

From: Alana Rafter <Alana.Rafter@ablawyers.com.au>
Sent: Thursday, January 11, 2024 5:23 PM
To: Awards <Awards@fwc.gov.au>
Cc: Luis Izzo <luis.izzo@ablawyers.com.au>; Victor Song <Victor.Song@ablawyers.com.au>
Subject: AM 2023/21 - Modern Awards Review 2023-24 - Usability of awards | Re: BNSW and ABI Submission - omitted attachment

Dear Registry,

We refer to the submission filed on behalf of Business NSW and Australian Business Industrial on 22 December 2023.

At paragraph 4.11 of that submission reference is made to an attachment (an unreported decision), which was inadvertently omitted from the PDF filed.

We apologise for that omission and provide a copy of the unreported decision.

Yours faithfully,

Alana

Alana Rafter
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From: Luis Izzo <Luis.Izzo@ablawyers.com.au>
Sent: Friday, 22 December 2023 12:22 PM
To: awards@fwc.gov.au
Cc: Victor Song <Victor.Song@ablawyers.com.au>
Subject: AM 2023/21 - Submission and Application

Dear Sir/Madam

Our firm acts for Business NSW and Australian Business Industrial.

I refer to the President's Statement in these proceedings dated 4 October 2023. **Attached** is a submission in response to the request for proposals regarding making awards easier to use. The submissions contain separate schedules containing draft determinations giving effect to each proposal advanced by our clients.

Whilst our clients propose 5 categories of changes, for the abundance of caution and for the reasons outlined in paragraphs 5.19 to 5.28 of the attached submissions, one category of proposed change (an exemption rate for certain classes of workers engaged on salaries 55% above the minimum weekly rate of the Clerks – Private Sector Award) is accompanied by the **attached** application filed by our clients under s157 of the FW Act.

A copy of the s157 application has been attached to this email for the purposes of filing.

Should you have any queries, please do not hesitate to contact me.

Yours faithfully

Luis Izzo
Managing Director - Sydney Workplace
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New South Wales

Case Title: United Voice v Pet Porpoise Pool Pty Ltd

Medium Neutral Citation:

Hearing Date(s): 17-18/10/2012

Decision Date: 10/07/2013

Jurisdiction: Industrial

Before: Magistrate Bradd

Decision: Verdict for the applicant

Catchwords: Whether employer has contravened a term of a modern award - whether employee correctly classified under the Amusement, Events, and Recreation Award 2010 – whether transitional provisions are relevant – whether employee must be able to perform work at lower classification before being graded at a higher classification – whether the grading of the employee under the Theatrical Employees Recreation and Leisure Industry (State) Award 2000 is relevant to grading under the Amusement, Events, and Recreation Award 2010 – the context of the Amusement, Events, and Recreation Award 2010 – the meaning of the word “qualification” – whether the meaning of the word “qualification” in the Theatrical Employees Recreation and Leisure Industry (State) Award 2000 is relevant to its meaning in the Amusement, Events, and Recreation Award 2010

Legislation Cited: Fair Work Act 2009 (Cth)
Theatrical Employees Recreation and Leisure Industry (State) Award 2000,
Amusement, Events, and Recreation Award 2010

Cases Cited: Bob Speers v Evans Head Bowling Club

Limited [1999] NSWIRComm 228, Anthony Raymond Fisk v SSS Auto Parts [2006] WAIRComm 5229, Mark Anthony Hand v Lismore Golf Club Limited [2001] NSWCMC 19, Kingmill Australia Pty Ltd t/as Thrifty Car Rental v Federated Clerks Union of Australia, New South Wales Branch [2001] NSWIRComm 141, Bryce v Apperley (1998) 82 IR 448, Angela Di Mauro v Maryvale Medical Clinic Proprietary Limited [2005] NSWCMC 172, Lisa Maree De Costa v Rhonda Wark t/as Earth Works Real Estate [2006] NSWCMC, McAuley v Blown Plastics Pty Ltd [2008] SAIRC 75, Aboriginal Legal Rights Movement Inc v Collins [2008] SAIRC 71, City of Wanneroo v Holmes (1989) 30 IR 362, Harker v Naval Military and Airforce Club of SA Inc [2004] SAIRC 40, Kucks v CSR Ltd (1996) 66 IR 1882, Hancock v Sanctuary Farm Child Care Centre and Kindergarten Pty Ltd [2000] SAIRC 30

Category: Primary Judgment

Parties: United Voice (NSW Branch)
Pet Porpoise Pool Pty Ltd

Representation

- Counsel: M Vance for the applicant
L Izzo for the respondent

- Solicitors:

File number(s): 2012/140829

JUDGMENT

- 1 The applicant, United Voice claims that Pet Porpoise Pool Pty Ltd is liable to pay Ms Rhiannon Hayden (nee Calvert) the sum of \$4,839.40, plus interest, and is liable to pay pecuniary penalties.

- 2 United Voice applies for orders alleging an offence¹ concerning the failure of Pet Porpoise Pool Pty Ltd to pay Ms Hayden in accordance with the *Amusement, Events, and Recreation Award 2010* (the modern award).
- 3 United Voice pleads that clause 13 of the modern award requires employees to be classified according to the structure and definitions set out in Schedule B-Classification Structure. United Voice pleads that Ms Hayden is correctly classified as grade 8, but Pet Porpoise Pool Pty Ltd paid Ms Hayden at a rate of pay below the rate of pay for a grade 8 employee.
- 4 The respondent, Pet Porpoise Pool Pty Ltd, pleads that Ms Hayden was paid at the rate of pay for grade 4, being the correct classification for her employment.

Issues

- 5 The issues before the court are:
 - (1) Whether the Theatrical Employees Recreation and Leisure Industry (State) award (the NAPSA award) is relevant;
 - (2) Whether the transitional provisions from the NAPSA award to the modern award are relevant.
 - (3) The correct classification.

Relevance of NAPSA award

- 6 United Voice says the NAPSA award is irrelevant because the modern award created a new classification, being grade 8. It is not possible to determine the appropriate classification under the NAPSA award and to use that classification to inform the correct classification under the modern

¹ Fair Work Act 2009 (Cth) s 45

award. The NAPSA award had five levels whereas the modern award has nine classifications.

- 7 Pet Porpoise Pool Pty Ltd says that the NAPSA award is relevant to classification under the modern award, and relies on a Fair Work Ombudsman "Pay and Conditions Guide" relating to the modern award and the NAPSA award.

- 8 The plain meaning of the words stated in the modern award is to be used to interpret the modern award. If there are ambiguities, the NAPSA award may clarify the meaning of words in the modern award. I have been referred to *Kingmill Australia Pty Ltd t/as Thrifty Car Rental v Federated Clerks Union of Australia, New South Wales Branch*². The issue before the commission was whether a clerical award covered employees of the appellant. The case centred on whether the employees were employed in a clerical capacity or in selling. At paragraph 31 of the judgment, it is stated:

In determining whether employees were covered by the award, the essential task was to construe the actual words used in their plain, ordinary meaning: see *Bryce v Apperley* (1998) 82 IR 448 at 452 per *Hungerford and Schmidt JJ*.

At paragraph 63, it is stated that the interpretation of awards are to be approached in accordance with the principles authoritatively stated in *Bryce*³:

In our view, in construing the true meaning of an industrial award, like any other instrument with legal force, the task requires an approach according to the actual words used and their plain, ordinary English meaning.

The quotation continues by adopting the words in another case. The judgment continues to consider the point of interpretation in paragraphs

² *Kingmill Australia Pty Ltd t/as Thrifty Car Rental v Federated Clerks Union of Australia, New South Wales Branch* [2001] NSWIRComm 141

³ *Bryce v Apperley* (1998) 82 IR 448

64-70, including consideration of the wider context of the making of the award, where it may be necessary to consider the whole document, or the root of an expression.

- 9 The expression “qualification” is one having its root in the NAPSA award level V where it is stated that:

An employee at this level would have worked or studied in a relevant field and/or have specialist knowledge, qualifications and experience, or is the holder of formal trade or technical qualification relevant to the employer in more than one trade or technical fields, which are required by the employer to perform the job; or

Holds specialist post trade qualifications which are required by the employer to perform the job...

- 10 Do the words used in the NAPSA award assist the court to interpret the meaning of “qualification” in the modern award? The answer is “no”, because the NAPSA award describes level V as follows:

Level V means an employee, who is engaged in supervising, training and co-ordinating staff and who is responsible for the maintenance of service and operational standards.

The description of level V provides context for the expression “qualification”. The description of “qualification” in the grade 8 classification of the modern award is not controlled by such a description. The drafters of the modern award chose not to describe grade 8 by any duty, skill, or title. It is not appropriate to read into the description of grade 8, a requirement for the employee to engage in supervising, training and co-ordination of staff.

- 11 The context of the modern award is that it commenced on 01/01/2010. It covers employers and employees in the amusement, events and recreation industry, as defined in the award. It incorporates the National Employment Standards as contained in the *Fair Work Act 2009 (Cth)* (NES). Part 2 of the modern award sets out provisions relating to

“Consultation and Dispute Resolution”. Part 3 of the modern award sets out provisions relating to “Termination of Employment”. Part 4 of the modern award sets out provisions relating to “Minimum Wages and Related Matters”. Clause 13 of Part 4 of the modern award provides that:

All employees covered by the award must be classified according to the structure and definitions set out in Schedule B-Classification Structure.

Clause 14 sets out minimum wages for each classification.

- 12 Schedule A of the modern award sets out “Transitional Provisions. Clause A2 provides for a transition from the NAPSA award if an employer was obliged to pay a minimum wage lower than that in the modern award.
- 13 The context of the modern award is that Pet Porpoise Pool Pty Ltd was required to classify Ms Hayden in accordance with Schedule B. The transitional provisions set out in clause A.2 applied to the minimum wages payable. If Pet Porpoise Pool Pty Ltd wished to delete the requirement for Ms Hayden to possess a degree in marine science or similar, it was required to notify Ms Hayden, and discuss the change with her. Pet Porpoise Pool Pty Ltd could have followed the dispute resolution process set out in clause 9. Pet Porpoise Pool Pty Ltd could have terminated the employment of Ms Hayden in accordance with Part 3, and paid redundancy pay as set out in the NES.
- 14 Briefly, the context of the modern award is that Pet Porpoise Pool Pty Ltd was required to classify Ms Hayden, transitional provisions related to minimum wages. There was a dispute resolution process. Pet Porpoise Pool Pty Ltd could have terminated the employment of Ms Hayden and paid her redundancy pay

Transitional provisions

- 15 United Voice says that the transitional provisions are irrelevant because there are no transitional provisions relating to classification.
- 16 The modern award states that transitional provisions apply to certain clauses. Schedule A sets out transitional arrangements in relation to minimum wages and piecework rates, casual or part-time loadings, Saturday, Sunday, public holiday, evening or other penalties, and shift allowances/penalties. The clauses setting out transitional provisions are not relevant to the issues in this case.
- 17 The Fair Work Ombudsman “Pay and Conditions Guideline”

This guide was developed...to assist employers and employees identify minimum wages, penalties, loadings and allowances.

In other words the guideline addressed the matters set out in schedule A of the modern award. It does not address classification, for which there is no transitional provision. To the extent that the guideline contains a table, which shows the hourly base rate of pay under the NAPSA award and modern award classification, it is a guide to rates of pay, and not classification.

The modern award

- 18 Schedule B-Classification Structure describes nine grades. Clause B9 Grade 8 is as follows:

An employee at this level is an employee who possesses qualifications or experience such as advanced engineering or technical skills or post trade or diploma level or who undertakes duties of a more advanced or complex level.

19 At the relevant time, Ms Hayden was admitted to the degree of Bachelor of Environmental Science (Sustainable Ecosystems – Marine).

20 United Voice say that Ms Hayden possessed qualifications such as advanced engineering or technical skills or post trade or diploma level, and is correctly classified as grade 8.

21 Pet Porpoise Pool Pty Ltd says that in order for an employee to be classified grade 8, the employee must be capable of being employed in grades 1-7. The description of what an employee is in each grade is as follows:

- (1) Grade 1 is an employee who has completed at least three months experience.
- (2) Grade 2 is an employee who has completed an appropriate level of training so as to enable the employee to perform the work within the scope of this level.
- (3) Grade 3 is an employee who has completed an appropriate level of training so as to enable the employee to perform the work within the scope of this level.
- (4) Grade 4 is an employee who has completed appropriate training or has acquired equivalent competency so as to perform work within the scope of this level. Work performed at this level will be trade level or equivalent.
- (5) Grade 5 is an employee who in addition to being a technician, tradesperson or equivalent is required to supervise staff, general hands technicians, and/or generally supervise projects including basic administration.
- (6) Grade 6 is an employee who may include a head technician, maintenance person, restoration officer, museum technician, and senior animal attendant or trainer.
- (7) Grade 7 is an employee who has completed appropriate training and is capable of applying skills learned to the work. An employee may have specific supervisory duties and the authority to direct other staff, however the greater percentage of their time need not be spent on management functions.

- 22 Pet Porpoise Pool Pty Ltd says that Ms Hayden is not capable of being a grade 5 employee because she was not required to supervise staff, nor is she capable of being a grade 6 employee because she was not a senior animal trainer, nor is she capable of being a grade 7 because she did not supervise staff, or perform management functions. It follows, according to Pet Porpoise Pool Pty Ltd that Ms Hayden cannot be a grade 8 employee.
- 23 Grade 8 is unique in that the grade is described as an employee possessing certain qualifications or experience or undertaking duties of a more advanced or more complex nature. Grades 1-7 describe titles and/or skills, but grade 8 does not. In terms of qualifications or experience, a person without grade 8 qualifications or experience as described in the grade 8 classification would not be classified grade 8, even though the employee supervised staff, is a senior animal trainer, or performed management functions. An employee who has grade 8 qualifications or experience does not need to supervise staff, perform management functions or be higher than a senior animal trainer, because those requirements are not set out in the classification.

Does Ms Hayden possess qualifications as described in the grade 8 classification?

- 24 Ms Hayden is an employee who possesses qualifications. The word “such as” means that the subsequent list is indicative of the type of qualifications that describe a grade 8 classification. Ms Hayden possesses a bachelors’ degree. The level of qualification is within the type of qualifications that describe a grade 8 classification, being a qualification higher than diploma level.
- 25 Ms Driscoll says that a degree in psychology would be more relevant to the work done by Ms Hayden. The opinion is one base on specialised knowledge, Ms Driscoll does not give evidence of specialised knowledge, nor does she lay any foundation for her opinion.

- 26 Mr Tolley says that certain certificate courses would be more relevant to the work done by Ms Hayden. From his experience as a Head Trainer, he is of the opinion that a university degree is not useful.
- 27 The opinions of Ms Driscoll and Mr Tolley are irrelevant because Pet Porpoise Pool Pty Ltd knew that Ms Hayden was admitted to the degree of Bachelor of Environmental Science (Sustainable Ecosystems – Marine), and knew of the information contained in the modern award, and decided to employ her under the modern award, rather than terminating her employment.
- 28 It is irrelevant that in July 2010, Pet Porpoise Pool Pty Ltd deleted the prerequisite for Ms Hayden to possess tertiary qualifications in marine science or similar, because Pet Porpoise Pool Pty Ltd employed Ms Hayden under the modern award, and in doing so was bound by the classifications described in the award.

Cases

- 29 The court has been referred to various cases.
- 30 *Bob Speers v Evans Head Bowling Club Limited*⁴. Mr Speers claimed that when he worked at the bowling club after 7 pm, he was required to undertake work falling within level 5 of the relevant award. The issue was whether Mr Speers was correctly classified as a level 4 employee, or a level 5 employee. The commission said that:

[The] task was to determine whether the degree of skill and responsibility of [Mr Speers] was equivalent to that identified by reference to the indicative tasks for level 5...[and] to determine whether the work performed was of equivalent skill and responsibility.

⁴Bob Speers v Evans Head Bowling Club Limited [1999] NSWIRComm 228

- 31 My analysis is consistent with the law set out in the case. The case deals with a classification that sets out skills and responsibility, whereas the classification in issue relevantly sets out qualifications. I have determined whether the qualifications of Ms Hayden are equivalent to the indicative list set out in the grade 8 classification.
- 32 *Anthony Raymond Fisk v SSS Auto Parts*⁵. The issue before the commission was whether the work of Mr Fisk as a forklift driver was a requirement of his duties or incidental to his duties. The court found that the work as a forklift driver was a requirement of Mr Fisk's duties. The finding was relevant to the employment classification of Mr Fisk. The court emphasised the need to take a practical approach, taking into account the quality of the different types of work done, and the principal purpose for which Mr Fisk was employed.
- 33 *Anthony Raymond Fisk v SSS Auto Parts* would be relevant if the issue in this case was whether the qualification of Ms Hayden was a requirement of her duties or incidental to her duties. The qualification was described on her job specifications until July 2010. The modern award commenced in January 2010. The deletion of the requirement was in terms of Part 2 of the modern award a major work place change, being a major change in the skills required. Pet Porpoise Pool Pty Ltd was bound to comply with Part 2 of the modern award, but did not do so.
- 34 *Mark Anthony Hand v Lismore Golf Club Limited*⁶ deals with the issue of the correct classification of Mr Hand who was employed as a level 3 employee under the relevant award. He claimed that level 5 was the correct classification. The award provided that the indicative tasks of a level 5 employee included duties of a lower level plus other duties. The court cited *Bob Speers v Evans Head Bowling Club Limited*⁷ stated:

⁵ *Anthony Raymond Fisk v SSS Auto Parts* [2006] WAIRComm 5229

⁶ *Mark Anthony Hand v Lismore Golf Club Limited* [2001] NSWCMC 19

⁷ *Bob Speers v Evans Head Bowling Club Limited*; *ibid*

To determine the level at which the duties fall requires a consideration that would embrace, not only examination of elements of the tasks themselves but also whether, in general, those tasks would properly be within the province of employees with a standard of training required in the preamble to a specific level, and whether the skills required to perform them were above and beyond those required for the previous level.

The case of *Mark Anthony Hand v Lismore Golf Club Limited* is concerned with an award where the classification provided that a level 5 employee was required to perform the duties of level 4, plus additional duties. The classification of grade 8 in the modern award does not state that the employee is required to perform any particular duties. The context of the of the portion of the judgment in *Bob Speers v Evans Head Bowling Club Limited*⁸ followed in *Mark Anthony Hand v Lismore Golf Club Limited*⁹ is that Mr Speers claimed tasks not listed as indicative tasks in the level 5 classification were level 5 tasks. The Commission said:

A much more detailed examination of the duties claimed to be at level 5 standard would need to be undertaken before it could be confidently accepted that the duties it was asserted would fall within level 5, even if not expressly referred to in the indicative tasks for level 5, in fact do so. (One reason that they may not be referred to in level 5 may be because they are noted as being appropriate for lower levels, e.g. training.)

The commission then continued in the same paragraph to say what is quoted in *Mark Anthony Hand v Lismore Golf Club Limited*.¹⁰ When the whole of the paragraph is considered, it is apparent that what the commission says relates to the issue before it, namely whether claimed tasks not listed as indicative tasks in the level 5 classification were level 5 tasks. The particular paragraph is of no assistance to the issue in this case, because this case is not one where it is relevant to consider the tasks Ms Hayden claims to have done to ascertain her correct classification. The issue in this case is concerned with her qualification, not the tasks she performed.

⁸ Ibid

⁹ *Mark Anthony Hand v Lismore Golf Club Limited*; *ibid*

35 *Angela Di Mauro v Maryvale Medical Clinic Proprietary Limited*.¹¹ The primary issue before the court was the appropriate grading of the applicant under the award. The Chief Industrial Magistrate said:

It has long been accepted that the label attached [by] either parties to their relationship is not conclusive.

36 In the case before me “the label attached by either parties to their relationship” is not relevant. In January 2010, Ms Hayden had a job title of “marine mammal keeper/trainer”. She was required to possess a tertiary qualification in marine science or similar. It is the qualification that is relevant to the correct classification, not the job title.

37 *Lisa Maree De Costa v Rhonda Wark t/as Earth Works Real Estate*.¹² The case concerned the question of whether the applicant was offered employment as a “Property Manager” or a “Property Officer”. The classification structure of the relevant award provided that a Property Manager“ was to be paid a minimum rate above that of “Property Officer“. One argument of the respondent was that the applicant lacked the experience and training to be a “Property Manager“, however, the Chief Industrial Magistrate found that the respondent held out the applicant to be the “Property Manager” for the benefit of the respondent. The Chief Magistrate said that: “In determining the minimum wage entitlement under the Award an Industrial Court must look beyond the title given to a particular employee, but rather at the duties and responsibilities of the position.“

38 In this case, the duties and responsibilities of the position would be relevant if the description of the grade 8 classification included an indicative list of duties and responsibilities, but it does not.

¹⁰ Ibid

¹¹ *Angela Di Mauro v Maryvale Medical Clinic Proprietary Limited* [2005] NSWCMC 172

¹² *Lisa Maree De Costa v Rhonda Wark t/as Earth Works Real Estate* [2006] NSWCMC

- 39 *McAuley v Blown Plastics Pty Ltd*¹³ is a case about underpayment of wages based on an incorrect classification. The court found that Ms McAuley was correctly classified. Ms McAuley commenced work as a casual employee in 2001. In February 2002 she obtained permanent employment, she was covered by the *Metal Industry (South Australia) Award*. In September 2002 she suffered a work place injury. In July 2003, Ms McAuley was covered under the *Metal Engineering and Associated Industries Award 1998*, which was a Federal award. In December 2003, she obtained a level 1 certificate in plastics. She continued to perform the same work and was classified as a C13. In 2004 she suffered a work place injury. In 2004, Ms McAuley obtained a level 2 certificate in plastics. In 2005, the parties agreed to an enterprise bargaining agreement, and Ms McAuley was classified as an operator trainee. In 2006, she completed the certificate III in plastics. Her last day of attendance at work was in December 2005. In July 2006, her employment was terminated in accordance with the provisions of the *Workers Rehabilitation and Compensation Act 1986*.
- 40 Industrial Magistrate Ardlie referred to *Aboriginal Legal Rights Movement Inc v Collins*¹⁴ where it is stated that:

The meaning intended by the author of the award must be ascertained primarily by reference to the plain and ordinary meaning of the words in their immediate context and in the context of the whole document. *City of Wanneroo v Holmes*,¹⁵ *Harker v Naval Military and Airforce Club of SA Inc*¹⁶

A narrow and pedantic approach to interpretation is misplaced, and the award should be read to give effect to its evident purposes having regard to the context of the relevant industry; one may reasonably strain for meanings which avoid inconvenience and injustice. *Kucks v CSR Ltd*¹⁷

The award itself must dictate how appropriate classifications are to be determined and the construction to be given to terms dealing

¹³ *McAuley v Blown Plastics Pty Ltd* [2008] SAIRC 75

¹⁴ *Aboriginal Legal Rights Movement Inc v Collins* [2008] SAIRC 71

¹⁵ *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379

¹⁶ *Harker v Naval Military and Airforce Club of SA Inc* [2004] SAIRC 40

¹⁷ *Kucks v CSR Ltd* (1996) 66 IR 1882 at 184

with such matters must be taken from “the context”, the general purpose and policy of [the] provision and its consistency and fairness. *Hancock v Sanctuary Farm Child Care Centre and Kindergarten Pty Ltd*¹⁸

The task of selecting which of a series of classifications applies is generally achieved by identifying the tasks performed by a particular employee and matching them with the relevant award criteria.¹⁹

- 41 The State award criteria for the classifications being considered included levels of training and indicative lists of duties performed.
- 42 The remarks adopted by Industrial Magistrate Ardlie from *Aboriginal Legal Rights Movement Inc v Collins*,²⁰ which remarks are adopted from various other cases do not add anything to the issue of interpretation of awards that is not said in the preceding cases listed in this judgment. As I have previously stated there is no requirement to identify the tasks performed by Ms Hayden, because the grade 8 classification does not include an indicative list of tasks. One must rely on the plain and ordinary meaning of the words. Methods of interpreting awards that apply when the relevant classification(s) include an indicative list cannot be used when such an interpretation would import meaning that would be inconsistent with the plain and ordinary meaning of the words chosen by the author of the award, such an approach is consistent with the proper approach to interpretation, and cannot be considered to be narrow and pedantic. I adopt the words of Cawthorne and Gilchrist JJ in *Hancock v Sanctuary Farm Child Care Centre and Kindergarten Pty Ltd*.²¹

The award itself must dictate how appropriate classifications are to be determined and the construction to be given to terms dealing with such matters must be taken from “the context”, the general purpose and policy of [the] provision and its consistency and fairness.

¹⁸ *Hancock v Sanctuary Farm Child Care Centre and Kindergarten Pty Ltd* [2000] SAIRC 30 at [24]

¹⁹ *Ibid* at [25 and [26]

²⁰ *Aboriginal Legal Rights Movement Inc v Collins*, *ibid*

Conclusion

- 43 From 01/01/2010, Ms Hayden was correctly classified as a grade 8 employee. She was paid as a grade 4 employee. She is entitled to be paid the amount that is provided in the modern award, taking into account the transitional provisions, as a grade 8 employee.
- 44 Pet Porpoise Pool Pty Ltd has contravened a term of the modern award by not classifying Ms Hayden as a grade 8 employee.

Orders

- 45 The verdict of the court is for the applicant.
- 46 The respondent is to pay Ms Hayden \$4,839.40. The respondent is to pay interest in accordance withs 547 *Fair Work Act 2009 (Cth)*.
- 47 The parties are to prepare submissions concerning the imposition of a pecuniary penalty.

²¹ *Hancock v Sanctuary Farm Child Care Centre and Kindergarten Pty Ltd* [2000] SAIRC 30 at [24]