

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*OLSEN v WELLARD FEEDS PTY LTD*

[2008] FMCA 320

INDUSTRIAL LAW – Alleged breach of award – whether award applied to employment of Mill Manager.

*Occupational Safety and Health Act 1984 (WA) s.55(1)*

*Workplace Relations Act, 1996 (Cth) ss.167, 719(6), 720, 722*

*Albrighton v Royal Prince Alfred Hospital (1980) 2 NSWLR 542*

*Carpenter v Corona Manufacturing (2002) 122 IR 387*

*Envotech Pty Ltd (trading as Australian Envelopes) v Goldie (2006) 157 IR 395*

*Ferrazza v Unimin Australia Ltd [2004] AIRC 346*

*Kilminster v Sun Newspapers Ltd (1931) 46 CLR 284*

*Lindsay v Associated Furnishers Ltd (unreported, Industrial Relations Court of Australia, 8 April 1997)*

Applicant:	CHELSEA OLSEN
Respondent:	WELLARD FEEDS PTY LTD ACN (009248195)
File Number:	PEG 170 of 2007
Judgment of:	Lucev FM
Hearing dates:	6 & 7 December 2007
Date of Last Submission:	7 December 2007
Delivered at:	Perth
Delivered on:	14 March 2008

## **REPRESENTATION**

Counsel for the Applicant: Ms E Needham  
Solicitors for the Applicant: Spark Helmore  
Counsel for the Respondent: Mr A L Drake-Brockman  
Solicitors for the Respondent: DLA Phillips Fox

## **ORDERS**

(1) The application be dismissed.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
PERTH**

**PEG 170 of 2007**

**CHELSEA OLSEN**  
Applicant

And

**WELLARD FEEDS PTY LTD**  
Respondent

**REASONS FOR JUDGMENT**

**Application**

1. By Application made on 22 August 2007 the Applicant, a workplace inspector appointed pursuant to s.167 of the *Workplace Relations Act, 1996* (Cth),<sup>1</sup> alleged that the Respondent had breached a clause of the Milling Industry-General-Award.<sup>2</sup>
2. Specifically, the Application seeks:
  - a) a declaration that the Respondent breached clause 29.3.8 of the Award by not paying unused accrued sick leave to Ronald West at the date of termination of his employment with the Respondent;
  - b) an order under s.720 of the *WR Act* for the Respondent to pay to West as at the date of termination of his employment all unused accrued sick leave owing under clause 29.3.8 of the Award, plus

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<sup>1</sup> “*WR Act*”.

<sup>2</sup> “*Award*”.

interest under s.722 of the *WR Act* from the date of termination of West's employment; and

- c) the imposition of a penalty against the Respondent under s.719(6) of the *WR Act*.

## **Issues**

3. The following issues arise in this matter:
  - a) whether the Respondent is bound by the Award; and
  - b) if the Respondent is bound by the Award, whether the Award applied to West's employment.

## **Is the Respondent bound by the Award?**

4. The Respondent denied it is bound by the Award, but ultimately made little of the denial. The point was not adverted to at all in the closing address for the Respondent.
5. The Respondent is a party bound by the Award, being, as the evidence of the Applicant inspector herself discloses, a successor, assignee or transmittee of a named respondent to the Award.

## **Does the Award apply to West's employment**

6. To determine whether the Award applies to West's employment the case law, principally developed by the Australian Industrial Relations Commission,<sup>3</sup> identifies a need for the principal purpose of the employment to be identified.
7. In *Carpenter v Corona Manufacturing*<sup>4</sup> the Full Bench of the Commission was dealing with a case involving the employment of a National Sales Manager and whether that manager was employed under the conditions of the Commercial Sales (Victoria) Award 1999. The employment agreement prescribed that the National Sales Manager was employed on duties involving "sales and management

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<sup>3</sup> "Commission".

<sup>4</sup> (2002) 122 IR 387 ("*Corona Manufacturing*").

duties throughout Australia”, and thus the Full Bench said that given that description his duties “can only be described as principally managerial in nature.”<sup>5</sup> The Full Bench of the Commission identified the test for determining whether employment was covered by an award as follows:

*“In determining whether or not a particular award applies to identified employment, more is required than a mere quantitative assessment of the time spent in carrying out various duties. An examination must be made of the nature of the work and the circumstances under which the employee is employed to do the work with a view to ascertaining the principal purpose for which the employee is employed.”*<sup>6</sup>

8. The view expressed by the Full Bench in *Corona Manufacturing* was not novel, and the Full Bench cites various authorities of various Industrial Tribunals and Courts as authority for the passage quoted above.
9. The principal purpose test as set out in *Corona Manufacturing* was followed by a single Commissioner of the Commission in *Ferrazza v Unimin Australia Ltd.*<sup>7</sup> The Commission found that the particular employees function was managerial and not technical,<sup>8</sup> in circumstances where the employee:
  - a) held a senior position;
  - b) was paid in excess of the award wage;
  - c) was engaged as Operations Manager;
  - d) managed a particular site;
  - e) reported to the Regional Operations Manager, Southern Line; and
  - f) had a number of superintendents reporting to him.<sup>9</sup>
10. The approach in *Corona Manufacturing* was adopted by a subsequent Full Bench of the Commission in *Envotech Pty Ltd (trading as*

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<sup>5</sup> *Corona Manufacturing* at 388-389 per Williams SDP, Lacy SDP and Tolley C.

<sup>6</sup> *Corona Manufacturing* at 389 per Williams SDP, Lacy SDP and Tolley C.

<sup>7</sup> [2004] AIRC 346 at para 44 per Cribb C (“*Ferrazza*”).

<sup>8</sup> *Ferrazza* at para 44 per Cribb C.

<sup>9</sup> *Ferrazza* at paras 37–40 per Cribb C.

*Australian Envelopes) v Goldie*.<sup>10</sup> In circumstances where the relevant employee:

- a) was employed as Warehouse Manager;
- b) had as his main function the overall management of the warehouse;
- c) reported to the National Operations Director;
- d) had a senior store person or leading hand reporting to him; and
- e) described himself as part of the management team,<sup>11</sup>

the Full Bench of the Commission came to the view that the employment “had the principal purpose of providing overall management of the warehouse” and was “a role ... not comprehended by any of the classifications” in the relevant award, and therefore the employee was not covered by the award at the time that his employment was terminated.<sup>12</sup>

### **The Award classification**

11. The Applicant asserts that the principal purpose of West’s employment was for work covered by the classification “Stock Feed Milling Level 7” in the Award. The relevant provision provides as follows:

*“17.5.7(a) General*

*17.5.7(a)(i) An employee who will be engaged in the operation of a mill with complex production processes.\**

*17.5.7(a)(ii) An employee who, within job requirements:*

- *exercises considerable supervision responsibility;*
- *has considerable accountability/reporting responsibilities;*
- *has the ability to take full responsibility for the section under their control;*

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<sup>10</sup> (2006) 157 IR 395 at 402-403 per Watson VP, Marsh SDP and Tolley C (“*Envotech*”).

<sup>11</sup> *Envotech* at 403 per Watson VP, Marsh SDP and Tolley C.

<sup>12</sup> *Envotech* at 403 per Watson VP, Marsh SDP and Tolley C.

- *has responsibility for quality control;*
- *operates with complex systems; and*
- *plans and implements in-house training programmes.*

#### *17.5.7(b) Typical tasks*

##### *17.5.7(b)(i) Production*

- *Operate the PLC computer production system*
- *Troubleshoot in complex production situations*
- *Manage the basic changes in product flow*
- *Implement training for individual production operatives*
- *Prepare plant/equipment maintenance schedule*
- *Organise shut down maintenance.*

##### *17.5.7(b)(ii) Maintenance*

- *Plan maintenance activities*
- *Allocate duties/tasks to maintenance staff*
- *Prepare maintenance schedule for production plant equipment repairs*
- *Oversee quality of maintenance*
- *Order spare parts*
- *Maintain stock control of maintenance tools and parts.*

#### *17.5.7(c) Typical qualifications*

- *Completion of approved advanced course in Milling*
- *Completion of an approved course in managing people*
- *Completion of an approved course in advanced system of production control*

- *Completion of an approved First Aid Certificate (Highly desirable).*

*NOTE: \*Typically this will include some or all of the following criteria:*

*Advanced application of PLC/computers (if used in the company).*

*Complex production flow systems of speciality flours/products.*

*Advanced quality control processes including laboratory analysis.”*

12. Before determining whether West was a Stock Feed Milling Level 7 employee under the Award it is necessary to determine:
  - a) the nature of the work performed by West; and
  - b) the circumstances (including the conditions) of his employment.
13. As to the nature and circumstances (including conditions) of West’s employment the Court finds as follows:
  - a) employment was as “Mill Manager” (following the termination of his earlier contract by the receiver manager in 1990 when that previous contract was terminated and entitlements were paid out);
  - b) employment was on a salary;
  - c) at the time of termination the salary was \$92,000.00 per annum;
  - d) a fully paid vehicle for both private and business use was supplied;
  - e) fuel was initially provided for private use of the vehicle and later the provision of fuel money was incorporated within the salary paid;
  - f) a home telephone was provided and paid for both private and business use;

- g) a mobile telephone was provided and paid for both private and business use;
- h) leave loading was paid on salary;
- i) salary was reviewable and renegotiable from time to time;
- j) a performance bonus was payable;
- k) his responsibility was for the entire running and operation of the mill;
- l) he was in charge of all employees at the mill;
- m) he had no formal set hours of work, and had autonomy to work whatever hours were required, whenever they were required, to get the job of Mill Manager done;
- n) he was responsible for the preparation of rosters;
- o) he was responsible for ensuring employees were available to carry out rosters;
- p) he had the ability, within limits set by senior management in the Perth head office to hire and fire staff, and in the first 3 months of an employees employment he was able to terminate employment at his own discretion;
- q) he had the discretion to purchase grain, machinery and consumables within certain pre-approved financial limits;
- r) he provided production figures to head office;
- s) he arranged for the provision of hours summaries to head office;
- t) he was responsible for arranging mill shutdowns, both prearranged and emergency; and
- u) he was responsible for safety at the mill, including statutory responsibility under s.55(1) of the *Occupational Safety and Health Act 1984, (WA)*.

14. Some of the above matters can be contrasted to Award entitlements and provisions:

- a) the position of Mill Manager is recognised by the Award, but is not included in the Award as a separate classification or category of employee, and is used in contradistinction to the “employees” covered by the Award;<sup>13</sup>
- b) employees under the Award are not paid a salary but a weekly wage;
- c) Ward’s salary was almost three times the relevant Award rate claimed, and whilst Award rates are minima,<sup>14</sup> the greater the discrepancy (and here the discrepancy is enormous) the more indicative it is of a management employee;<sup>15</sup>
- d) the Award contains no provision for a fully paid motor vehicle, fuel or telephone but rather a kilometre allowance and reimbursement of travel expenses;<sup>16</sup>
- e) employees were responsible for individual roles in the mill, and those in supervisory positions were responsible for sections of the mill;
- f) hours were prescribed by the Award as 38 a week to be worked between 6.00am and 6.00pm Monday to Friday with penalty rates payable for weekend work.<sup>17</sup>

15. An examination of West’s duties against the definition of Stock Feed Milling Level 7 classification under the Award demonstrates the following:

- a) for the purposes of clause 17.5.7(a)(i) West was not an employee “engaged in the operation of a mill with complex production processes”, but rather the employee responsible for the overall operation of the mill;

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<sup>13</sup> Award, cl.21.1.3(b).

<sup>14</sup> *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284.

<sup>15</sup> *Lindsay v Associated Furnishers Ltd* (unreported, Industrial Relations Court of Australia, 8 April 1997).

<sup>16</sup> Award, cl. 21.12- 21.15.

<sup>17</sup> Award, cl.23.

- b) for the purposes of clause 17.5.7(a)(ii) he was not an employee who:
  - i) exercised considerable supervision responsibility, rather, he was responsible for the overall supervision of all employees in the mill;
  - ii) had considerable accountability/reporting responsibilities, rather, he was the person who had complete accountability and reporting responsibilities for all of the functions of the mill (even those that he did not perform, did not know how to perform, or did not necessarily understand, because his function was to manage not necessarily to do or to understand how the function was performed);<sup>18</sup>
  - iii) the ability to take full responsibility for the section under his control, because he was responsible not for sections but all of the mill.

16. West no doubt had responsibility for quality control, operating the complex systems, and planning and implementing in-house training programs as provided for by the remainder of clause 17.5.7(a)(ii) of the Award, but it was as overall manager of the mill, not within the confines of a particular job within a particular section in the mill which is clearly what a Stock Feed Milling Level 7 employee is responsible for. So too with the other tasks of such an employee. There is again no doubt on the evidence that West could, and sometimes did, perform many of those tasks (he had been employed at the mill for many years and had effectively built it up from scratch) but again it was in a macro organisational sense rather than a micro organisational sense that he would sometimes perform those tasks.

17. In relation to the typical qualifications of a Stock Feed Milling Level 7 employee West had none of the typical qualifications. In particular, he had no milling qualifications, and was not a miller.

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<sup>18</sup> Compare *Albrighton v Royal Prince Alfred Hospital* (1980) 2 NSWLR 542 at 557-558 where the hospital was held responsible for the performance of a specialist even though the hospital's administrators, who were technically his superiors, did not have the capacity to directly supervise the specialist's tasks themselves.

## **Conclusion**

18. Having regard to the nature and circumstances of West's employment as outlined above the Court is in no doubt that he was a managerial employee, and that the principal purpose of his employment was to manage the mill. As such he was not an Award employee. The Award did not apply to West as an employee of the Respondent.
19. The Application must be dismissed because the Award did not apply to West's employment.

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**I certify that the preceding nineteen (19) paragraphs are a true copy of the reasons for judgment of Lucev FM**

Associate: Rachel Peattie

Date: 14 March 2008