been any breach of the Award by FRNSW concerning the payment of travel allowances to Messrs Baker, Harris, Forester or Furlong.

54 In relation to Mr Brusilowicz, the allowance was apparently referable to the period 5 April to 9 April when he performed recall duty and overtime at the Floods. Working from the payslips attached to his affidavit, the pay period in which he performed that duty ended on 13 April 2017, a mere four (4) days after he returned to Sydney. The two subsequent pay periods ended on 27 April 2017 and 11 May 2017, and the payment was made in the latter which, for the reasons set out above, is within two pay periods after the date on which the duty was performed in compliance with the Award.

55 Even if a contrary, and more restrictive view taken, resulting in a conclusion that the amounts should have been paid in the pay period ending on 27 April 2017, there is no evidence that the failure to pay the amount in the correct pay period was intentional or reckless or the result of any conscious lack of care or attention to the Award or FRNSW obligations under the Award, and any contravention is therefore properly described as technical and bare. In those circumstances, and having the regard to the obvious and significant challenges faced by FRNSW in responding to an event as significant as the Floods, any contravention of the Award arising from the time of payment is properly to be regarded as *de minimus non curat lex*, such that no penalty

would be justified if a contravention was established. It is of course not appropriate to find any contravention as the Summons neither alleges nor particularises any breach of clause 9.8 of the Award, and contains only a bare an un-particularised assertion of a breach of clause 6.9.2.

**Conclusion**

56 The Summons is dismissed.

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