IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION

COURT NUMBER W01489202

BETWEEN

ANDREW EDWARDS

Plaintiff

and

SHE HAIRDRESSING PTY LTD T/AS SNIP N SHAPE

Defendant

TRANSCRIPT OF HEARING: 18 MARCH 2010

Magistrate Franz Holzer
For the Plaintiff: Mr Matthew Follett, counsel
For the Defendant: Mr Rohan Miller, counsel

DISCLAIMER: THIS IS AN EDITED EXCERPT OF THE ABOVE HEARING. NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.

HIS HONOUR:

1. In the matter of Edwards and She Hairdressing Pty Ltd. The matter concerns a complaint issued in this court on 31 May 2007. It alleges various breaches of the *Workplace Relations Act 1996* (Cth) (**WR Act**) and in particular it alleges breaches of an award called the *Hairdressing & Beauty Services Victoria Award 2001* (**Award**). The claimed amount as amended was for $63,749.79. It concerned 7 employees of She Hairdressing Pty Ltd which traded as Snip N Shape at the relevant times at the Westfield Shopping Town in Doncaster.

2. The relevant breaches of the Award – there are 3 in issue. One is a tool award allowance. The second is a payment in lieu of notice claim and the third is a severance pay claim. The breaches are alleged to have occurred between about 17 May 2003 and 13 February 2006.

3. In this case relevantly the relevant business was sold by the defendant, She Hairdressing Pty Ltd to Bass Entertainment Pty Ltd by way of a contract of sale dated 16 November 2005 for an amount of $315,000. At the commencement of the hearing leave was sought and granted to Mr Millar who appeared on behalf of the defendant to amend the defence. That wasn't opposed by Mr Follett, counsel that appears on behalf of the plaintiff.

4. The matter proceeded by way of both affidavits and witness statements. I won't detail all of those and also by way of viva voce evidence from, or in relation to whom, I heard many if not all the witnesses relevant to the determination that I have to make. I was assisted by both counsel and in particular assisted by a number of outlines of submission to which I have had regard and they include the plaintiff's outline of submissions on liability and penalty dated 23 February, the defendant's document of the same date and reply submissions of defendant also bearing the same date, 23 February and I received subsequently a letter dated 4 March 2010 from Hunt & Hunt, in which an issue was raised in relation to the accuracy of some of the material before me.

5. Suffice to say I've taken my own regard of the evidence as I noted and where I've needed to I have listened to the tape of the evidence to clarify any ambiguities or issues that were otherwise uncertain to me.

6. The proceeding in a large part concerns ultimately a question of construction. A question of construction of the relevant award and whether, indeed on the evidence before me, there were any breaches proven of the sort that are alleged. In terms of construing any contract of employment, the principles are I think relatively plain. I must approach that task in a commonsense, non-technical way as so much is clear from the decision of His

Honour Justice Ross in the case to which I referred counsel *Whittaker v Unisys Australia Pty Ltd*[1] and also the decision of *MLW Technology Pty Ltd v May*[2], particularly at paragraph 70, by Acting Justice of Appeal Gillard, as he then was. The test is an objective one and so much is clear from the case of the High Court in *Toll v Alphafarm*[3]. I won't recite the full citation of that but I have looked at that, in particular the reference at page 179 of the High Court decision.

7. In terms of an assessment I turn to this issue specifically and intentionally. The issue that I wish to deal with first is one of redundancy. The authority is to make plain that the focus in such an approach is on the position rather than anything else and occurs when the employer in question no longer desires to have the performance of the job done by anyone at all and when the employee's role no longer exists or the duties of the role have changed that for all practical purposes the original role no longer exists then that is a redundancy. *Foster's Group Ltd v Wing*[4] is authority for that proposition and when one has regard to that authority and also when one has regard to the plain words of redundancy in the Third Edition of the Macquarie Dictionary, there has to be a situation proven to my satisfaction to the requisite standard that the employee is or has become superfluous or needs of the employer.

8. There does seem from the authorities that redundancy at common law may exist in a broader sense, for example, upon a redistribution of job functions amongst other employees, and for example, in the context of a reorganisation or of a restructuring but there must in any event be no redeployment possible and the employee must be surplus to the employer's future needs in order to found a redundancy. So the question really as a first issue for me was "Is the present case really one of redundancy?"

9. When one considers some of the relevant authorities including the 1984 Termination Change and Redundancy case to which I was taken and also clause 12.1.2 of the Award which was exhibit P20, it seems that severance payments are generally not payable in circumstances where there was a transmission of business provided, and this is the important proviso, that accrued entitlements were preserved and to that extent, in my view, the present case is distinguishable from those set out in the *Amcor Limited v CFMEU*[5] case as the employees here were employed by an entirely different employer, in this case Bass Entertainment Pty Ltd, although I note the contract of sale refers to the vendor as Snip-N-Shape Pty Ltd but nothing seems to me to turn on that fact in isolation.

10. In this case, prima facie, in my view, clause 12.1.2 of the Award does apply and accordingly, clause 12.3.1 of the Award responds.

11. The issue, then is whether or not clause 12.7.1(a) responds so

as to disentitle any application of clauses 12.1.2 and 12.3.1 and in turn clause 13.5 to which I was taken.

12. On the evidence before me the transmittee, Bass Entertainment, did not recognise prior continuous service and so much is clear from paragraph 9 of exhibit P2, because at all times Mr Frost, on behalf of Bass Entertainment, believed that the vendor would meet that liability. It was of course open to the parties to agree on such matters and I find that this is a matter of fact on the evidence that the vendor agreed to meet this liability. The situation is therefore in my view akin and very similar from the case of *Foster v Parbery*[6], a decision of His Honour Justice White, delivered on 30 November 2009.

13. In this case I have the contract of sale which I said was entered into on or about 16 November 2005. The vendor and purchaser were both represented. The vendor by Rockman & Rockman and the purchaser by Lawcorp Lawyers Pty Ltd. General condition 13.1 of that contract defines apportioned expenses as including long service, sick leave, but that had been deleted from the contract that was signed. Special condition 4 contemplated the giving of notices of termination to all employees of the business and the possibility of re-employment. It is claimed from exhibit D5 that an issue therefore arose in this case in relation to the obligations and entitlements arising under the contract of sale. I note in that regard, paragraph 15 of Ms Petrocco's affidavit, which was sworn on 17 April 2008, forming exhibit D7, and have contrasted that with paragraphs 10 and 12 of Mr Frost's first affidavit affirmed 28 February 2008 and paragraph 12 of the second affidavit of Mr Frost affirmed 26 March 2009 and contrasted further with paragraph 20 of the affidavit of Mr Pacor sworn 21 April 2008. Where there is conflict and there was conflict between the evidence of Mr Frost and Mr Pacor I do prefer, having heard the evidence of both witnesses, the evidence of Mr Frost.

14. Why do I say that? There are a number of factors in my view.

15. The first is that I do not believe it likely that on the 13 February 2006 Mr Pacor gave to Mr Frost a complete listing of staff entitlements including all sick leave accrued as he asserted. I note that that allegation was in any event inconsistent with the letter of McMahon Fearnley to Hunt & Hunt dated 21 October 2008 which formed exhibit DH2 to the affidavit of Mr Thompson sworn 6 April 2009. It is also consistent with the letter, in my view, of McMahon Fearnley dated 20 January 2009 was before me. Mr Pacor gave no evidence and there is no mention of giving that listing to them of the evidence that I have heard.

16. The second factor is the letter from Michael Argentino, the vendor's accountant, dated 11 October 2005, that formed FF2 to exhibit P3. The statement "entitlements will be paid to staff up to a date of settlement" seems to me to be entirely inconsistent with

the position now advanced by the defendant.

17. Thirdly, a further letter from Michael Argentino dated 20 October 2005 which was exhibit FF3 to exhibit P3 also referred to the fact that long service leave entitlements would be put in trust and retained on the evidence before me, that is also my view inconsistent with the position advanced by the defendant of course that didn't happen, on the evidence either.

18. Fourthly, and significantly in my view, Mr Frost's own viva voce evidence was consistent with his understanding of the, objectively, the contract of sale. One must ask, why shouldn't a court give some effect to that contract entered into as I said with the benefit of legal advice on both sides and in circumstances where the wording, in my view, was quite plain and similarly the intention was equally plain? I am not prepared, in this case, to imply a term into the contract that prior employment with the defendant would be recognised which in this case doesn't in my view fall within the ambit of the 1977 *BP Refinery* case[7] to which Mr Millar took me.

19. I have dealt with the question of severance first. The question of the payment in lieu of notice really falls into line with my finding in relation to the severance issue and having regard to those matters it follows that the plaintiff is in my view entitled to an order on behalf of the affected employees in relation firstly to the payment claim in lieu of notice and the amount of that component sum $17,884.75 and severance pay issue similarly the same reason at $41,551.04.

20. In relation to the tooling allowance, I don’t accept the position advanced by the defendant. There is no evidence properly before me of any agreement at the time any of the employees were employed that no tooling allowance was payable and on the contrary the evidence before me was that all 7 employees indicated that they used their own tools and no allowance was paid to them for that use. The closest that one comes to the defendant's contention is the evidence of Crispino. She was told, on the evidence, before May 2001 that tooling allowance was built into her wages. Mr Pacor used the phrase that was part of a total package but when one has regard to the totality of the evidence and in particular the relevant payslips that were before me in my view that claim or the defence to that portion of the claim is not sustainable. The tooling allowance ought to have been paid on the evidence pursuant to clause 21.9.2 of the award and I therefore also make an allowance for tooling of $4,314.

21. Interest on all sums that I have referred to ought be payable pursuant to section 179A(1) of the pre-reform WR Act and I propose to so order.

22. Mr Millar, on behalf of the defendant, raised the further issue

which I wish to comment upon, that's the question of mitigation. In my view when a plaintiff claims payment of a debt, in this case pursuant to section 178(6) of the pre-reform WR Act, remoteness of damage and mitigation of loss are both irrelevant and I say so having regard to the decision of Lord Justice Otton in *Jervis v Harris*[8],. There is, therefore, in my view, no substance to paragraph 8A of the amended defence relied upon at the hearing.

23. Turning to the question of penalty under section 178(1) of the pre-reform WR Act the principles the court should have regard to are well known and established. They are not contentious but for the sake of completeness, I have referred to and have relied upon the analysis of the approach of His Honour Justice Tracey in *Kelly v Fitzpatrick*[9].

24. Relevantly, in exercise of discretion in relation to penalty the following I think are pertinent. There has been no contrition at all by the defendant in this case. There has been no corrective action also by the defendant and in my view no genuine co-operation either. The question does arise where unlawful conduct is proven arose out of an argument that erroneous construction of a relevant term. A query whether the legislative purpose of deterrence is furthered by the imposition of a penalty and that's the *CEPU v Telstra*[10] decision of Her Honour Justice Gordon.

25. There are, in my view, 3 proven breaches, however the breaches of clauses 12 and 13 in my view do arise out of the one transaction and therefore in respect of the maximum penalty I should treat the totality of those breaches as having a maximum penalty applicable of $66,000. Having regard to the circumstances of this case and in particular on a final check pursuant to the totality principle, I have reduced the amount of the penalty from $11,000 to $7,000 and I propose to order in this case that a penalty of $7,000 be paid. All penalties to be paid into consolidated revenue of the Commonwealth.

26. In summary, therefore, there will be an order in favour of the plaintiff against the defendant for a total sum of $63,749.79 together with interest to be calculated, on the basis I have indicated, and a penalty further to that of $7,000.

27. Gentlemen, can I leave it to you to work out the question of interest? It may not be done now but it should be done presently and handed to my clerk.

28. Thank you both and your instructors.

Mr Millar: 29. Yes Your Honour, I am instructed to seek 2 things, firstly that any orders made for the payment of money be by instalments. My client seeks time for compliance with orders for payment of that magnitude and secondly a stay of 21 days on the orders.

HIS HONOUR:	30.	Mr Follett is there any objection to either of those?
Mr Follett:	31.	No objection is proposed, Your Honour.
HIS HONOUR:	32.	Have you turned your mind to the question as to how the instalments might be paid rather than leaving it up in the air or to not hear something about what's envisaged in terms of timeline?
Mr Millar:	33.	Yes, over 12 months, Your Honour
Mr Follett:	34.	Is that 12 equal instalments?
HIS HONOUR:	35.	Having had that indication Mr Follett, is that an issue?
Mr Follett:	36.	No, Your Honour
HIS HONOUR:	37.	I'll make those orders then, I'll leave you to work out the question, both those orders will be made, and I'll leave you to work out the question of interest that might be part of the Court record.
Mr Millar:	38.	Thank you, Your Honour
HIS HONOUR:	39.	Otherwise, thank you both for your assistance, it was a great assistance, both your work and your energy was appreciated.

END OF TRANSCRIPT

---

[1] [2010] VSC 9.

[2] [2005] VSCA 29.

[3] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited & Ors* (2004) 219 CLR 165.

[4] (2005) 148 IR 224.

[5] (2005) 222 CLR 241.

[6] [2009] NSWSC 1304.

[7] *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363.

[8] [1996] Ch 195 at 202-3.

[9] (2007) 166 IR 14.

[10] [2007] FCA 1607.