Federal Court of Australia

Association of Professional Engineers, Scientists and Managers Australia v Peabody Energy Australia Coal Pty Ltd [2022] FCA 945

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| File numbers: | NSD 753 of 2020  NSD 1388 of 2020 |
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| Judgment of: | **WIGNEY J** |
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| Date of judgment: | 17 August 2022 |
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| Catchwords: | **INDUSTRIAL LAW** – respondent operated two black coal mines in New South Wales and Queensland – employees at each mine made redundant due to closure of mine and redundant positions – applicant initiated proceedings for contravention of a “modern award” per s 45 of the *Fair Work Act 2009* (Cth) alleging respondent failed to pay employees certain entitlements under the Black Coal Mining Industry Award 2010 – issue of whether the Award did not apply to the employees because they were “high income employees” within the meaning of s 329 of the *Fair Work Act 2009* (Cth) – question of whether employees had a “guarantee of annual earnings” for a “guaranteed period” under ss 330 and 331 of the *Fair Work Act 2009* (Cth) – employees held not to be “high income employees” for the purposes of the *Fair Work Act 2009* (Cth) – issue of whether certain employees were terminated “by retrenchment” to establish entitlement under the Award – construction of the relevant Award – consideration of the meaning of “retrenchment” in its industrial context – whether meaning of the word “retrenchment” in a different context elsewhere in the Award affected or prevailed over its ordinary meaning in the relevant provision of the Award – “retrenchment” held to bear its ordinary meaning for relevant aspects of the Award – criteria in s 47(1) of the *Fair Work Act 2009* (Cth) held to be satisfied – respondent’s contravention of s 45 of the *Fair Work Act 2009* (Cth) established – appropriate relief to be determined |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) ss 15AA, 15AB, 46  *Fair Work Act* *2009* (Cth) ss 3(b), 12, 13, 14, 45, 46, 47, 47(1), 47(2), 132, 328(1), 328(2), 328(3), 329, 329(1), 330, 330(1), 331, 538, 540, 540(2), 545(2), 546(1)  *Fair Work (Registered Organisations) Act 2009* (Cth)  *Legislation Act 2003* (Cth) s 13  *Fair Work Regulations 2009* (Cth) r 3.05  *Fair Work Bill 2008* (Cth)  Black Coal Mining Industry Award 2010 (Cth) cl 13.4, 14.2, 14.4  Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) |
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| Cases cited: | *Amcor Limited v Construction Forestry, Mining and Energy Union* (2005) 222 CLR 241; [2005] HCA 10  *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426;[2006] FCA 813  *Coal Mining Industry (Composite Log of Claims)*, Australian Coal Industry Tribunal, 16 February 1973, CR2183  *Coal Mining Industry (New South Wales, Queensland)*, Australian Coal Industry Tribunal, 14 September 1976, CR2514  *Coal Mining Industry (Severance and retrenchment Pay: New South Wales and Queensland)*, Australian Coal Industry Tribunal, 19 January 1983, CR3132  *Construction, Forestry, Mining and Energy Union (Construction and General Division) v Master Builders’ Group Training Scheme Inc* (2007) 161 IR 86; [2007] FCA 435  *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498  *Kucks v CSR Ltd* (1996) 66 IR 182  *National Tertiary Education Union v La Trobe University* [2014] FCA 1330  *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18; [2016] FCAFC 99  *Prestige Property Services Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2007) 161 FCR 95; [2007] FCAFC 137  *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28  *R v The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Limited* (1977) 16 SASR 6  *Re 4 Yearly Review of Modern Awards – Black Coal Mining Industry Award 2010* (2015) 249 IR 26; [2015] FWCFB 2192  *Re 4 Yearly Review of Modern Awards – Black Coal Mining Industry Award 2010* (2017) 266 IR 129; [2017] FWCFB 584  *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511; [1993] FCA 72  *Zadar v Truck Moves Australia Pty Ltd* [2016] FCAFC 83 |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 91 |
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| Date of hearing: | 23 June 2021 |
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| Counsel for the Applicant | Mr I Taylor SC with Ms L Saunders |
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| Solicitor for the Applicant | AEN Legal |
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| Counsel for the Respondent | Mr C J Murdoch QC |
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| Solicitor for the Respondent | MinterEllison |

ORDERS

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|  | | NSD 753 of 2020  NSD 1388 of 2020 |
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| BETWEEN: | ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA  Applicant | |
| AND: | PEABODY ENERGY AUSTRALIA COAL PTY LTD  Respondent | |

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| order made by: | WIGNEY J |
| DATE OF ORDER: | 17 august 2022 |

THE COURT ORDERS THAT:

1. The parties confer with a view to reaching agreement in respect of the appropriate orders for the further conduct of the matter and within seven days of the date of this judgment:
   1. jointly provide the Court with proposed consent orders for the further conduct of the matter; or
   2. failing agreement in respect of the orders, separately provide the Court with written submissions, not exceeding two pages in length, in respect of the orders they propose for the further conduct of the matter.
2. In the event that the parties are unable to agree in respect of the orders for the further conduct of the matter, the proceeding be listed for a case management hearing on a date to be fixed.

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

REASONS FOR JUDGMENT

WIGNEY J:

1. **Peabody** Energy Australia Coal Pty Ltd is a company which operates black coal mines in Australia and elsewhere. The mines it operated in Australia included a mine near North Goonyella in Queensland, known as the **North Goonyella mine**,and a mine in Walkworth, New South Wales known as the **Wambo Underground mine**. In 2019, Peabody terminated the employment of a number of employees at the North Goonyella mine. The **North Goonyella employees** were made redundant because a fire at the mine led to the closure of mining operations until the mine could be recovered. In 2020, Peabody terminated the employment of a number of employees at the Wambo Underground mine. The **Wambo employees** were made redundant as a result of market forces.
2. The Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) is an employee organisation which represents certain persons employed in or around the black coal mining industry. APESMA commenced this proceeding against Peabody pursuant to s 540 of the ***Fair Work Act*** *2009* (Cth), claiming that Peabody had contravened a term of the Black Coal Mining Industry **Award** 2010, which is a “modern award” made by the Fair Work Commission under the Fair Work Act, and thereby had contravened s 45 of the Fair Work Act. APESMA alleged that Peabody had failed to pay the North Goonyella employees and the Wambo employees certain payments that they were entitled to under the Award upon their termination. The payments to which the employees were said to be entitled were payments for accrued, but not taken, personal leave/carer’s leave upon termination pursuant to cl 13.4(b) of the Award.
3. Peabody did not dispute that it had not made payments to the employees pursuant to cl 13.4(b) of the Award. It denied, however, that it was obliged to make those payments to the employees. Peabody claimed that, in the case of all but one of the employees, the Award did not apply to the employees by reason of s 47 of the Fair Work Act because they were “high income employees” as defined in s 329 of the Fair Work Act. Peabody also claimed that the North Goonyella employees were not entitled to receive payments under cl 13.4(b) because they were not terminated “by retrenchment”, or by reason of any of the other circumstances referred to in cl 13.4(b)(i) of the Award.
4. APESMA and Peabody agreed that the question whether Peabody had contravened s 45 of the Fair Work Act as a result of its failure to make the relevant payments to the employees should be determined separately to, and in advance of, the question of relief. This judgment accordingly only deals with the question of liability.

# RELEVANT STATUTORY PROVISIONS

1. The objects of the Fair Work Act include providing “a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by”, relevantly, “ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, *modern awards* and national minimum wage orders” (emphasis added): s 3(b) of the Fair Work Act.
2. A “modern award” is a “modern award made under Part 2-3” of the Fair Work Act: s 12 of the Fair Work Act. Part 2-3 of the Fair Work Act provides for the Fair Work Commission to make, vary and revoke modern awards which set minimum terms and conditions for national system employees in particular industries or occupations: see s 132 of the Fair Work Act.
3. Section 45 of the Fair Work Act provides that a “person must not contravene a term of a modern award”. Section 45 is a civil remedy provision. A person who has been found to have contravened a civil penalty provision may be ordered to, among other things, pay compensation for loss that a person has suffered because of the contravention (s 545(2)(b) of the Fair Work Act) and pay a pecuniary penalty that the court considers appropriate: s 546(1) of the Fair Work Act.
4. Sections 46 and 47 of the Fair Work Act provide as follows in relation to the significance of a modern award applying to a person and the circumstances in which a modern award applies to an employer and employee:

**46 The significance of a modern award applying to a person**

(1) A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.

(2) A modern award does not give a person an entitlement unless the award applies to the person.

Note: Subsection (2) does not affect the ability of outworker terms in a modern award to be enforced under Part 4-1 in relation to outworkers who are not employees.

**47 When a modern award *applies* to an employer, employee, organisation or outworker entity**

*When a modern award* ***applies*** *to an employee, employer, organisation or outworker entity*

(1) A modern award ***applies*** to an employee, employer, organisation or outworker entity if:

(a) the modern award covers the employee, employer, organisation or outworker entity; and

(b) the modern award is in operation; and

(c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

*Modern awards do not apply to high income employees*

(2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

*Modern awards apply to employees in relation to particular employment*

(3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

1. Subsection 47(2) is of particular significance in this case. As can be seen, it provides that a modern award does not apply to an employee at a time when the employee is a “high income employee”. Section 329 of the Fair Work Act defines “high income employee” in the following terms:

**329 High income employee**

(1) A full-time employee is a ***high income employee*** of an employer at a time if:

(a) the employee has a guarantee of annual earnings for the guaranteed period; and

(b) the time occurs during the period; and

(c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.

(2) An employee other than a full-time employee is a ***high income employee*** of an employer at a time if:

(a) the employee has a guarantee of annual earnings for the guaranteed period; and

(b) the time occurs during the period; and

(c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.

(3) To avoid doubt, the employee does not have a guarantee of annual earnings for the guaranteed period if the employer revokes the guarantee of annual earnings with the employee’s agreement.

1. As can be seen, the definition of “high income employee” largely hinges on whether the employee has a “guarantee of annual earnings” for the “guaranteed period”. A “guarantee of annual earnings” is defined in the following terms in s 330 of the Fair Work Act:

**330 Guarantee of annual earnings and annual rate of guarantee**

(1) An undertaking given by an employer to an employee is a ***guarantee of annual earnings*** if:

(a) the employee is covered by a modern award that is in operation; and

(b) the undertaking is an undertaking in writing to pay the employee an amount of earnings in relation to the performance of work during a period of 12 months or more; and

(c) the employee agrees to accept the undertaking, and agrees with the amount of the earnings; and

(d) the undertaking and the employee’s agreement are given before the start of the period, and within 14 days after:

(i) the day the employee is employed; or

(ii) a day on which the employer and employee agree to vary the terms and conditions of the employee’s employment; and

(e) an enterprise agreement does not apply to the employee’s employment at the start of the period.

(2) However, if:

(a) an employee is employed for a period shorter than 12 months; or

(b) an employee will perform duties of a particular kind for a period shorter than 12 months;

the undertaking may be given for that shorter period.

(3) The ***annual rate*** of the guarantee of annual earnings is the annual rate of the earnings covered by the undertaking.

1. Section 331 of the Fair Work Act provides that the “guaranteed period” for a guarantee of annual earnings is the period that “starts at the start of the period of the undertaking that is the guarantee of annual earnings” and ends at the earliest of either “the end of that period”, “an enterprise agreement starting to apply to the employment of the employee”, or “the employer revoking the guarantee of annual earnings with the employee’s agreement”: s 331(a) and (b) of the Fair Work Act.
2. Section 328 of the Fair Work Act provides as follows in respect of an employer’s obligations in relation to a guarantee of annual earnings:

**328 Employer obligations in relation to guarantee of annual earnings**

*Employer must comply with guarantee*

(1) An employer that has given a guarantee of annual earnings to an employee must (subject to any reductions arising from circumstances in which the employer is required or entitled to reduce the employee’s earnings) comply with the guarantee during any period during which the employee:

(a) is a high income employee of the employer; and

(b) is covered by a modern award that is in operation.

Note 1: Examples of circumstances in which the employer is required or entitled to reduce the employee’s earnings are unpaid leave or absence, and periods of industrial action (see Division 9 of Part 3-3).

Note 2: This subsection is a civil remedy provision (see Part 4-1).

*Employer must comply with guarantee for period before termination*

(2) If:

(a) the employment of a high income employee is terminated before the end of the guaranteed period; and

(b) either or both of the following apply:

(i) the employer terminates the employment;

(ii) the employee becomes a transferring employee in relation to a transfer of business from the employer to a new employer, and the guarantee of annual earnings has effect under subsection 316(2) as if it had been given to the employee by the new employer; and

(c) the employee is covered by a modern award that is in operation at the time of the termination;

the employer must pay earnings to the employee in relation to the part of the guaranteed period before the termination at the annual rate of the guarantee of annual earnings.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Employer must give notice of consequences*

(3) Before or at the time of giving a guarantee of annual earnings to an employee covered by a modern award that is in operation, an employer must notify the employee in writing that a modern award will not apply to the employee during any period during which the annual rate of the guarantee of annual earnings exceeds the high income threshold.

Note: This subsection is a civil remedy provision (see Part 4-1).

1. As can be see, ss 328(1), (2) and (3) are civil remedy provisions.

# THE BLACK COAL MINING INDUSTRY AWARD

1. The Award commenced on 1 January 2010 as a modern award made by the Fair Work Commission under Part 2-3 of the Fair Work Act.
2. The Award contained the following provisions during the course of the employment of each of the North Goonyella employees and the Wambo employees, including just prior to the termination of their employment.
3. Clause 13.4 of the Award was in the following terms:

**13.4 Payments on termination**

In the case of termination of employment, and in addition to any other amounts payable pursuant to this award to an employee on termination, the employee must be paid in accordance with this clause.

(a) **Accrued annual leave**

The employee must be paid for all annual leave entitlements, and annual leave accrued in accordance with clause 25.3, at the employee’s base rate of pay.

(b) **Accrued personal/carer’s leave**

**(i)** An employee whose employment is terminated:

* by retrenchment;
* by retirement at or after age 60;
* by the employer because of ill health; or
* by death;

must, if the employee has 70 or more hours of untaken personal leave entitlement, be paid for that entitlement at the employee’s base rate of pay.

**(ii)** When an employer terminates the employment of an employee during a period of absence on paid personal leave, the employee must be paid until the employee has no further accumulation of personal leave or until the employee is fit for duty, whichever occurs first.

1. Clause 14.2 of the Award defined “redundancy” in the following terms:

**14.2 Definition of redundancy**

(a) An employee is made redundant where an employee’s employment is terminated at the employer’s initiative:

(i) because the employer no longer requires the job done by the employee to be done by anyone except where this is due to the ordinary and customary turnover of labour; or

(ii) because of insolvency or bankruptcy of the employer.

(b) This clause does not apply to employees engaged for a fixed term or a specified task.

1. Clause 14.4 of the Award was in the following terms:

**14.4 Retrenchment payment**

**(a)** Except where clause 14.5 applies, where redundancies occur due to:

**(i)** technological change;

**(ii)** market forces; or

**(iii)** diminution of reserves,

the employees terminated are entitled to retrenchment pay equal to two ordinary weeks’ pay for each completed year of employment up to a maximum of 30 weeks’ pay. This payment is additional to the payment prescribed in clause 14.3.

**(b)** Regardless of length of employment, the minimum payment due to employees under clause 14.4(a) is two ordinary weeks’ pay.

**(c)** Despite clause 14.4(a), an employee who as at 20 March 2017 (**the operative date**) had more than 15 completed years of employment and after the operative date is made redundant will be entitled to retrenchment pay equal to two ordinary weeks’ pay for each completed year of employment as at the operative date. This payment is additional to the payment prescribed in clause 14.3.

# FACTS

1. The relevant facts were, for the most part, not in dispute.
2. APESMA is, and at all material times was, an organisation registered pursuant to the *Fair Work (Registered Organisations) Act 2009* (Cth) and an “employee organisation” within the meaning of s 12 of the Fair Work Act. APESMA represents the industrial interests of persons employed in or around the black coal mining industry to the extent that its rules permit it to do so. APESMA had standing to commence these proceedings pursuant to s 540(2) of the Fair Work Act.
3. Peabody is, and at all material times was, a “national system employer” within the meaning of s 14 of the Fair Work Act and an “employer” for the purposes of s 538 and s 12 of the Fair Work Act.
4. Peabody operates black coal mines throughout Australia. Its mining operations included the North Goonyella mine and the Wambo Underground mine. Both of those mines were black coal mines.

## The North Goonyella employees

1. Peabody employed the following people at the North Goonyella mine: Mr Matthew Brown, who was employed as a shift engineer; Mr Bradley **Faggotter**, who was employed as a storeperson; Mr Neil Green, who was employed as a panel supervisor; Mr Craig **Ward**, who was employed as a control systems engineer; Mr Daryl **Matthews**, who was employed as a control room operator; Mr Richard Borg, who was employed as a panel supervisor; Mr Jonathan Borg, who was employed as a panel supervisor; and Mr John Fitzpatrick, who was employed as a shift coordinator.
2. The North Goonyella employees were all “national system employee[s]” of Peabody as defined in s 13 of the Fair Work Act.
3. The Award *covered* Peabody and each of the North Goonyella employees for the purposes of s 47(1)(a) of the Fair Work Act. The question whether the Award *applied* to the North Goonyella employees depends on whether they were “high income employee[s]” as defined in s 329 of the Fair Work Act (the **high income employee issue**). That issue is considered later. There was no dispute that, with the exception of Mr Faggotter, each of the North Goonyella employees were, at the time of their termination, being paid annual remuneration which exceeded $153,600, which was the “high income threshold” prescribed in r 3.05 of the ***Fair Work Regulations*** *2009* (Cth). There was no dispute that the Award applied to Mr Faggotter.
4. Each of the North Goonyella employees had their employment terminated on 27 November 2019, other than Mr Ward, whose employment was terminated on 26 November 2019, and Mr Matthews, whose employment was terminated on 15 December 2019. The reason cited by Peabody for the termination of the employment of the North Goonyella employees was “redundancy”.
5. The North Goonyella employees were made redundant as a consequence of a fire which occurred at the mine in or around September 2018. The fire occurred two months after Peabody had announced plans to build a new mining area to extend the life of the North Goonyella mine to 2026. The area was unsafe and led to the eventual closure of the site until it could be recovered. The coal reserves were otherwise not diminished but could not be accessed due to the safety concerns associated with the fire.
6. The employment of the North Goonyella employees was terminated by Peabody because it “no longer require[d] the job[s] done by the employee[s] to be done by anyone” for reasons other than the “ordinary and customary turnover of labour”: cf cl 14.2(a)(i) of the Award. The redundancy of the employees did not occur due to “technological change”, “market forces” or the “diminution of reserves”: cf cl 14.4(a)(i), (ii) and (iii) of the Award.
7. The employment of the North Goonyella employees was not terminated by virtue of their retirement at or after age 60, or by Peabody because of ill health, or by death: cf cl 13.4(b)(i) of the Award. If it is found that the Award applied to the North Goonyella employees (because they were not high income employees), the question whether the North Goonyella employees were entitled to be paid accrued personal leave/carer’s leave under cl 13.4(b) of the Award depends on whether their employment was terminated “by retrenchment” (the **retrenchment issue**).
8. Peabody did not make any payments pursuant to cl 13.4(b) of the Award to any of the North Goonyella employees upon their termination.

## The Wambo employees

1. Peabody employed the following people at the Wambo Underground mine: Mr Neil **Sanderson**, who was employed as a shift engineer, Mr Shea Gallegos, Mr Darryl Douglas, Mr Norman White, Mr Marc Johns, Mr Shane Walker, Mr Clinton Chapman, Mr Michael Williams, Mr Bradley Cuneo, Mr Jared Richardson and Mr Christopher Rahn, all of whom were employed as a deputy, and Mr Glen Buckley, who was employed as an undermanager.
2. The Wambo employees were all “national system employee[s]” of Peabody as defined in s 13 of the Fair Work Act.
3. The Award *covered* each of the Wambo employees for the purposes of s 47(1)(a) of the Fair Work Act. As with the North Goonyella employees, the question whether the Award *applied* to the Wambo employees depends on whether they were “high income employee[s]” as defined in s 329 of the Fair Work Act (the high income employee issue). There was no dispute that each of the Wambo employees were, at the time of their termination, being paid annual remuneration which exceeded $153,600, which was the “high income threshold” prescribed in r 3.05 of the Fair Work Regulations.
4. Each of the Wambo employees had their employment terminated on various dates between 21 August 2020 and 14 September 2020. The reason cited by Peabody for the termination of the employment of the North Goonyella employees was “redundancy due to market forces from the impact of coal prices from the COVID-19 pandemic”.
5. There was no dispute that, if the Award applied to the Wambo employees, the termination of their employment by Peabody was “by retrenchment” for the purposes of cl 13.4(b)(i) of the Award.
6. There is an issue as to whether some of the Wambo employees (Messrs White, Walker, Richardson, Gallegos, Cuneo and Chapman) had a personal leave/carer’s leave balance in excess of 70 hours at the time of their termination and were therefore entitled to a payment under cl 13.4(b)(i) in any event. The parties agreed that that issue would, if necessary, be determined at the remedial or quantum stage of the proceeding, if it comes to that.
7. Peabody did not make any payments pursuant to cl 13.4(b) of the Award to any of the Wambo employees upon their termination.

## Employment contracts

1. Peabody’s case that the North Goonyella employees (other than Mr Faggotter) and the Wambo employees were all high income employees hinged on the proposition that the terms of the employees’ contracts of employment that dealt with remuneration were such that they constituted guarantees of annual earnings for the purposes of s 329 of the Fair Work Act. The parties did not suggest that there were any material differences between the relevant terms of the various employees’ contracts of employment. It accordingly suffices, for present purposes, to identify the relevant terms of the contract of one employee, Mr Sanderson. Both Peabody and APESMA, in their respective submissions, relied on Mr Sanderson’s contract by way of example.
2. The terms and conditions of Mr Sanderson’s contract of employment were recorded in a document entitled “Salary and Specific Conditions of Employment” signed by Mr Sanderson on 19 March 2010. The terms relevant to Mr Sanderson’s remuneration were as follows:

You[r] current Base Annualised Salary is **$134,973** per annum.

Your salary will be paid in equal monthly instalments into your nominated bank account on approximately the 15th day of each month.

Your salary has been structured to include all factors associated with this appointment, including but not limited to hour of work and other allowances and conditions.

If an industrial instrument (e.g. an award) or legislation conferring minimum entitlements is or becomes applicable to your employment, your Base Annualised Salary and other benefits provided to you (including cash and the value of non-cash benefits), may be applied in satisfaction of any entitlements you may have under that industrial instrument or legislation (for example, overtime rates, leave loading, penalty rates and meal allowances), to the maximum extent permitted by law.

Your Base Annualised Salary under this agreement is not a rate of pay for ordinary hours on which penalties or other entitlements under an industrial instrument may be calculated.

Your Total Remuneration Package is reviewed annually at the company’s discretion and the outcome depends on individual work performance and responsibilities and overall company performances.

1. Mr Sanderson’s salary was reviewed by Peabody and increased on a number of occasions. Mr Sanderson was advised of the changes to his “Base Annualised Salary” in letters from Peabody dated 1 April 2007, 6 March 2009, 1 April 2010, 21 February 2011, 22 February 2012, 4 March 2013, 5 March 2014, 11 February 2016, 19 February 2017 and 20 February 2019. The letter dated 20 February 2019 informed Mr Sanderson that his base salary would “increase to $170,441.00 AUD the first pay period in April”. A subsequent letter dated 19 February 2020 simply advised Mr Sanderson that his “incentive payment” of $6,110.30 would be paid on 6 March 2020.
2. Peabody conceded that, apart from the contracts of employment of the various employees (including the letters advising of salary increases), none of the employees were given any other document that contained a written undertaking for the purposes of Part 2-9, Division 3 of the Fair Work Act (which relevantly includes s 329 and s 330). Peabody also effectively conceded that it had not given any of the relevant employees any notice in accordance with, or notice capable of satisfying, s 328(3) of the Fair Work Act.

# THE “HIGH INCOME EMPLOYEE” ISSUE

1. As has already been noted, the question whether the North Goonyella employees (other than Mr Faggotter) and the Wambo employees were high income employees depends on whether the terms of the employees’ contracts of employment that dealt with remuneration constituted “guarantee[s] of annual earnings” for the purposes of s 329 of the Fair Work Act. There was no dispute that the annual base salary that Peabody had agreed to pay each of the relevant employees (other than Mr Faggotter) as at the date of their termination was greater than the high income threshold. There was also no dispute that the employees had agreed to the terms of their remuneration. But is the fact that Peabody and the employees had agreed that the employees would be paid a specified annual salary on the terms set out in the relevant contracts, as varied in the later correspondence, sufficient to constitute a “guarantee of annual earnings”?

## Peabody’s contentions

1. Peabody contended that the employment contracts and contract variations (the letters advising of increases to the base salary) constituted an undertaking given by Peabody to each of the relevant employees, in writing, to pay them an amount of earnings in relation to the performance of work during a 12 month period or more. In Peabody’s submission, the employees also each agreed to accept the undertakings given by Peabody by accepting the terms of their employment contracts, usually by signing a document which set out the terms and conditions of employment, and continuing to perform work under those contracts as varied by Peabody’s letters which advised the employees that their salaries had been increased. Peabody’s undertakings, and the employees’ purported agreement to them, were said by Peabody to have been given, in each case, before the start of the guaranteed period and within 14 days after the employees were employed, or a day on which Peabody and the employees agreed to vary the terms of the employees’ employment.
2. It followed, according to Peabody, that each of the mandatory requirements of s 330(1)(b), (c) and (d) of the Fair Work Act were satisfied. There was no dispute that the employees were covered by a modern award that was in operation at the relevant time and that an enterprise agreement did not apply to the employees’ employment at the start of the period. There was, therefore, no dispute that the requirements in s 330(1)(a) and (e) were satisfied.

## A guarantee of annual earnings?

1. The critical question for determination is whether the agreement between Peabody and each of the employees that Peabody would pay them a particular salary was sufficient to constitute a guarantee of annual earnings, or if something more was required.
2. The short answer to that question is that something more was required. The terms of the contracts of employment were not sufficient to constitute “guarantee[s] of annual earnings” within the meaning of s 330 of the Fair Work Act.
3. It may be accepted that, under the terms of the contracts of employment of each of the relevant employees, Peabody agreed to pay, and the employees agreed to accept, a specified “Base Annualised Salary”, to be paid in equal monthly instalments, in return for the employees performing work. Peabody’s agreement to pay the employees an annualised salary could, at least in a general sense, perhaps be said to constitute an undertaking of sorts by Peabody to pay the employees the specified amount of earnings in relation to the performance of work. However, upon closer consideration of the terms of ss 328 to 331 of the Fair Work Act, and the terms of the contracts of employment between Peabody and the relevant employees, it cannot be accepted that any such undertakings by Peabody were capable of constituting “guarantee[s] of annual earnings” within the meaning of s 330 of the Fair Work Act. Nor can it be concluded that the employees relevantly accepted any such undertakings, as opposed to agreeing to the amount of the earnings Peabody had agreed to pay.
4. Looking first at the relevant provisions, it would be erroneous to read and construe the terms of s 330 of the Fair Work Act in isolation. Rather, s 330 must be read in the context of the entire scheme in Div 3 of Pt 2-9 of the Fair Work Act, which allows an employer to offer, and an employee to accept, a guarantee by the employer that the employee will earn more than a certain amount for a period of time, with the result that a modern award that would otherwise apply to the employee no longer applies. Importantly, the scheme includes protections to ensure that the guarantee is identifiable, enforceable and voluntarily accepted by the employee with knowledge that the result will be that the modern award will no longer apply to them. When read as a whole, it is readily apparent that a guarantee of annual earnings involves something more than a mere contractual promise to pay an employee a specified salary.
5. Subsection 328(1) provides that an employer who has given a guarantee of annual earnings to an employee must comply with that guarantee while the employee is a high income employee and covered by a modern award. Subsection 328(2) similarly provides that, in the case of a high income employee who has been terminated, the employer must in effect comply with the guarantee by paying the employee earnings at the annual rate for the period prior to termination. Importantly, ss 328(1) and (2) are civil remedy provisions, with the result that the guarantee is enforceable pursuant to the provisions in Pt 4-1 of the Fair Work Act. An employer found to be in contravention of either of the provisions is liable to pay a potentially substantial pecuniary penalty. It is difficult to accept that the intended operation of s 328 was such that an employer who breaches a contractual term requiring the employer to pay an employee a specified salary which happens to exceed the high income threshold would be liable to pay a pecuniary penalty for breaching that term. Given that ss 328(1) and (2) are civil remedy provisions, one would expect that a guarantee of annual earnings would be readily identifiable as such and therefore would involve or require something more than a mere agreement between an employer and an employee in respect of earnings.
6. The requirement imposed by s 328(3) is also an important element of the statutory scheme. It requires an employer, before or at the time of giving a guarantee of annual earnings, to notify the employee who is covered by a modern award of the consequences of the guarantee – the consequences being that the modern award that would otherwise apply to the employee will not apply. The obvious purpose of this provision is to ensure that an employee who accepts an undertaking given by an employer to pay an amount of earnings above the high income threshold only does so knowingly and voluntarily. Subsection 328(3) is also a civil remedy provision. It is difficult to imagine that it was intended that an employer who merely entered into a contract to pay an employee a salary which happened to be higher than the high income threshold could be liable to pay a pecuniary penalty for failing to notify the employee in accordance with s 328(3). One would again expect, in the circumstances, that the giving of a guarantee of annual earnings would be something that was readily recognisable and involve something more than a mere offer by an employer to pay a particular salary.
7. It should perhaps be noted, in the context of s 328(3) of the Fair Work Act, that Peabody submitted that an employer’s failure to comply with s 328(3) would not invalidate a guarantee of annual earnings given by an employer. It is unnecessary to decide that issue. APESMA did not contend that any guarantees of annual earnings given by Peabody were invalidated by Peabody’s contravention of s 328(3). APESMA’s case was, in effect, that no guarantees of annual earnings had been given in accordance with s 330, and therefore no question in relation to the effect of any contravention of s 328(3) arose. In any event, there is much to be said for the proposition that the statutory scheme in Pt 2-9 evinces a legislative purpose to invalidate any guarantee of annual earnings given or entered into in circumstances where the employer had failed to comply with s 328(3) of the Fair Work Act: cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [93] (McHugh, Gummow, Kirby and Hayne JJ). As has already been noted, s 328(3) provides an important protection for employees and is plainly intended to ensure that employees are made aware that if they accept an undertaking given by an employer pursuant to s 330(1)(b), a modern award will not apply to them throughout any period during which their income exceeds the high income threshold. It involves no great leap to conclude that the legislative purpose was to vitiate or nullify any acceptance of an undertaking given in the absence of compliance with s 328(3) of the Fair Work Act.
8. A number of provisions in Pt 2-9 also indicate that a guarantee of annual earnings requires an undertaking to pay an amount of earnings for a fixed or determinate and readily identifiable period, as opposed to an agreement to pay a specified salary for an indefinite period, or until the agreement is varied or terminated. Subsections 329(1) and (2) provides that an employee is a high income employee if, among other things, the employee has a guarantee of annual earnings for the “guaranteed period”. Section 331 provides that the “guaranteed period” starts at the start of the period of the undertaking and ends at a particular point; that point being the earliest of either the “end of that period”, or an enterprise agreement starting to apply, or the employer revoking the guarantee “with the employee’s agreement”. The reference in s 331 to the “end of that period” suggests that the undertaking in question must specify, or have an identifiable, end date. That specified end date must be a date at least 12 months after the start date of the undertaking: s 330(1)(b) of the Fair Work Act.
9. Perhaps the strongest indication that a guarantee of annual earnings must be something over and above a mere agreement to pay an employee a specified salary is in s 330(1)(c). An undertaking to pay an employee an amount of earnings can only be a guarantee of annual earnings if the employee in question “agrees to accept the undertaking, *and* agrees with the amount of the earnings” (emphasis added): s 330(1)(c) of the Fair Work Act. It is not sufficient for the employee to merely agree with the amount of the earnings. It is difficult to accept that an employee who simply accepts the terms of a contract which specifies a particular salary could be said to have not only agreed with the amount of the earnings specified in the contract, but also separately agreed to an unexpressed or implicit undertaking by the employer to pay that salary. The indication again is that a mere offer by an employer to pay a particular salary is not sufficient to constitute an undertaking to pay, for the purposes of s 330(1)(b), and that an employee’s acceptance of the employer’s offer to pay a particular salary is not sufficient to constitute an agreement to accept an undertaking for the purposes of s 330(1)(c) of the Fair Work Act.
10. Peabody contended, by reference to certain extrinsic material relating to the award modernisation process generally, that there was a clear legislative intention to exclude high income earners from modern award coverage. It may perhaps be accepted that there was a general legislative intent that modern awards should not apply to high income employees in certain circumstances. It is clear, however, that Parliament intended to clearly define those circumstances, and to include protections for such employees. That is apparent from the relevant extrinsic material. The second reading speech in respect of the ***Fair Work Bill*** *2008* (Cth), for example, included the following statement (Commonwealth, *Parliamentary Debates*, Senate, 25 November 2008, 11191 (Julia Gillard, Acting Prime Minister)):

The government recognises that awards have less relevance to employees earning high incomes. Under the bill, an employer and an employee who is guaranteed to earn more than $100,000, indexed, may enter a written guarantee that results in a modern award not applying. The bill includes a number of important protections to ensure employees enter such an arrangement voluntarily.

1. To the extent that it could be said that there was any ambiguity in the relevant statutory provisions, this statement from the second reading speech tends to confirm that it was only intended that an award would not apply to an employee who earned a high income if the employee accepted a guarantee in respect of their earnings with knowledge that, as a result of accepting that guarantee, a modern award which would otherwise apply to them would not apply. It is also apparent that it was intended that the employee’s acceptance of that guarantee would involve something more than the employee simply accepting the salary offered to them by the employer.
2. That was also made plain in the Explanatory Memorandum to the Fair Work Bill, which stated (at [1320]), in respect of cl 330 (now reflected in s 330 of the Fair Work Act), that the “employer and employee must reach agreement about the undertaking and the employee’s acceptance of the undertaking before it commences operation”.
3. Turning next to the terms of the contracts which Peabody claimed constituted guarantees of annual earnings as defined in s 330 of the Fair Work Act, the first point to note is that the contracts do not use any of the language used in Pt 2-9 of the Fair Work Act. Using Mr Sanderson’s contract as an example, the contract does not state that Peabody gave Mr Sanderson an “undertaking” (or guarantee) to pay him an amount of earnings for a specified period of time. Nor is any reference made to the amount of earnings exceeding the “high income threshold”. The contract simply specifies a “Base Annualised Salary” which will be paid in equal monthly instalments, and that Mr Sanderson’s “Total Remuneration Package” is reviewed annually.
4. The second point to note is that no fixed “period”, capable of constituting a “guaranteed period” as defined in s 331, is identified in the contract. Even if it could be said that the start of the period during which the specified earnings were to be paid is the date of the contract, no date for the end of the period is specified. The most that could be said is that Peabody had agreed to pay the specified annual salary to Mr Sanderson in monthly instalments until the contract was varied or terminated. The mere fact that the salary is said to be an annual salary does not mean that there is a guaranteed period of 12 months.
5. The third point to note is that there is no basis upon which it could be said that Mr Sanderson agreed to accept any undertaking as to the payment of an amount of earnings *and* agreed with the amount of the earnings: cf s 330(1)(c) of the Fair Work Act. The most that could be said is that, by signing the contract as requested, Mr Sanderson agreed to accept its terms. It may be accepted that, in signing the contract, Mr Sanderson agreed or accepted the term specifying his salary. It could not realistically be said, however, that, in signing the contract, Mr Sanderson somehow accepted any undertaking by Peabody, particularly given that the terms of the contract make no reference whatsoever to any undertaking by Peabody that was capable of acceptance.
6. The position is even clearer when consideration is given to the letters Peabody sent to Mr Sanderson which Peabody characterised as contract variations. A letter dated 20 February 2019 simply advised Mr Sanderson that his “2018 performance-based incentive award and 2019 base salary” included an “incentive payment” of $6,817.64, a “merit increase” of 2.50%, and an increase to his base salary to $170,441, with the “first pay period in April”. A letter dated 19 February 2020 simply advised Mr Sanderson that he was to receive an “incentive payment” of $6,110.30 on 6 March 2020.
7. Neither of those letters referred to any undertaking (or guarantee) by Peabody to pay Mr Sanderson an amount of earnings for any identified or identifiable “guaranteed period”. The most that could be said is that Peabody had offered to pay Mr Sanderson monthly instalments of the new annualised salary going forward. The letters also do not request, or call upon, Mr Sanderson to accept or reject any undertaking, or even agree to the amount of earnings. Nor is there any evidence that Mr Sanderson accepted any undertaking, or otherwise agreed to the amount of earnings. Even if it could be said that, by continuing to work for Peabody and accepting the new monthly instalments in respect of his salary, Mr Sanderson agreed to the amount of earnings specified in the letter, it cannot be accepted that that conduct alone constituted an acceptance of any undertaking by Peabody, particularly since the letter made no reference whatsoever to any undertaking given by Peabody.
8. As noted earlier, Peabody did not contend that the terms of any of its contracts with the North Goonyella employees (other than Mr Faggotter) or the Wambo employees differed in any material way from its contract with Mr Sanderson.
9. It follows from the conclusions that have been arrived at in respect of the statutory scheme and the contracts in question that Peabody’s contention that the North Goonyella employees (other than Mr Faggotter) and the Wambo employees were high income employees at the time of their termination has no merit and must be rejected. None of those employees had a “guarantee of annual earnings” for a “guaranteed period” which included the date of their termination: cf s 329(1)(a) and (b) and s 331 of the Fair Work Act. Peabody had not given any of the employees an “undertaking in writing” to pay them an “amount of earnings in relation to the performance of work during a period of 12 months or more”: cf s 330(1)(b) of the Fair Work Act. Nor could it be said that any of the employees had agreed to accept any such undertaking and had also agreed with the amount of the earnings: cf s 330(1)(c) of the Fair Work Act. The most that could be said is that, at some point prior to their termination, Peabody had told the employees what their ongoing salaries would be and the employees, by continuing to work up to the time of their termination, had agreed with that amount of remuneration.

# THE RETRENCHMENT ISSUE

1. As noted earlier, the retrenchment issue is whether the North Goonyella employees were entitled to be paid accrued personal leave/carer’s leave under cl 13.4(b)(i) of the Award on the basis that their employment was terminated “by retrenchment”. It is common ground that they were not terminated by retirement at or after the age of 60, or by Peabody because of ill health, or by death. There was no dispute that the termination by Peabody of the employment of the Wambo employees was “by retrenchment” for the purposes of cl 13.4(b)(i) of the Award.
2. The issue hinges on the meaning of “retrenchment” in cl 13.4(b)(i) of the Award. APESMA, on the one hand, contended that the word “retrenchment” in cl 13.4 simply means or describes the circumstance in which an employee’s employment has been terminated through or as a result of redundancy. In APESMA’s submission, the termination of the North Goonyella employees by reason of redundancy as a consequence of the fire at the mine was a “retrenchment” for the purposes of cl 13.4 of the Award. Peabody, on the other hand, contended that the word “retrenchment” in cl 13.4 takes its meaning from cl 14.4(a) of the Award, which defines the particular types of redundancies which attract an entitlement to “retrenchment pay”. In Peabody’s submission, the word “retrenchment” must bear the same meaning in cl 13.4 and cl 14.4, and therefore “retrenchment” in cl 13.4 must mean redundancies due to technological change, market forces or diminution in reserves.
3. The issue is essentially one of construction of the relevant provisions in the Award. It is useful, therefore, to first consider the applicable principles in respect of the construction of awards. Consideration must also be given to the meaning of the word “retrenchment” in the industrial context and to the history of the relevant provisions in the Award.

## The construction of awards

1. The principles applicable to the construction of awards made by the Fair Work Commission are well-settled. They may be summarised as follows.
2. First, because an award is an “instrument”, the provisions of the *Acts* ***Interpretation Act*** *1901* (Cth) apply to an award as if it were an Act, and as if each provision of the award were a section of an Act: see s 46 of the Interpretation Act; ***City of Wanneroo*** *v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426;[2006] FCA 813 at [52] (French J); *Construction, Forestry, Mining and Energy Union (Construction and General Division) v* ***Master Builders’*** *Group Training Scheme Inc* (2007) 161 IR 86; [2007] FCA 435 at [33] (Besanko J); see also s 13 of the *Legislation Act 2003* (Cth), which is a parallel provision to s 46 of the Interpretation Act in respect of legislative instruments. Section 15AA of the Interpretation Act, which provides that an interpretation which promotes the purpose or object underlying the Act should be preferred to one that does not, and s 15AB of the Interpretation Act, which deals with the use of extrinsic material, may be of particular relevance: *City of Wanneroo* at [54]; *Master Builders’* at [33].
3. Second, the starting point is generally a consideration of the ordinary meaning of the words in the award: *City of Wanneroo* at [53]. The words used in awards, however, are not to be construed “in a vacuum divorced from industrial realities” (*City of Wanneroo* at [57]) and “narrow or pedantic approaches to the interpretation of an award are misplaced”: *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J); see also *Geo A Bond & Co Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504 (Street J); *Prestige Property Services Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2007) 161 FCR 95; [2007] FCAFC 137 at [56] (North and Mansfield JJ); *Zadar v Truck Moves Australia Pty Ltd* [2016] FCAFC 83 at [26]-[27] (Flick J); ***Amcor*** *Limited v Construction Forestry, Mining and Energy Union* (2005) 222 CLR 241; [2005] HCA 10 at 246 (Gleeson CJ and McHugh J).
4. Third, regard must also be had to context, which includes “context which may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction”: *City of Wanneroo* at [53]. Context may also extend to “other documents with which there is an association” and, in some cases, even “ideas that gave rise to an expression in a document from which it has been taken”: *Short v FW* ***Hercus*** *Pty Ltd* (1993) 40 FCR 511; [1993] FCA 72 at 518 (Burchett J); *City of Wanneroo* at [53]. The “circumstances of the origin and use of the clause are plainly relevant to an understanding of what is likely to have been intended by its use”: *Hercus* at 517.
5. Peabody submitted that resort should only be had to context, including the origin and previous use of the relevant clauses in the Award, where those provisions were ambiguous or uncertain. There are two answers to that submission. First, it is wrong to suggest that regard should only be had to context in the case of ambiguity. None of the relevant authorities suggest that to be the case. Second, and in any event, the relevant clauses in the Award are relevantly ambiguous. Were it otherwise, the retrenchment issue would not arise, or at least there would be little to argue about because the meaning of the clauses would be clear.

## The meaning of “retrenchment” in its industrial context

1. In *Amcor*, Gleeson CJ and McHugh J observed (at [14]) that “[r]edundancy of position is not a legal or industrial term of art, although there are many cases which examine the concept of redundancy, usually for the purpose of distinguishing it from other causes of retrenchment”. In the same case, Gummow, Hayne and Heydon JJ noted (at [54]) that, in an industrial context, the “emphasis [is] upon a ‘job’ becoming redundant rather than a worker becoming redundant”.
2. Those observations in *Amcor* led Tracey J to observe in *National Tertiary Education Union v La Trobe University* [2014] FCA 1330 (at [27]) that if “a workers’ [sic] job becomes redundant the consequence may be that the worker will be ‘retrenched’ in the sense that his or her contract of service will be terminated”. In *R v The Industrial Commission of South Australia; ex parte Adelaide Milk Supply Co-operative Limited* (1977) 16 SASR 6 at 26, Bright J similarly referred to “retrenchment through redundancy”. “Redundancy”, in this context, generally refers to the “situation in which the employer no longer wants the work hitherto performed by a particular employee to be done by anyone”, such that the “job or position, rather than its incumbent, is ‘redundant’”: ***Port Kembla Coal*** *Terminal Ltd v Construction, Forestry, Mining and Energy Union* (2016) 248 FCR 18; [2016] FCAFC 99 at [160] (Jessup J).
3. It would seem, therefore, that the ordinary meaning of “retrenchment” in an industrial context is the termination of an employee’s contract of service, usually as a result of the employee’s job becoming redundant. An employee is “retrenched” because his or her job has become redundant. Importantly, that meaning of “retrenchment” broadly aligns with the definition of “redundancy” in cl 14.2 of the Award which, in summary, is that “[a]n employee is made redundant where an employee’s employment is terminated at the employer’s initiative … [b]ecause the employee no longer requires the job done by the employee to be done by anyone…”.

## History of the relevant provisions in the Award

1. There could be little doubt that the Award, and in particular the provisions relating to payments upon termination as a result of redundancy, is the product of a long and fairly tortuous history of negotiation and arbitration in the coal mining industry. The redundancy provisions have their genesis in provisions in prior coal industry awards, including provisions that were included in those awards as a result of various decisions of the Coal Industry Tribunal. That perhaps explains the somewhat haphazard, disjointed and ambiguous manner in which the Award provides for different payments to be made upon redundancy depending on the circumstances.
2. It is unnecessary to deal at length with the history of the current provisions in the Award. The history was helpfully summarised in two decisions of the Full Bench of the Fair Work Commission: *Re 4 Yearly Review of Modern Awards – Black Coal Mining Industry Award 2010* [2015] FWCFB 2192; (2015) 249 IR 26 at [29]-[38]; *Re 4 Yearly Review of Modern Awards – Black Coal Mining Industry Award 2010* [2017] FWCFB 584; (2017) 266 IR 129 at [17]-[22] (the **2017 4 Yearly Review**). Of particular significance are decisions of the Coal Industry Tribunal in 1973, 1975 and 1983. The critical points to note about the history are as follows.
3. First, the clause dealing with “severance payment” that is now cl 14.3 of the Award has its origins in a decision of the Coal Industry Tribunal made on 16 February 1973: *Coal Mining Industry (Composite Log of Claims)*, Australian Coal Industry Tribunal, 16 February 1973, CR2183.
4. Second, on 14 September 1976, the Coal Industry Tribunal decided to “vary existing sick leave clauses [in the then-current award] to provide for payments in lieu of sick leave accruements where the employee is retrenched, where his services are terminated through operation of mineworkers pensions legislation because of age, where his services are terminated by his employer because of ill-health, or where the employee dies”: *Coal Mining Industry (New South Wales, Queensland)*, Australian Coal Industry Tribunal, 14 September 1976, CR2514 (the **1976 CIT decision)**, 9. This was in effect the genesis of cl 13.4(b) of the Award. There is no suggestion in this decision of the Coal Industry Tribunal that “retrenchment” in this context bore any limited or special meaning. It may also be noted that, at this point in time, the award did not include any clause akin to clause 14.4 of the Award.
5. Third, the Coal Industry Tribunal’s decision of 14 September 1976 also rescinded the then-existing clause relating to severance pay and inserted, in its stead, a clause which provided that “[w]hen a reduction of hands is decided upon by an employer … an employee who is retrenched and who at the date of such retrenchment has completed at least five years of continuous employment with his employer, shall be entitled to receive from his employer severance pay calculated at the rate of one ordinary week’s pay for each completed year of employment”: 1976 CIT decision, 17.
6. Fourth, on 19 January 1983, the Coal Industry Tribunal decided to insert an additional clause in the applicable award or awards which was the genesis of cl 14.4 of the Award. The Tribunal decided to retain the “existing severance pay provisions”, but removed the “five year service ‘barrier’”. As a result, the severance pay provision as amended was in similar terms to cl 14.3 in the Award. The Tribunal considered that the existing severance pay provision struck the appropriate balance “where the circumstances leading to retrenchment could not reasonably have been foreseen”, including “natural disasters” such as “flood, dire and/or explosion and creep”: *Coal Mining Industry (Severance and retrenchment Pay: New South Wales and Queensland)*, Australian Coal Industry Tribunal, 19 January 1983, CR3132 (the **1983 CIT decision**). Importantly, however, the Tribunal also decided that “further provision should be made for retrenchment on the specified grounds of technological change, market forces and diminution of reserves”, those being circumstances leading to retrenchment which were “reasonably foreseeable”: 1983 CIT decision. This further provision, which provided for two weeks of pay for every completed year of service, was the genesis of cl 14.4 of the Award. The critical point to note is that the inclusion of this additional provision was plainly not intended to cut-down, limit or otherwise reduce the other redundancy provisions, or to somehow limit or otherwise alter the meaning of the word “retrenchment” in the existing provisions.
7. Fifth, as the Full Bench of the Fair Work Commission explained in the 2017 4 Yearly Review (at [20]-[21]):

Following the abolition of the CIT in 1995, the main award covering employees in the coal mining industry was the *Coal Mining Industry (Production and Engineering) Award 1997* (the P&E Award). This award consolidated a number of previously separate awards as set and varied by the CIT during the course of its existence from 1946 to 1995.

During the award modernisation process, the industry parties agreed that the Modern Award should be based upon the core conditions of employment contained in the P&E Award and the pre-reform award covering coal industry “staff” employees. Amongst these core conditions were the existing redundancy and severance pay provisions contained in the P&E Award. These were largely replicated in the Modern Award on the basis that they constituted an industry-specific redundancy scheme, with some minor modifications including the insertion of a definition of redundancy.

1. The point to note is that the redundancy and severance pay provisions in the Coal Mining Industry (Production and Engineering) Award 1997, which were in part the product of the decisions of the Coal Industry Tribunal referred to earlier, were “largely replicated” in the Award.

## The proper construction of cl 13.4(b) of the Award

1. As already noted, the critical question is whether the meaning of “retrenchment” in cl 13.4(b) of the Award is affected or limited by the terms of cl 14.4 of the Award such that it means retrenchment or redundancy which occurs due to technological change, market forces or diminution of reserves. The short answer to that question is ‘no’. That is so for a number of reasons.
2. First, there is nothing in the text of cl 13.4 itself to indicate that the word “retrenchment” bears a meaning other than its ordinary one, or that the right to be paid “untaken personal leave entitlement” pursuant to cl 13.4 is limited to particular types of retrenchment. As discussed earlier, the ordinary meaning of “retrenchment” is the termination of an employee’s contract of service as a result of the employee’s job becoming redundant. There is nothing in the text of cl 13.4 to suggest that the word “retrenchment” in cl 13.4 bears some other more limited meaning, or is limited to meaning termination of an employee’s contract of service as a result of particular types or causes of redundancy.
3. Second, it may be accepted that the Award must be read both as a whole and consistently, and that, generally speaking, words used in the Award should bear a consistent meaning. The word “retrenchment” in cl 14.4(a), however, is used as part of the composite expression “retrenchment pay”. That expression is used to describe or name the particular payments that are required to be made pursuant to cl 14.4(a). Clause 14.4(a) identifies particular types of redundancies which attract the payment provided for in that clause. There is nothing to suggest that the use of the composite expression “retrenchment pay” in cl 14.4(a) somehow defines, or alters, the ordinary meaning of the word “retrenchment” when used in cl 14.4(b) or elsewhere in the Award.
4. Third, the history or genesis of the redundancy clauses in the Award, discussed earlier, is a relevant contextual consideration. It strongly suggests that cl 14.4(a) provides an additional entitlement and its inclusion in the Award was not intended to limit or restrict other entitlements in the Award, including the entitlement to be paid for untaken personal leave/carer’s leave.
5. It follows that Peaboy’s contention that the North Goonyella employees were not entitled to be paid for accrued personal leave/carer’s leave under cl 13.4(b) of the Award because their employment was not terminated “by retrenchment” is unmeritorious and must be rejected.

# CONCLUSION AND DISPOSITION

1. The Award applied to the North Goonyella and Wambo employees because each of the criteria in s 47(1)(a) to (c) of the Fair Work Act was relevantly satisfied. As for paragraphs (a) and (b), there was no dispute that the Award covered each of the employees and Peabody, and no dispute that the Award was in operation at all times. As for paragraph (c), no provision of the Fair Work Act provided, or had the effect, that the Award did not apply to the employees. For the reasons that have been given, Peabody’s contention that s 47(2) of the Fair Work Act provided, or had the effect, that the Award did not apply to the employees at the time of the termination of their employment must be rejected. In short, the employees were not “high income employee[s]”, as defined in s 329 of the Fair Work Act, because they did not have a “guarantee of annual earnings” as defined in s 330(1) of the Fair Work Act.
2. There was no dispute that if, as has been found, the award applied to them, the Wambo employees who had more than 70 hours of untaken personal leave/carer’s leave entitlement as at the date of their termination were entitled to payments in accordance with cl 13.4(b) of the Award. There was no dispute that their employment was terminated by retrenchment for the purposes of cl 13.4(b) of the Award.
3. The North Goonyella employees who had more than 70 hours of untaken personal leave/carer’s leave entitlement as at the date of their termination were also entitled to payments in accordance with cl 13.4(b) of the Award. That is because, like the Wambo employees, their employment was relevantly terminated by retrenchment. Peabody’s argument to the contrary, based on the contention that “retrenchment” in cl 13.4(b)(i) meant or was limited to redundancy due to technological change, market forces or diminution of reserves, has no merit for the reasons that have been given. In short, “retrenchment” in cl 13.4(b)(i) does not bear that limited or special meaning simply because cl 14.4(a) provides that it is only in those circumstances that an employee is entitled to a “retrenchment payment”.
4. It follows that, by failing to pay the North Goonyella employees, and those of the Wambo employees who had more than 70 hours of untaken personal leave/carer’s leave entitlement as at the date of their termination, their entitlements pursuant to cl 13.4(b) of the Award, Peabody contravened a term of the Award contrary to s 45 of the Fair Work Act. The appropriate relief to grant in respect of Peabody’s contraventions of s 45 of the Fair Work Act is to be determined at or following a further hearing in respect of that issue. The parties should confer with a view to reaching agreement in relation to the orders necessary to facilitate the further conduct of the matter. In the absence of agreement in respect of those orders, the matter will be listed for a case management hearing to resolve any outstanding procedural issues.

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| I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 17 August 2022