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# PRINCIPLES OF SET OFF IN THE EMPLOYMENT CONTEXT: A short note on cases

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## A. INTRODUCTION - AWARD WAGE ANNUALISATION CLAUSES

One of the most significant award amendments being made by the Fair Work Commission (FWC) as it completes its long running 4 yearly review concerns award annualised salary or wage provisions. Not all awards contain annualised payment arrangements but for those that do, an updated annualised payment clause will be introduced, with some variation depending on the industry. Annualised payment arrangements are also being introduced for the first time in other awards.

This change will have no effect if an employee is simply being paid in accordance with an award (for ordinary hours, overtime, penalties etc). However, where an award based annualised payment arrangement is used, employers will need to comply with the new requirements including specifying in writing:

- a. the annualised wage payable;
- b. which applicable award provisions are satisfied by payment of the annualised wage;
- c. the method of calculation of the annualised wage, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and
- d. the outer limit number of ordinary hours which would normally attract a penalty rate payment and the outer limit number of overtime hours which the employee may be required to work in a pay period without any extra payment.

If an employee works more than these hours in any pay period, then the employee will be entitled to separate payment in addition to the annualised wage. The clause also requires an annual comparison review with the award and that detailed records of hours of work and breaks are kept and signed off by the employee each pay cycle. For some industries and occupations, an annualised payment arrangement can be terminated on notice.

The FWC has said that employers may still make contract arrangements to pay employees in accordance with a salary arrangement that compensates or “buys out” identified award entitlements without engaging with the annualised wage arrangements provision in the applicable award.<sup>1</sup>

Given these developments, it is timely to consider the principles of common law set off in an employment context. The following notes provide a brief summary of the facts and relevant principles distilled from local cases in this area which provide a background to the comments of the FWC Full Bench.

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<sup>1</sup> See [2018] FWCFB 154 at [102],[2019] FWCFB 4368 at [22], [2019] FWCFB 8583 at [7].



## B. CASES

### 1. **Ray v Radano** [1967] AR (NSW) 471

- Chef was employed at a restaurant for a fixed weekly wage plus travelling allowance for working 6 days per week. On termination he claimed that he had not been paid award based overtime.
- The court held that the parties did not have the award in mind when the contract was agreed and it was the intention of the parties that the wage be paid for all of the work of the employee with no allocation of parts of it to particular considerations. Therefore, the whole wage could be used to answer the award claim.
- [478-479] per Sheldon J *“If no more appears than that (a) work was done; (b) the work was covered by an award; (c) a wage was paid; then the whole of that wage can be set-off against the award entitlement for the work whether it arises as ordinary time, overtime, weekend penalty rates or any other monetary right under the award.”*
- *“On the other hand, if by contract, express or implied, the whole or part of the payment made to the complainant has been in respect of matters which are outside the award entitlement, the payment to the extent cannot be set-off. This may include amounts allocated, say, for fares or as a uniform allowance where there is no award entitlement in respect of such matters.”*
- **Principle - Are wages intended to cover all entitlements generally? If so, then can be set off against award entitlements.**

### 2. **Pacific Publications Pty Ltd v Cantlon** (1983) 4 IR 415

- Question whether \$4,000 paid as a gratuity on retrenchment could be offset against an award entitlement of 16 weeks pay in lieu of notice.
- The Commission held, applying the reasoning of Sheldon J, that the amount could not be offset.
- **Principle – An amount paid for one purpose cannot be offset against an entitlement with a different purpose.**

### 3. **Lynch v Buckley Sawmills Pty Ltd** (1984) 3 FCR 503

- 4 employees of a timber mill were offered and accepted contracts with no sick or annual leave or public holidays when the timber mill employer ran into financial trouble. They were to be paid a cash rate per cubic metre.
- Their union claimed an underpayment of award entitlements for wages, termination, annual leave and public holidays.
- The workers were held to be employees with award entitlements.
- The employer claimed the workers were paid more in some weeks than under the award and these amounts should be offset. The argument was rejected.
- *“. . .it is clear that the respondent never paid any amount to any of the four workers on the express or implied basis that it was an amount which the worker was “entitled under (the) award”. . .none of those payments which were in fact above the award rate were paid as amounts due under the award; they were paid as amounts due under an agreement which patently was not intended to fulfil the respondent obligations to pay wages under the award.”*
- *“. . .an employer who has paid, by agreement with an employee, an over-award payment can not later use that over-award payment to offset a subsequent payment of an amount less than that prescribed by the award.”*

- **Principle – earlier overpayments cannot be offset against later underpayments (unless there is specific agreement about intention of payments).**

4. ***Peter Anthony Poulos v Waltons Stores (Interstate) Ltd*** [1986] FCA 159

- Relevant question was whether the employer could set off amounts paid to employee as commissions against wages owing.
- The applicable award contained provision for commissions to be paid in addition to wages.
- The matter was not fully considered due to a lack of evidence.
- Held that offset claim ran foul of award provisions but even in the absence of the specific award provision, it was doubtful whether the employer could plead satisfaction in this way.
- *“It may be that payments made expressly for one purpose cannot be relied upon as having satisfied obligations under another head altogether”.*
- **Principle – Commissions cannot be offset against award entitlements (at least without specific contractual agreement).**

5. ***Poletti v Ecob (No.2)*** (1989) 31 IR 321

- Mr Poletti was a foreman in horse racing stables. He was paid a flat wage, partially in cash. He was paid extra in lieu of taking annual leave, at his request.
- A claim was made for underpayment of wages, overtime, annual leave and public holidays.
- “[42] *It is to be noted that there are two separate situations dealt with in the passage from the judgment of Sheldon J. . . .*”
- *“The first situation is that in which the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above or extraneous to award entitlements. In that situation, the contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied on in satisfaction of award entitlements arising outside the agreed purpose of the payments.”*
- *“The second situation is that in which there are outstanding award entitlements, and a sum of money is paid by the employer to the employee. If that sum is designated by the employer as being for a purpose other than the satisfaction of the award entitlements, the employer cannot afterwards claim to have satisfied the award entitlements by means of the payment.”*
- “[48] *There was no evidence to suggest the existence in the industry . . . of a custom or practice whereby overtime work was rewarded by cash payments, believed to be “beyond the ambit of the taxation laws”.*”
- *“The appellant and Mr Hunt clearly contemplated that the hours to be worked by Mr Hunt would not be restricted to the ordinary working hours fixed by the award. Their intention was to fix remuneration for the total number of hours to be worked by Mr Hunt in each week. Accordingly, . . . there was an agreement . . . as to the manner in which the amounts paid were to be applied.”*
- The Full Court held the intention of the parties was to fix remuneration for the total number of hours worked by Mr P and therefore the cash payments should be treated as having satisfied the employer’s obligations in respect of wages for ordinary time.

- The additional amounts paid in lieu of taking annual leave should also be off set against the award entitlement but could not be off set against the award overtime entitlement.
- **Principle - The parties had agreed the wages paid would cover ordinary time and annual leave. Accordingly, the wage payments could not be off set against other award entitlements. Is this a fine point of distinction from *Ray v Radano*?**

**6. *Logan v Otis Elevator Co Pty Ltd* (1999) 94 IR 218**

- Mr Logan was employed as a lift mechanic and then as a local representative in the Orange area. He was paid an annual salary for the latter role.
- Following termination he made claims for overtime and call backs under award.
- The evidence was that the salary included an amount intended to compensate for all overtime including call-outs but there was no apportionment between them.
- The Full Court held this was a case of the second scenario outlined by Sheldon J: “[30] . . . *there are outstanding award entitlements, and a sum of money is paid by the employer to the employee.*”
- However, neither party had sought to designate the excess in satisfaction of any particular award entitlement. “*The whole of the excess was paid and received as an amount appropriate to reflect the difference between the position of a local representative, with all that entails, and an ordinary electrician special class. . . Without such a designation, none of the excess can be reasonably identified as a payment on account of overtime and call-backs.*”
- No set off was allowed against award overtime and call back payments.
- **Principle – is there a need to specifically apportion coverage of award entitlements?**

**7. *Australia and New Zealand Banking Group Limited v Finance Sector Union of Australia* [2001] FCA 1785**

- The ANZ had a “Retirement/Severance Allowance Scheme” under which award based long service leave was specifically set off against the Scheme. The Scheme provided that employees would receive a payment either under the Scheme or the Award whichever was the more advantageous to the individual.
- On redundancy, the ANZ reduced the scheme allowance by the amount of the award long service leave (which was paid).
- It was accepted that the Scheme benefit was a money entitlement in respect of long service leave.
- The Full Federal Court held that the whole of the money paid to the employees was to be taken into account in determining whether they had been paid their award entitlements to long service leave.
- “[52] *“there must be a close correlation between the nature of the contractual obligation and the nature of the award obligation. But it is not necessary that the same label be used”.*
- **Principle - This case applied the second limb of Sheldon J’s test in favour of the employer.**

8. **James Turner Roofing Pty Ltd v Peters** (2003) WASCA 28
- A roofing company paid an “all in” hourly rate to its employee (a roofing plumber) without provision for overtime, public holidays, RDOs, sick leave or holidays;
  - No written contract existed.
  - The employer contended that its above award hourly rate should be set off against the award payments not provided for.
  - The magistrate at first instance did not allow a set off.
  - “[45] *The payment of an amount as wages for hours worked in a period can be relied on by the employer in satisfaction of an award obligation to pay wages for that period whether in relation to wages for ordinary time, overtime, weekend penalty rates, holidays worked or any other like monetary entitlement under the award*”.
  - “*However, if a payment is made expressly or impliedly to cover a particular obligation . . . the payment cannot be claimed as a set off against monies payable to cover some other incident of employment.*”
  - The appeal was allowed and the matter remitted to the Magistrates Court to determine.
  - **Principle – the agreement of an “all in” rate meant there could be a set off.**
9. **Workplace Ombudsman v Ella Enterprises Pty Ltd & Anor** [2010] FMCA 54
- The employee worked as a truck driver for a horse transport company. There was no written contract. The employee was to be paid \$806 gross per week for working 55 hours. Any time above 55 hours was to be treated as overtime. There was also a weekly bonus payment of \$120 for an “overnight” allowance which was not discussed at the time of employment. The employee was subject to award coverage throughout the employment.
  - The question was whether the allowance could be set off against award payment obligations.
  - The court held that the weekly bonus payment was designated by the employer as being for a purpose other than the satisfaction of award entitlements and therefore could not be used as a set off.
  - **Principle - This case applied the second limb of Sheldon J’s test in favour of the employee.**
10. **Linkhill Pty Ltd v Director, Office of the Fair Work Building Inspectorate** [2015] FCAFC 99
- Linkhill was a building manager. It engaged several workers as contractors at a fixed hourly rate. The trial judge determined the workers were employees covered by industrial award and were entitled to overtime, penalty rates and several other award based entitlements beyond the award hourly rate of pay.
  - On appeal, Linkhill argued that the hourly rate paid to the workers was paid in satisfaction of all legal entitlements and should be set off against the award entitlements.
  - “[98] . . . *what is required is a close correlation between the award obligation and the contractual obligation in respect of which the payment was made. It is not the monetary nature of the payment made under the contract that must correlate with the award. It is the subject matter of the contractual obligations for which the payment was made that must be examined . . .*”

- The court held that the evidence did not establish that the parties intended the flat hourly rate of pay to include all award entitlements.
- **Principle – the existence of an “all in” rate was not established and the first limb of Sheldon J’s test was not satisfied.**

**11. *Stewart v Next Residential Pty Ltd* [2016] WAIRC 00756**

- Administration coordinator had a written contract which provided “*Your salary is inclusive of any award provisions/entitlements that may be payable under an award*”. It also included a requirement to work reasonable additional hours and provided “*Your remuneration takes these additional hours of work in account and no further payment will be made for extra hours worked.*”
- The claimant received a salary of \$75,000. She made a claim that the employer failed to pay her for overtime and lunch breaks.
- The Clerks Award provided for payment of annualised salary in satisfaction of any or all of named award provisions.
- Court held the contract was uncertain about which award provisions were covered by the salary (and the lunch breaks issue was not capable of being subject to the annualised salary).
- Court held the contract did not exclude the claim because it did not clearly indicate that the annual salary included those entitlements subject of the claim.
- **Principle – is it necessary when preparing a contract to specifically address a particular award annualisation provision in the contract?**

**C. TAKE AWAY**

In its recent comments in the award review process, the FWC Full Bench has said that contractual set off provisions can still have a role to play in satisfying award payment obligations. However, the cases noted above make it clear that this process is not always straight forward. Unfortunately not all of the cases contain detail of all of the background facts and in some of the cases, the court did not have the benefit of opposing submissions from the respondent.

However, the FWC Full Bench has made it clear that care needs to be taken to ensure:

- a. the contractual offset clause is precise about the award entitlements being covered by the above award wage;
- b. records of hours worked will still need to be kept and regularly reviewed to ensure that the employee is actually receiving as much or more than they would be entitled to receive under the award; and
- c. the payment of an above award wage does not result in the employee being paid less than the award requires for any particular pay period.

Existing contract “*offset*” clauses may not be sufficient to comply with these requirements. Given the recent publicity surrounding large corporate underpayments, employers should consider their own particular circumstances in determining the best approach in order to ensure award compliance.

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