FEDERAL COURT OF AUSTRALIA

Corporate Air Charter Pty Ltd v Australian Federation of Air Pilots [2025] FCAFC 45

Appeal from:	*Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd* [2023] SAET 63 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 2)* [2024] SAET 23 *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 3)* [2024] SAET 36
File number(s):	SAD 89 of 2024
Judgment of:	**LOGAN, DOWLING AND MCDONALD JJ**
Date of judgment:	4 April 2025
Catchwords:	**INDUSTRIAL LAW** — whether rostered stand-by duty is "work" under Air Pilots Award – whether rostered stand-by duty is paid work – whether Air Pilots Award provides for averaging of hours of work – whether authorised leave should be counted as ordinary hours – whether contractual set-off available – whether adequate reasons provided by primary judge – no error identified – appeal dismissed.
Legislation:	*Civil Aviation Act 1988* (Cth) s 9 *Fair Work Act 2009* (Cth) ss 12, 62, 63, 134, 138, 565 *Fair Work Regulations 2009* (Cth) reg 1.05 *Air Pilots Award 2010* *Air Pilots Award 2020* cll 2, 5, 9, 10, 12, 15, 16, 25
Cases cited:	*Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 *Burgess v Mount Thorley Operations Pty Ltd* [2003] NSWIRComm 432; 132 IR 400 *City of Wanneroo v Holmes* (1989) 30 IR 362 *Construction, Forestry, Maritime, Mining and Energy Union v Fremantle Port Authority* [2024] FCA 848; 333 IR 337 *Fox v Percy* [2003] HCA 22; 214 CLR 118 *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498

	Hospital Employees' Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home (1977) 57 WAIG 455 *Kucks v CSR Ltd* (1996) 66 IR 182 *Minister for Police v WA Police Force Union of Workers* (1969) 49 WAIG 993 *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77; 262 FCR 527 *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 *Treasury Wine Estates Vintners Ltd v Pearson* [2019] FCAFC 21; 268 FCR 12 *WA Police Union of Workers v Minister for Police* (1981) 61 WAIG 1906 *Warramunda Village Inc v Pryde* [2002] FCAFC 58; 116 FCR 58 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536
Division:	Fair Work Division
Registry:	South Australia
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	98
Date of last submission:	10 December 2024
Date of hearing:	19, 20 November 2024
Counsel for the Appellants:	Mr J P Phillips SC
Solicitor for the Appellants:	Employsure
Counsel for the Respondent:	Mr J E Hartley
Solicitor for the Respondent:	Australian Federation of Air Pilots

ORDERS

SAD89 of 2024

BETWEEN:	**CORPORATE AIR CHARTER PTY LTD** First Appellant
	CHRISTIAN ANGLBERGER Second Appellant
AND:	**AUSTRALIAN FEDERATION OF AIR PILOTS** Respondent
ORDER MADE BY:	**LOGAN, DOWLING AND MCDONALD JJ**
DATE OF ORDER:	**4 APRIL 2025**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 The *Air Pilots Award 2010* and the *Air Pilots Award 2020* (collectively, the **Award**) make provision for "reserve or stand-by duty". That duty requires a pilot on reserve or stand-by to be contactable and, if contacted, to report for the appointed duty no later than two hours after being contacted.

2 Ms Nina Pulaska was a pilot employed by the first appellant and a member of the respondent. The second appellant was the Managing Director of the first appellant. From time to time, Ms Pulaska was rostered on "stand-by duty" by the first appellant. The first issue raised by this appeal is whether that stand-by duty is work for the purposes of the Award. The second issue is whether it is paid work.

3 If the answer to the first and second issues is yes, four subsidiary issues arise. First, are the appellants able to average the hours of a pilot over a specified period in assessing any payment? Second, should 30 minute meal breaks be deducted from any payment? Third, in assessing the hours worked by the pilot, should authorised leave be counted towards ordinary hours of work? Fourth, did the court below determine to allow set-off for over-Award payments, and if so, did it allow for that set-off in the orders made and provide adequate reasons for doing so?

4 The court below is the South Australian Employment Court. The appellants appeal from three judgments of a Deputy President of that court. The first determined that rostered stand-by duty was paid work under the Award: *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd* [2023] SAET 63 (**first judgment**). The second determined that 30 minute meal breaks were not to be deducted from any payment for stand-by duty because Ms Pulaska did not take those breaks: *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 2)* [2024] SAET 23 (**second judgment**). The third determined the amounts owed by the first respondent to Ms Pulaska as the result of the stand-by duty she performed: *Australian Federation of Air Pilots v Corporate Air Charter Pty Ltd (No 3)* [2024] SAET 36 (**third judgment**).

5 There was no dispute between the parties that an appeal lies from the South Australian Employment Court to this Court. That is so by operation of s 565 of the *Fair Work **Act***

2009 (Cth), read together with the definition of "eligible State Court or Territory Court" in s 12 of the Act (at paragraph (d) of the definition) and reg 1.05 of the *Fair Work Regulations 2009* (Cth).

6 The appellants' notice of appeal includes 14 grounds of appeal. Those grounds are directed to the primary and subsidiary issues identified above. We have grouped those grounds within those issues. Grounds 1-8 are directed to the finding of the Deputy President that rostered stand-by duty was paid work under the Award. They allege errors in the interpretation of the Award; failure by the Deputy President to have regard to, or to recognise, certain matters; errors said to arise by reason of the Deputy President's taking into account certain matters; and errors in the conclusion. Grounds 9-14 are directed to the amounts to be paid to Ms Pulaska as a consequence of the Deputy President's finding that stand-by duty was paid work under the Award. They allege errors in respect of meal breaks during stand-by duty; authorised leave counting towards ordinary hours worked; set-off; and the adequacy of the reasons below.

7 For the reasons set out below, the appeal should be dismissed. We have determined that reserve or stand-by duty under the Award is paid work. The other grounds, directed to the amounts due to Ms Pulaska, should also be rejected.

PRINCIPLES OF INTERPRETATION

8 There was little dispute between the parties about the principles governing the interpretation of the Award. Those principles are well-established and apply similarly to awards and enterprise agreements made under the Act: see *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77; 262 FCR 527 at 565 [189] (Bromberg, Katzmann and O'Callaghan JJ), recently cited in *Construction, Forestry, Maritime, Mining and Energy Union v Fremantle Port Authority* [2024] FCA 848; 333 IR 337 at 385 [23]. Those principles may be summarised as follows.

9 The starting point for interpretation of an award or enterprise agreement is the ordinary meaning of the words, read as a whole and in context: *City of* ***Wanneroo*** *v Holmes* (1989) 30 IR 362 at 378 (French J), cited with approval in ***WorkPac*** *Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536 at 580 [197] (Tracey, Bromberg and Rangiah JJ). The context will include the *statutory* context provided by the Act.

10 The context will also include the *industrial* context. The interpretation "… turns on the language of the particular agreement [or award], understood in the light of its industrial context

and purpose …": ***Amcor*** *Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; 222 CLR 241 at 246 [2] (Gleeson CJ and McHugh J); *WorkPac* at 580 [197].

11 The words are not to be interpreted in a vacuum divorced from industrial realities: *Wanneroo* at 378. Rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without the careful attention to form and draftsmanship that one expects to find in an Act of Parliament: see *Wanneroo* at 378-9, citing *George A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503 (Street J); *WorkPac* at 580 [197].

12 The framers of such documents were likely of a "practical bent of mind" and may well have been more concerned with expressing an intention in a way likely to be understood in the relevant industry rather than with legal niceties and jargon, so that a purposive approach to interpretation is appropriate and a narrow or pedantic approach is misplaced: see *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16] (Marshall, Tracey and Flick JJ); *Amcor* at 271-2 [96] (Kirby J); *WorkPac* at 580 [197].

13 We have applied those principles in our interpretation below.

ISSUE ONE – IS ROSTERED STAND-BY DUTY WORK UNDER THE AWARD?

14 Ms Pulaska is a qualified pilot licensed to operate aircraft within Australia. She was employed by the first appellant between March 2018 and January 2022 in the position of "B200 Captain". Her employment was regulated by the Award and by a contract of employment. The Award was initially the *Air Pilots Award 2010* and later the *Air Pilots Award 2020.* The relevant terms of those awards are identical; the only relevant difference is a change to the numbering of the clauses. The references to clauses of the Award below use the numbering found in the 2020 award (as at 1 November 2021). The contract of employment purported to operate from 19 March 2018 although Ms Pulaska's evidence was that it was not provided to her until 2 May 2018.

15 There is no dispute that Ms Pulaska was rostered to perform stand-by duty. Ms Pulaska described that duty as the period when she had to be available to undertake flight duties on short notice.

16 Clause 15 of the Award is headed "Hours of work, days off and rest periods". Clause 15.2 provides:

> Hours of work, days off and rest periods will be determined in accordance with the following provided that ordinary hours of work must not average more than 38 per week:
>
> (a) the regulations approved by CASA [the Civil Aviation Safety Authority] from time to time;
>
> (b) general or employer-specific exemptions to, or concessions under, the regulations approved by CASA from time to time; or
>
> (c) a Fatigue Risk Management System (FRMS) that has been developed by the employer after consultation with the affected pilots and/or their representatives and approved by CASA to apply to particular employers and employees.

17 Clause 15.6 is headed "Reserve time" and provides:

> (a) A pilot on reserve or stand-by duty will be contactable within any scheduled reserve duty period and will report for the appointed duty no later than 2 hours after being contacted. The employer will specify reserve duty period commencement and finishing times which will be as agreed between the employer and the majority of pilots but the duration of such reserve duty periods will not exceed 11 hours.
>
> (b) On any day a rostered tour of duty will not be immediately preceded by or immediately followed by a period of reserve duty.

18 Consistent with cl 15.6, Ms Pulaska's evidence below was that during her rostered stand-by duty she was to be contactable; and, if she was contacted, she was expected to present at the airport for duty as soon as possible and no later than two hours after being contacted; and, upon presentation she was to be fit for duties, including flying duties.

19 The Award does not include any provision for overtime and does not expressly provide whether, and if so, how, pilots will be remunerated during periods of rostered stand-by duty.

The judgment of the Deputy President on issue one

20 The Deputy President found that the Award clearly describes stand-by duty as a work duty performed by pilots: first judgment at [52]. To reach that conclusion, the Deputy President found as follows:

(1) The Award uses the term "work" generally to describe duties to be performed under the Award. The Award then includes references to types of work, including a tour of duty, flying time, stand-by duty and reserve duty. This conveys that "duty" and "work" are used synonymously under the Award, and stand-by duty is therefore "work": first judgment at [48]-[49].

(2) The Award establishes a dichotomy between the concept of duty, being "work", and duty-free periods. In this dichotomy, stand-by duty is clearly work: first judgment at [48]-[51].

(3) The Award expressly limits the number of stand-by hours that a pilot can undertake and prohibits rostered tours of duty from occurring immediately before or after "a period of reserve duty" (apparently used synonymously with a period on stand-by): cl 15.6(b). These regulations applying to stand-by periods signify that the Award applies fatigue risk management considerations to stand-by duty: first judgment at [50].

(4) The Civil Aviation Safety Authority (**CASA**) flying time restriction is 100 flying hours in 30 days (although we note that the CASA Order and Exemption provide for 100 flying hours over *28* days) while the Award stipulates that a full-time employee may be required to work up to 152 hours over 28 days (cl 15.2). This necessarily means that other types of duty that do not involve flying, including stand-by duty, are intended to be rostered and counted as hours of work, so as to amount to 152 working hours over 28 days: first judgment at [53].

Do textual considerations support rostered stand-by duty as work?

21 The starting point is the ordinary meaning of the words, read as a whole and in context. Clause 15.6 is set out above. It is headed "Reserve time". It uses the expressions "reserve or stand-by *duty*" and "reserve *duty* period[s]". The ordinary meaning of the word "duty" is, in context, associated with work. It relevantly connotes an obligation to carry out a particular task. The *Macquarie Dictionary* (Pan Macmillan Australia, 2025) relevantly defines "duty" as "action required by one's position or occupation"; the *Oxford English Dictionary* (Oxford University Press, 2025) defines "duty" as "the action which one's position or station directly requires". The use of the word "duty" is a textual indicator that stand-by duty is work.

22 That approach to the word "duty" is consistent with its use elsewhere in the Award. Clause 10.5(a)(i) and (ii) provides for minimum payments for casual employees. Those employees are entitled to a minimum payment on "each occasion they are required to attend work" for a "period of duty (including rostered stand-by)". "Work" is used synonymously with "duty" and, in particular, it is evident that it includes stand-by duty.

23 A form of the word "duty" is also used in the Award in the composite expression "flying duties": see cl 2 (in the definition of "senior instructor"), cl 12.1(a), (b) and (d) (dealing with a temporary change to flying duties), cl 25.3 (dealing with additional leave for certain health

reasons) and Schedule A at A.1.12 (dealing with flying duties in a higher classification). Those flying duties are synonymous with work. Those uses suggest that "duty" is work, and that the Award uses the expression "duty" or "duties" to describe particular types of work. There is no compelling reason to read "duty" in cl 15.2 in a way different to those uses.

24 Clause 15 (which contains cl 15.6, dealing with reserve and stand-by duty) is headed "Hours of work, days off and rest periods". Relying on that heading, the respondent submitted that stand-by duty is not a "rest period" or a "day off" and therefore must be "hours of work". As to rest periods, cl 15.8 (dealing with "[p]eriods free of duty") requires a "tour of duty or period of reserve time" to be preceded by a "rest period"; suggesting that reserve time is something different to a rest period. The expression "rest period" is elsewhere used in the Award in contradistinction to reserve or stand-by duty: see cl 15.8(j). As to days off, cl 16.3 requires a roster to separately specify "periods free of duty" and "stand-by duty, reserve duty days" – again, suggesting that the two are intended to be different, and that periods of reserve or stand-by duty are not periods "free of duty", and are therefore "duty". This is consistent with the terms of cl 15.6(b), which provides that a rostered tour of duty will not be immediately preceded or immediately followed by a period of reserve duty. That, in turn, suggests that reserve duty is something other than a rest period or a day off. The respondent submits that the result is that "hours of work" is the only remaining category, which must apply to stand-by and reserve duty.

25 All of those matters above are textual support for stand-by duty being treated as a species of work under the Award.

Do contextual considerations support rostered stand-by duty as work?

26 There was no dispute that when a pilot is on stand-by duty they are directed to: (a) be contactable; (b) report for the appointed duty no later than two hours after being contacted; and (c) be fit for duty (including flying duty) if they report for duty. That is the context in which stand-by duty is carried out. The evidence below was that:

(a) the first appellant directed Ms Pulaska not to be affected by alcohol during her stand-by duty;

(b) Ms Pulaska could not engage in activities that she would otherwise engage in on her days off; and

(c) Ms Pulaska was "significantly impacted" by stand-by duty.

27 It is clear that Ms Pulaska was under a number of directions from her employer throughout her stand-by period. Directions were given as to what she must do during stand-by duty (be contactable, be fit for duty, and report for duty), and what she must not do (be affected by alcohol or otherwise unfit for duty at short notice, and be uncontactable). The fact that she was under those directions during stand-by duty supports a conclusion that stand-by duty is work.

28 The respondent also relies upon the *industrial* context. The respondent submits that it has long been accepted in employment law authorities that "they also serve who only stand and wait": see *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 at 466 (Dixon J). Whether that is so has most often been considered in the context in which a wrongfully dismissed employee remains ready, willing and able to perform the contract (but is prevented by the employer from doing so) and seeks damages including in respect of the period during which they were ready, willing and able. The orthodox view is that readiness and willingness to perform services is insufficient to earn wages: see Irving M, *The Contract of Employment*, 1st ed, LexisNexis, 2012 at [9.18] (and 2nd ed, Lexis Nexis, 2019 at [12.5], citing the 1st ed). However, and in any event, the present circumstances are different. As explained above, Ms Pulaska was employed at the relevant times and was under certain directions from her employer. In support of its position, the respondent relies upon a number of cases that it says are instructive or analogous.

Minister for Police v WA Police Force Union of Workers (1969) 49 WAIG 993

29 The relevant award made no separate provision for stand-by, on-call or waiting allowance. When a police constable was on-call, they were required to "remain at home, consume no alcohol and be prepared to conduct breathalyser tests when required". Justice Nevile said that if a worker was instructed by their superior to do certain things and not to do certain other things during a certain period, then he must be on duty during that period. It followed that, for the purposes of the relevant award, such time must be "time worked". Therefore, the constable was not "off duty" because when off duty "he can do anything that he likes". He was "subject to continual command of the employer … to stay at home and to abstain from doing certain things and to be ready to work in a more extensive manner should he be called upon".

Hospital Employees' Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home (1977) 57 WAIG 455 (Lee-Downs)

30 A member of the applicant was rostered to night shifts and was directed to "attend to the patients, to their needs and to their wants". The question was whether the time spent overnight, even when not assisting patients, was "time worked". Chief Justice Burt (Wallace J agreeing)

said that the time was "time worked" if "the worker is … doing whatever it is that he is doing, upon instructions express or implied given to him by his employers".

Warramunda Village Inc v Pryde [2002] FCAFC 58; 116 FCR 58 (Warramunda)

31 The appellant operated a residential aged care home. The respondents were personal care workers. An issue arose as to whether "sleepover shifts" were "work". A "sleepover shift" was an evening shift beginning at 10.00 pm and ending at 7.30 am. A worker on a sleepover shift was provided with a flat, on premises, and was required to render assistance where necessary. Otherwise, the worker was not on active duty and could "eat, listen to the radio or sleep as he (or she) pleases": *Warramunda* at 64 [27]. Justice Finkelstein (with whom Gyles J agreed) applied *Lee-Downs* saying that "work" refers to "an employee who is under the instruction of an employer: the time under instruction is 'time worked'": *Warramunda* at 67 [37]; see also, to the same effect, 62 [17] (Lee J).

WA Police Union of Workers v Minister for Police (1981) 61 WAIG 1906

32 A roster required certain female detectives to be recalled to work outside of their rostered hours to assist at a sexual assault referral centre: see at 1907. The Court (Wallace, Brinsden and Kennedy JJ) found that hours on that roster were not "time worked" within the award. The respondent submitted the distinguishing circumstances from the present case were that every police officer was always under a duty to return to work if required, and that the Magistrate had failed to find that there had been a direction that the officers were required to return to work if called whilst on duty.

33 We accept that, on balance, these authorities support the proposition that if an employee is instructed by their employer to do certain things and not to do certain other things during a period, then during that period they are on duty and the time is generally to be regarded as time worked. Of course, whether that is so in the case of a particular award or enterprise agreement will depend on the way in which those instruments use particular expressions, and on whether they provide for certain periods when employees are subject to instructions to be compensated for in other ways – for example, by the provision of a special allowance.

34 The operation of the Award with respect to rostered stand-by duty and the treatment of similar industrial instruments provide contextual support for stand-by duty being work under the Award.

Do considerations of purpose support rostered stand-by duty as work?

35 The Award is a modern award made by the Fair Work **Commission** pursuant to Part 2-3 of the Act. That Part of the Act includes the "modern awards objective". The modern awards objective provides that the Commission must ensure that modern awards, together with the National Employment Standards contained in the Act, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain matters: see s 134 of the Act. Those matters to be taken into account include:

> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts …

36 Section 138 of the Act provides:

> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

37 The modern award objective expresses that the purpose of modern awards is to provide a fair and relevant minimum safety net of terms and conditions, including particularly by reference to additional hours constituted by overtime, shiftwork and unsocial hours. The rostered stand-by under the Award involves rostered duty to a maximum of 11 hours where the employee remains under directions and, on the evidence in this case, is not able to go about some of their normal activities. Construing stand-by duty as work, and paid work, under the Award is consistent with the industrial purpose reflected in the modern awards objective.

The appellants' contention that stand-by is not paid work

38 The appellants' construction focuses on cl 15.2 of the Award read together with Civil Aviation **Order** 48.1 Instrument 2019 and the CASA **Exemption** that applied to the first appellant (CASA.FRMS.0052 Revision 1) – both made under the "regulations approved by CASA". They allege that the Order and Exemption are incorporated into the Award and, it says those instruments provide that stand-by duty is not work, hence the result is that the Award provides that stand-by is not work.

39 Clause 15.2 of the Award (fully extracted above) relevantly provides:

Hours of work, days off and rest periods will be determined in accordance with the following provided that ordinary hours of work must not average more than 38 per week:

(a) the regulations approved by CASA from time to time;

(b) general or employer-specific exemptions to, or concessions under, the regulations approved by CASA from time to time; or

40 The Order defines "duty", "duty period" and "flight duty period" as follows:

duty means any task that a person who is employed as an FCM [flight crewmember] is required to carry out associated with the business of an AOC [Air Operator's Certificate] holder.

duty period means a period of time which:

(a) starts when an FCM is required by an AOC holder to report for duty; and

(b) ends when the FCM is free of all duties.

Note A duty period includes any time spent by the FCM in positioning. See the definition of ***positioning*** in subparagraph 6.3 (e).

flight duty period (or ***FDP***) means a period of time which:

(a) starts when a person is required by an AOC holder to report for a duty period in which 1 or more flights as an FCM are undertaken; and

(b) ends at the later of:

(i) the person's completion of all duties associated with the flight, or the last of the flights; or

(ii) 15 minutes after the end of the person's flight, or the last of the flights.

41 The Order then defines "standby" and "standby-like arrangement" as follows:

standby means a period of time during which an FCM:

(a) is required by an AOC holder to hold himself or herself available for duties; and

(b) has access to suitable sleeping accommodation; and

(c) is free from all duties associated with his or her employment.

Note If suitable sleeping accommodation is not available for an FCM, who is required by an AOC holder to hold himself or herself available for duty, the FCM will be considered to be on duty and not on standby.

standby-like arrangement means a period of time during which an FCM:

(a) is required by an AOC holder to hold himself or herself available for duties; and

(b) has no access to suitable sleeping accommodation.

42 The appellants contend that the Order, by the definitions above, makes a clear distinction between duty and stand-by such that stand-by is not work under the Order, and consequently not work under the Award. Likewise, it relies upon the Exemption where it defines standby (at cl 2.17) as "a period during which a flight crewmember is required to be available for a duty period. Standby is neither duty, nor time free of duty".

43 Whilst the respondent accepts that the Order and the Exemption do not expressly define stand-by duty as work, it submits that those instruments establish stand-by as a third category, "neither duty nor not-duty". It directs attention to:

(a) the Exemption at cl 2.21, which provides that "[t]ime free of duty" is defined as "a period of time during which a flight crewmember is free of all duty and standby associated with his or her employment"; and

(b) the Order at cl 6.1, which defines "standby" to mean a period of time during which the pilot is required to hold themselves available for duties but is "free from all duties associated with his or her employment", while stating that an "off-duty period" is a period of time during which a pilot is "free of all duties *and standby* associated with his or her employment" (emphasis added).

The respondent accepts that the Order and Exemption do not treat stand-by in the same way as flying duties, but says that they also do not treat it as off-duty time.

44 Perhaps more fundamentally, the respondent also submits that the Order and the Exemption serve a different purpose to the Award. We accept that submission. The purpose of the Award is to provide a fair and relevant minimum safety net of terms and conditions: s 134 of the Act. The Order and the Exemption are made by CASA. CASA is the government body that regulates Australian aviation safety including by the promulgation of safety standards: s 9 of the *Civil Aviation Act 1988* (Cth). The Order and the Exemption are directed principally to that purpose. The Order and the Exemption would not be expected to be directed at establishing minimum terms and conditions of employment, save where they impact on safety. Even then, an award or enterprise agreement might provide for minimum standards and conditions that are different from the minimum requirements for safety, so long as they are not inconsistent with the requirements of the Order and the Exemption.

45 We accept the submission of the respondent that the provisions of the Order and the Exemption do not establish, on their own terms or in context, that stand-by duty is not duty and is not work.

They do not expressly provide that it is neither duty nor work. They do contain textual and contextual indications that stand-by duty is *not* a rest period. It is true that the Order defines "stand-by" as a period in which a flight crewmember "is free from all duties associated with his or her employment", but, whatever that may mean in the context of the Order itself, it cannot mean that a flight crewmember who is on stand-by duty, as referred to in the Award, is not required to comply with the requirement that they remain available to attend for flight duty, or to comply with directions of their employer which are reasonably necessary to give effect to the purpose of stand-by duty.

46 Further, and in any event, we accept the submission of the respondent that the terms of the Order and the Exemption are not incorporated into the Award. Clause 15.2 provides that hours of work, days off and rest periods are to be "determined in accordance with" the Order and the Exemption. First, the Award does not use clear and express language of incorporation: see, for example, (in the context incorporation of terms into contracts of employment) ***Burgess*** *v Mount Thorley Operations Pty Ltd* [2003] NSWIRComm 432; 132 IR 400 at 425-8 [42]-[61] where the Full Bench of the New South Wales Industrial Relations Commission found that the words "in accordance with" were insufficiently direct to incorporate the relevant document. Second, the terms of the Order and the Exemption are not clearly apt for the incorporation into the Award. Third, the terms of the Order and the Exemption have their own scheme and field of operation, suggesting no requirement for incorporation. Fourth, in any event, there is no warrant for reading terms used in the Order and the Exemption, which are subordinate to the Award, as dictating the meaning of terms as they are used in the Award.

47 We conclude that the statement that hours of work, days off and rest periods are to be determined in accordance with the Order and the Exemption requires that the rostering of pilots not be inconsistent with the Order and the Exemption; it does not follow that expressions used in the Award are to be interpreted by reference to the esoteric way similar terms are used in the Order and the Exemption.

48 For completeness, we add that the appellants' construction would lead to some surprising and undesirable consequences. For example, if stand-by was not to be credited to Ms Pulaska's ordinary 38 hours of work, it would have been open to the first appellant to roster Ms Pulaska on permanent stand-by from Monday to Friday from 6.00 am to 8.00 pm and on Saturday from 6.00 am to 6.00 pm: the Order at Appendix 2 cll 8.1 (maximum 14 hour stand-by shift), 8.4 (off-duty for 10 hours), 10.5 (36 consecutive hours off, including two local nights, per week)

and Exemption cll 4.6.1 (maximum 16 hour stand-by shift), 4.6.3 (off-duty for 10 hours), 4.8.1 (36 consecutive hours off, including two local nights, per week). Ms Pulaska would be entitled to one Saturday off every third week: cl 10.6 of the Order. On this roster, Ms Pulaska would be on stand-by duty for 82 hours per week, and 70 hours every third week. This roster would encompass 4,060 annual hours. With a salary of around $75,000, Ms Pulaska's effective hourly rate would be $18.47. That is less than the relevant minimum wage.

Conclusion on issue one

49 For the reasons set out above we conclude that the text, context and purpose of the Award support a conclusion that rostered stand-by duty is work under the Award. We reject the appellants' construction.

ISSUE TWO – IS ROSTERED STAND-BY DUTY PAID WORK UNDER THE AWARD?

50 Having determined that rostered stand-by duty is work under the Award it is necessary to determine the second issue: is rostered stand-by duty *paid* work under the Award?

The judgment of the Deputy President on issue two

51 In the first judgment, the Deputy President ruled in relation to issue two that there is an entitlement to payment for all stand-by overtime under the Award. In reaching his finding, the Deputy President reasoned as follows:

(1) The absence of a penalty rate for overtime in the Award meant nothing more than that the Award does not require a higher rate of payment for overtime. It is not a relevant factor that goes to determining whether the Award requires payment for overtime: first judgment at [32] and [55].

(2) The absence of a specified hourly rate for full-time employees is not a prohibition on working overtime or an indicator that it is intended to be unpaid work. To the contrary, the Award clearly contemplates that paid overtime can be worked. For example, cl 5.1 of the Award includes "overtime rates" as a topic of "individual flexibility arrangements". The Award was also varied in March 2023 to include a written form for recording agreement between an employer and employee that the employee take paid time off instead of being paid to work overtime. The variation also provides for overtime penalty rates for helicopter aircrew conducting helicopter operations. This

variation indicates that the Award did not previously preclude being paid for overtime: first judgment at [33]-[34] and [56].

(3) The hourly rate for stand-by overtime is set in the same manner as for part-time employees under the Award. Calculating the applicable rate of pay involves identifying on a pro rata basis the equivalent pay and conditions to those of full-time employees: cl 9.3 of the Award, first judgment at [61].

Does the award provide for averaging hours of work?

52 Again, it is necessary to have regard to cl 15.2 of the Award where it provides that "hours of work, days off and rest periods will be determined in accordance with [the Order, the Exemption, and any Fatigue Risk Management System (**FRMS**)] provided that ordinary hours of work must not average more than 38 per week".

53 As set out above, cl 15.2 provides that ordinary hours of work must not *average* more than 38 per week. That clause does not provide for, or otherwise identify, a period over which hours are to be averaged.

54 Section 62(1) of the Act relevantly provides that an employer must not request or require a full-time employee to work more than 38 hours unless the additional hours are reasonable. Section 62(3) sets out matters that must be taken into account in determining whether the additional hours are reasonable. Section 62(3)(i) provides:

> In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:
>
> …
>
> (i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;
>
> …

55 Section 62(4) provides that (for the purposes of the restriction of 38 hours in s 62(1)) the hours that the employee works in a week are taken to include any hours of leave or absence, whether paid or unpaid, taken by the employee that is authorised by the employer (or authorised by a term of employment or by a Commonwealth or state law).

56 Section 63(1) relevantly provides that a modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period, but that the average

weekly hours over the period for a full-time employee must not exceed 38 hours. Section 63 does not include a provision in the same terms as s 62(4) (providing for the inclusion of leave or absence). However, it appears to us that ss 62 and 63 are intended to be read, and operate, together such that it might sensibly be said that it was not necessary to repeat s 62(4) within s 63.

57 How then should the provision for "averaging" in cl 15.2 be construed? The respondent submits that there are two possibilities. First, it says that cl 15.2 makes no valid averaging provision because it does not specify a period (on its own terms and elsewhere). Second, cl 15.2 permits averaging where CASA allows, over a period CASA specifies. It submits that the Deputy President held the second, then determined that CASA had not approved any averaging period and therefore none applied. The Deputy President said (at [13] of the first judgment):

> … Clause 15.2 limits the ordinary hours of work to no more than 38 a week on average, subject to certain exceptions. These may include some CASA approved averaging periods, but none applied to this employment. Therefore, the Award limits ordinary hours of work to 38 each week. It also sets 38 as the minimum weekly hours for Ms Pulaska as a full-time employee, irrespective of what duties may have been allocated.

58 The respondent urges this Court to take the same approach. It says such an approach "orthodoxly construes cl 15.2, giving work to the word 'average' (should CASA address averaging in an instrument), whilst preserving validity".

59 As identified, s 63 provides that, where an award contemplates weekly hours exceeding 38 hours, the award may specify a period over which weekly hours will be averaged. Consistently with the capacity for an award to provide for averaging, cl 15.2 seeks to provide for full-time employees to work no more than an average of 38 hours per week. However, cl 15.2 does not specify a period over which hours are to be averaged. The appellants urge that the Order, the Exemption or an FRMS might specify a period for averaging. Given that cl 15.2 contemplates averaging but does not specify a period over which averaging is to occur, and also states that hours of work are to be determined in accordance with the Order, the Exemption or an FRMS, we are inclined to accept that, if those instruments did specify a period over which hours were to be averaged, then cl 15.1 could be regarded as "providing for the averaging of terms over" any such period, as contemplated by s 63(1) of the Act. However, we are unable to discern such a specified period in any of the Award, the Order or the Exemption. Certain periods are referred to in the Order, but none clearly for the purpose of an averaging of weekly hours of employees.

60 Clause 9.1 of Appendix 4 to the Order provides: "The cumulative flight time accrued by an FCM during any consecutive 28-day period must not exceed 100 hours". The appellants rely upon that clause to submit that the specified period for the purposes of cl 15.2 of the Award is 28 days. However, that clause is followed by cl 9.2 which provides: "The cumulative flight time accrued by an FCM during any consecutive 365-day period must not exceed 1000 hours". Next, cl 10.1 of Appendix 4 provides that the cumulative duty accrued by an FCM during any consecutive 168 hour period must not exceed 60 hours. All of those clauses are clearly designed for a different purpose and there is no textual or contextual support for the submission that, for example, cl 9.1 is intended to operate as the specified period for the purposes of s 63 of the Act and cl 15.2 of the Award. There was no explanation as to why the period in cl 9.1 is chosen by the appellants in preference to the periods in cll 9.2 or 10.1.

61 The appellants direct attention to two further periods. The fortnightly pay-cycle and the annual salary, to submit (in the alternative to 28 days) that the averaging period is a fortnight or a year. Again, the Award makes no express reference to either of those periods as the relevant period for the purposes of cl 15.2. We accept, consistent with the principles set out above, that the words of the Award are not to be "interpreted in a vacuum divorced from industrial realities" and "industrial agreements are made for various industries in the light of the customs and working conditions of each". However, there is no textual, contextual or purposive support for those periods over and above the other potential periods. There was no evidence before us about whether a fortnightly pay-cycle is an industry standard or otherwise consistent arrangement. There is nothing that satisfies us that cl 15.2 provides that the 38 hours were to be averaged over either of those periods.

62 We acknowledge that our approach gives no work to the word "average" in cl 15.2 of the Award in the circumstances of this case. Although the inclusion of that word in cl 15.2 suggests that it was intended that averaging over *some* period should be permitted, the result is unavoidable where none of the Award, the Order or the Exemption provides a specified period of time over which that "average" is to be calculated. A consequence of our conclusion is that the maximum number of hours per week is 38 hours, and rostered stand-by hours worked beyond the minimum number of hours must be remunerated. That is consistent with the conclusion of the Deputy President and, for the reasons set out above, we see no error in it.

APPEAL GROUNDS 1–8 AND THE FIRST AND SECOND ISSUES

63 For completeness, we indicate that we intend that the matters above address grounds of appeal 1-8. These grounds of appeal are stated as follows:

> 1. The Air Pilots Award 2010 and 2020 (hereinafter referred to as the Award) the subject of this claim does not have a clause for Overtime notwithstanding that absence the Court below determined a rate for overtime for a pilot on stand-by duty and in so doing fell into error by not exercising a judicial function of interpreting the Award but performed an impermissible arbitral or legislative one.
>
> 2. Erred by failing properly to construe sub-clause 15.2 of the Award by not having regard to relevant CASA regulations.
>
> 3. Erred by failing properly to construe sub-clause 15.2 of the Award by disregarding the word 'average' with respect to the minimum hours of work, which entails an averaging process over a relevant period.
>
> 4. Erred by failing to give due regard to the fortnightly pay cycle and the equal fortnightly pay as provided as assessed on the annual salary in accordance with terms of the Award and the contract of employment.
>
> 5. Erred by failing to recognise that the salary is stated under the Award as an annual one which in turn means that the relevant period for the averaging of minimum hours is either an annual one or over another period.
>
> 6. Erred by taking into account impermissible or irrelevant matters of assessing what would be a minimum hourly rate.
>
> 7. Erred by finding that stand-by duty was paid duty under the Award.
>
> 8. Erred by failing to find that the Award makes no provision for the payment to a pilot when on stand-by.

64 Ground 1 is addressed at [21]-[48] of these reasons, which deal with issue one. Ground 2 is addressed at [38]-[48], which deal with that part of issue one that addresses the appellants' construction. Ground 3 is addressed at [52]-[62], which deal with issue two. Grounds 4 and 5 are addressed at [61], which deals with part of issue two.

65 Ground 6 was not discretely dealt with by the appellants. We understand ground 6 to be directed to the consequence of the Deputy President's conclusion that averaging was not provided for because no averaging period was specified. This is addressed at [52]-[62] and [78]-[90] of these reasons, which deal with averaging and set-off.

66 Grounds 7 and 8 are addressed at [50]-[62] of these reasons, which deal with issue two.

THE REMAINING QUANTUM ISSUES

67 Having determined that rostered stand-by duty is paid work under the Award, and that the appellants are not able to average the hours of a pilot over a specified period, it is necessary to

determine the three remaining subsidiary issues previously identified at [3] above. They are each dealt with below.

Should 30 minute meal breaks be deducted?

68 By appeal ground 9, the appellants submit that the Deputy President erred by finding that "meal breaks had whilst on stand-by were to be regarded as paid time". The respondent submits that the Deputy President did not make that finding; rather, he found that, as a matter of fact, Ms Pulaska did not take meal breaks while on stand-by.

69 The consideration of this ground proceeds on the basis of our conclusions above that stand-by duty is "duty" and is "work" under the Award. Clause 17.1 of the Award states that "no pilot will be required to be on duty for a period in excess of 5 hours without a 30 minute break free of duty for a meal". One of the duties that applies to pilots whilst on stand-by duty is the duty to be contactable. To be free of that duty is to be uncontactable. So much is consistent with the terms of cl 15.6 that describes that a pilot on reserve or stand-by duty "will be contactable within any scheduled reserve duty period". The evidence of Ms Pulaska below was that she did not take a 30 minute break free of duty when performing stand-by duty at home. That evidence was accepted by the Deputy President: see second judgment at [26].

70 The Deputy President's findings were that Ms Pulaska "did not stop being on stand-by while she consumed a meal", "no breaks from stand-by duty were rostered" and "[t]here was no other instruction to take a break": second judgment at [18]. That is not a finding, as ground 9 suggests, that meal breaks taken whilst on stand-by were to be regarded as paid time; rather it is a finding that Ms Pulaska did not take those breaks. We see no error in that finding.

71 The appellants submit that it is "implausible" that Ms Pulaska was not free from duty during stand-by. However, the Deputy President had before him uncontested evidence that Ms Pulaska was always "contactable".

72 The correctness standard for appellate review requires the appellate court to reach its own conclusion, making due allowances for the advantages of the trial judge: *Fox v Percy* [2003] HCA 22; 214 CLR 118. The trial judge's advantages "derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole": *Fox v Percy* at 126 [23]. However, even allowing for that advantage, there was no dispute before the South Australian Employment Court about Ms Pulaska's evidence that she did not take,

was not rostered to take, and was not instructed to take, meal breaks. Her evidence is not implausible. No amount attributable to meal breaks should be deducted from the amounts that are to be paid to Ms Pulaska.

Should authorised leave be counted as ordinary hours?

73 By ground 10, the appellants submit that the Deputy President erred by finding that "hours of paid leave, including statutory annual leave, weekly workers compensation, sick or personal leave [are] added to the total weekly hours for overtime purposes particularly in the absence of an Overtime clause in the Award".

74 The respondent submits that s 62(4) of the Act is a complete answer to this contention. Section 62(4) provides:

> … the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in a week and that are authorised …

75 As already identified, s 63 provides that a "modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period". Averaging of hours is provided for by cl 15.2 of the Award which states that "ordinary hours of work must not average more than 38 per week".

76 The appellants rely on the capacity to average hours to distinguish this case and the authorities relied upon by the Deputy President at [35] of the second judgment.

77 There is nothing in the text, context or purpose of s 63 that suggests that it operates to exclude s 62(4). Sections 62 and 63 are interrelated: see, for example, s 62(3)(i) (set out at [54] above). Section 63 allows for the averaging of hours in a modern award or enterprise agreement. Section 62(3)(i) provides that such averaging is a consideration that must be taken into account when considering whether hours worked above 38 are reasonable. Properly construed, ss 62 and 63 should be read together to provide for the maximum weekly hours allowed under the Act and circumstances where they may be exceeded. In that way, s 62(4) operates on any averaging under s 63. The text of s 62(4) is clear. The Deputy President did not err by including hours of leave in Ms Pulaska's total weekly hours of work for overtime purposes.

Set-off determination and reasons

78 In relation to set-off, the appellants raised four related grounds of appeal. These grounds of appeal are stated as follows:

11. Erred by failing to take into account relevant matters such as the contract of employment which provided a set-off for annual remuneration paid in excess of that provided by the Award in consideration for any work performed which may attract an additional Award entitlement.

12. Erred by making concluded findings of fact without providing any or any adequate reasons as to how such findings arose in the face of competing evidence to the contrary.

13. Erred in making a final order for a sum of money for underpayment under the Award without taking into account the contractual set-off available notwithstanding an earlier interlocutory finding that on account of sub-clause 10.3 of the contract of employment which expressly permitted a set-off of any salary component paid which was more than any minimum Award entitlements.

14. Erred in making a final order for the payment of a sum certain and interest on that sum without providing any or any adequate reasons as to the calculation of that sum and the calculation of interest on it.

79 We deal first with grounds 11 and 13, being those that relate to the issue of set-off provided for at cl 10.3 of Ms Pulaska's contract of employment.

80 Clause 10.3 of Ms Pulaska's employment contract states: "Where your pay exceeds your legislative entitlements, any above component not otherwise allocated may be offset against any other applicable entitlements". Clause 10.1 provides: "Your pay will be the amount described at item 8 of the schedule". Item 8 provides for the annual amount of pay.

81 The Deputy President found that cl 10.3 of Ms Pulaska's employment contract permitted set-off of any over-Award payments against unpaid entitlements: second judgment at [48]-[49]. The Deputy President stated, at [47] of the second judgment, that:

> While the text could be clearer, I find [Ms Pulaska's employment contract] permits any salary component that is more than "legislative entitlements", being the minimum Award entitlements, to "be offset against" any other applicable but unpaid entitlements. There is no time limit to the period in which pay, and entitlements may be offset. This means the employer may set-off any salary excess against the unpaid overtime.

82 The Deputy President also found that, while the respondent had submitted that there was no contractual set-off right, the respondent gave credit to the appellants for all salary paid throughout the employment in the respondent's calculation of what is owed: second judgment at [10] and third judgment at [4]. The Deputy President agreed with the respondent's calculation, finding that the appellants owed Ms Pulaska the total pre-tax sum of $22,198.60. This calculation comprised $29,450.53 of unpaid entitlements, less a $7,251.93 set-off: third judgment at [4] and [9]-[12]. The Deputy President also held that the respondent was entitled to interest of $4,000: third judgment at [12].

83 The third judgment makes clear that the Deputy President took into account the contractual set-off for over-Award payments and applied the set-off consideration to the calculation of the unpaid entitlements. The calculation of that sum was set out at [3]-[4] and [9]-[12] of the third judgment.

84 The appellants' submissions as to set-off reveal that their complaint in ground 11 is not the Deputy President's failure to take into account set-off in calculating the unpaid entitlements, as it is clear on the face of the first to third judgments that set-off was factored into this calculation. Instead, the appellants' complaint is more properly characterised as the Deputy President's failure to apply the appellants' proposed *method* when calculating that set-off amount.

85 The appellants contend that set-off should be calculated on the basis of averaging hours across Ms Pulaska's entire employment period. On this approach, if Ms Pulaska worked, for example, 20 hours in a week and was being paid a full-time salary, the appellants' position was that the first appellant was therefore 18 hours in credit and could "offset" those 18 hours against payments due in later pay periods. The appellants refer to this method of calculating set-off as the "**running ledger**" method. The appellants submit that the running ledger of credited hours could be reconciled over the totality of the period of Ms Pulaska's employment.

86 By way of contrast, the set-off method that was put forward by the respondent, and which was adopted by the Deputy President in his calculation of unpaid entitlements, is such that the **Award amount** (comprising, in Ms Pulaska's case, the base award salary plus a turboprop allowance plus a command instrument rating plus accident insurance annual leave loading) is added to Ms Pulaska's **unpaid overtime entitlements**. From this figure, there is a subtraction of the total payment Ms Pulaska received that year from the first appellant. The resulting figure is a **set-off overtime entitlement** that the respondent says is consistent with cl 10.3 of Ms Pulaska's employment contract, and which is owed to Ms Pulaska. The respondent contended, and the Deputy President agreed by virtue of his adoption of the respondent's calculations, that this exercise is to be done on an annual basis for every year there is an over-Award excess.

87 Before this Court, the respondent submitted that the appellants' proposed method for calculating set-off, encompassing a running ledger unconstrained as to time, is, in effect, an attempt to relitigate the "averaging" point. The averaging point is described earlier in these reasons at [52]-[62] above. Counsel for the appellants appeared to agree with this, saying in

the hearing before this Court that "whether you call it averaging or set-off, we're entitled to claim credit for [the amount] as a running account".

88 It is not necessary to say more about the averaging point. We have determined that the Award does not provide for averaging of hours because it specifies no period for that purpose as required by s 63(1) of the Act. In light of that finding, it necessarily follows that the appellants' proposed method for calculating set-off based on averaging is incorrect.

89 The respondent's method for the calculation of set-off on an annualised basis is correct. It aligns with the clear meaning of cl 10.3 of the employment contract: "Where your pay exceeds your legislative entitlements, any above component not otherwise allocated may be offset against any other applicable entitlements". Reading cl 10.3 alongside cl 10.1 and item 8 of the Schedule, "your pay" is understood to be on an annual basis: where Ms Pulaska's annual pay exceeds the Award amount, the difference may be set-off against Ms Pulaska's overtime entitlements. Construing cl 10.1 in such a way that reconciliation is not done on an annual basis, but is instead performed over the totality of the period that Ms Pulaska was employed, would tend to produce erroneous and unintended results. One could imagine a situation where an employee who has been with the same employer for 20 years states that they are presently being paid under the Award amount, only for their employer to respond that 20 years ago the employee was paid over the Award amount and therefore the employee has no entitlement to be paid.

90 We find that the Deputy President did not fail to take into account set-off. Moreover, he adopted the appropriate method in calculating the set-off amount. Ground 11 is rejected.

91 Ground 13 alleges the Deputy President failed to take into account contractual set-off, notwithstanding an earlier interlocutory finding that cl 10.3 permits set-off. The appellants' written submissions clarify that this ground relates to the Deputy President's alleged failure to take into account a calculation of set-off on the basis of averaging the running ledger over the totality of the period of Ms Pulaska's employment. The appellants contend that at [47] of the second judgment, the Deputy President had conveyed that set-off would be calculated in this manner, but that the third judgment expressly contradicted this earlier ruling and found that set-off was instead to be calculated on an annualised basis.

92 At [47] of the second judgment, the Deputy President found:

> The set-off issue is determined by the text of cl 10.3 of the contract. In my opinion this clause records the respondent's agreement with Ms Pulaska that a set-off is permitted. While the text could be clearer, I find it permits any salary component that is more than "legislative entitlements", being the minimum Award entitlements, to "be offset against" any other applicable but unpaid entitlements. *There is no time limit to the period in which pay, and entitlements may be offset.* This means the employer may set-off any salary excess against the unpaid overtime.
>
> (Emphasis added.)

93 The appellants submitted that the Deputy President's ruling in the third judgment, whereby the Deputy President rejected the averaging of hours for the purpose of calculating the set-off amount, was inconsistent with the finding in the second judgment that there was no time limit with respect to set-off. In particular, in the third judgment at [7], the Deputy President found:

> The respondent has not submitted any different work times. Instead, and contrary to the Court's ruling, it has maintained its position that weekly hours exclude hours of paid leave and hours of paid workers compensation incapacity, and that it can average hours of work over the whole four years of employment.

94 We do not consider the rulings in the second and third judgments to be inconsistent. The better interpretation of [47] of the second judgment is that the Deputy President was saying that there was no time limit in respect of the process to pay a salary component more than the legislative entitlement. That is not the same as saying that there was no limited period that was relevant when calculating the set-off overtime entitlement. Ground 13 proceeds on a reading of the second judgment that is incorrect. The ground is rejected. In any case, even if the Deputy President had reasoned inconsistently in the two judgments, for the reasons already given at [89] above, the better view is that the contract of employment allowed for offsetting on an annualised basis.

95 As to the adequacy of the Deputy President's reasons, the appellants submit by grounds 12 and 14 that the Deputy President did not provide adequate reasons as to the calculation of the sum and the applicable interest, and made concluded findings of fact without providing adequate reasons as to how those findings arose.

96 Regarding both grounds, we find that, in context, the Deputy President's reasons were adequate. As the respondent submitted, both the appellants and the respondent had prepared and submitted quantum calculations that were premised on certain factual and legal assumptions. The parties' calculations assumed different methods of calculating set-off. The appellants assumed a calculation of the set-off amount based on averaging hours over the totality of Ms Pulaska's employment period, while the respondent assumed a calculation of the set-off amount based on an annualised reconciliation of the sum of Ms Pulaska's Award

amount and unpaid overtime entitlements, less the total payment she received that year. In the first judgment, the Deputy President accepted that the respondent's calculation method was correct, and that no averaging of hours was permitted: first judgment at [13]. It necessarily followed that, in the second and third judgments, the respondent's quantum calculation would be preferred over a quantum calculation that was inconsistent with the Deputy President's ruling in the first judgment. This is also the case in regard to a number of factual and legal findings made by the Deputy President in favour of the respondent, including:

(a) the finding that claimed allowances were payable (second judgment at [5]);

(b) the finding that Ms Pulaska did spend time on pre-flight and post-flight duties (second judgment at [5]);

(c) the acceptance of Ms Pulaska's unchallenged evidence as to when she worked and took breaks (second judgment at [24]-[25]);

(d) the finding that no deduction was made for meal breaks (second judgment at [26]); and

(e) the finding that authorised leave counted towards Ms Pulaska's ordinary hours of work (second judgment at [45]).

97 Accordingly, it is clear that the Deputy President did not merely accept, absent reasons, the respondent's calculations. The Deputy President's acceptance of those calculations was premised on findings of fact and law that were made sufficiently clear in his judgments. Accordingly, grounds 12 and 14 are rejected.

CONCLUSION

98 For the reasons given above, none of the appellants' grounds of appeal has been successful. It follows that the appeal must be dismissed.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Logan, Dowling and McDonald.

Associate:

Dated: 4 April 2025