CITATION: *Angelo Bilalis v Kakadu Air Services Pty Ltd (7589)* [2002] NTMC 046

PARTIES:	ANGELO BILALIS
	v
	KAKADU AIR SERVICES PTY LTD
TITLE OF COURT:	LOCAL COURT OF DARWIN
JURISDICTION:	SMALL CLAIMS ACT
FILE NO(s):	20107094
DELIVERED ON:	12 December 2002
DELIVERED AT:	Darwin
HEARING DATE(s):	21.02.02; 22.02.02; 30.05.02; 31.05.02; 12.08.02; 13.08.02 & 14.08.02
JUDGMENT OF:	MR TRIGG

CATCHWORDS:
Workplace Relations Act – sections 179, 179A, 179C, 179D and 347.
Claim for unpaid wages.
Costs- whether proceedings instituted without reasonable cause.

REPRESENTATION:

Counsel:

Plaintiff:	In person
Defendant:	Mr Spamer

Solicitors:

Plaintiff:	nil
Defendant:	Spamer

Judgment category classification:	B
Judgment ID number:	(2002) NTMC 046
Number of paragraphs:	146

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20107094

BETWEEN:

ANGELO BILALIS
Plaintiff

AND:

KAKADU AIR SERVICES PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 12 December 2002)

Mr D TRIGG SM:

1. The plaintiff commenced this action in the Local Court at Darwin in accordance with the *Small Claims Act* on 2nd day of May 2001. The Particulars of Claim were as follows:

> ''IN THE MATTER OF SECTIONS 179, 179A, 179B, 179C AND 179D OF THE *WORKPLACE RELATIONS ACT 1996* (Cth)
>
> 1. At all material times the plaintiff was employed by the defendant as an aircraft pilot at Kakadu Air Services Pty Ltd at Jabiru and other places within the Northern Territory (address) in the Northern Territory. Registered company address 72 Cavenagh Street Darwin Northern Territory.
>
> 2. The plaintiff was employed under the *Pilots (General aviation) Award* 1984 for the duration of his employment.
>
> 3. From 23 April 1995 to 5 July 1995 the plaintiff was employed as a casual aircraft pilot. From 6 July 1995 to 27 May 1998 the plaintiff was employed as a weekly full time aircraft pilot.

4. The Award stipulated the plaintiff's hours of work and the plaintiff's wages.

   The plaintiff commenced employment for the defendant on or about 23 April 1995 *and ceased employment for the defendant on or about 25 May 1998.

5. Notwithstanding the terms of any agreement in respect to wages, at all material times the minimum terms and conditions of the plaintiff's employment favourable to the plaintiff, were governed by a Federal Industrial Award of the Australian Industrial Relations Commission.

6. The applicable Federal *Industrial Award was the *Pilots (General Aviation) Award* 1984 ("the Award").

7. At all material times the defendant was bound to observe the terms and conditions prescribed from time to time in the Award. The defendant was bound to the award by citation.

8. In breach of an express term prescribed in paragraph 7 hereof, the defendant failed to pay the plaintiff the wages and allowances prescribed in paragraph 7 hereof and there is due and owing to the plaintiff the sum of $10,000 particulars of which have already been supplied to the defendant and are detailed in the attachment.

And the plaintiff claims:

(i) the sum of $10,000

(ii) alternatively, the sum referred to in sub-paragraph 9(i) hereof as damages for breach of contract;

(iii) Interest at the rate the Court thinks fit pursuant to s 179A of the *Workplace Relations Act 1996."*

2. At the time the plaintiff filed the Statement of Claim he also filed along with it various other documents by way of attachments, as stipulated in paragraph 8 of the Particulars of Claim. Included amongst these attachments was a photocopy of the plaintiff's original letter of grievance sent to the defendant and dated the 10th day of June 1998. I have proceeded

on the basis that this letter forms a part of the plaintiff's pleadings and was, in effect, further and better particulars of his claim.

3. The hearing in this matter commenced before me the 21st day of February 2002 and went for two days. The matter did not conclude in this time and so resumed on 30 and 31 May 2002. However, the matter still did not conclude and the hearing continued on 12, 13 and 14 August 2002. The hearing finally concluded late on the 14th day of August 2002.

4. The plaintiff represented himself during the hearing and the defendant was represented by Mr Spamer.

5. In the course of the plaintiff's evidence before me, the plaintiff went through his letter of grievance and referred to various documents and records which were tendered as his evidence progressed. In the course of conducting an inquiry into the matters at issue (s 14 of the *Small Claims Act),* the plaintiff made various alterations to the original letter of grievance. He produced a handwritten eleven page document (during his evidence) which purported to set out his claim entitlements and how he said he was entitled to them. The original of this document was made available to the court and a copy to the defendant. I found the way that the plaintiff presented his case to be quite helpful. I have treated the eleven page handwritten document as amended further and better particulars of claim. I propose to go through each of the claimed items but, before doing so, will deal with some general matters of evidence.

6. The plaintiff first obtained a pilot's licence in 1984. He was keen to get as much flying as possible so that he could increase his hours and experience. His ultimate goal was to be a pilot with a major airline. He came to the Northern Territory to work towards achieving his goal. He was highly motivated and ambitious.

7. The defendant was a company incorporated in the Northern Territory. The principal and driving force behind the company was Bob McDonald. His wife Ngaire was also a director of the company, working on the financial side. The defendant operated scenic flights from Jabiru over the Kakadu National Park. It had about 6 aircraft (some single engine and some twin engine) at Jabiru for this purpose. In addition it operated other general flying operations by way of charter, and also an RPT route at various stages of it's history. The defendant ran some of their flying operations out of Darwin airport.

8. The defendant employed pilots (both casually and full-time) in order to conduct it's business. There was a reasonable turn over of pilots.

9. After arriving in the Northern Territory the plaintiff went to Jabiru airstrip in April 1995 and presented himself to Bruce Moncrieff who was the chief pilot for the defendant. The plaintiff handed him his resume. A brief discussion followed, and as a result of that discussion Bruce Moncrieff offered the plaintiff employment with the defendant on a casual basis in Jabiru. The plaintiff accepted this offer and returned to Darwin to collect his personal items and then returned to Jabiru to commence employment.

10. He commenced employment as a pilot with the defendant on a casual basis on about 23 April 1995. Prior to commencing his employment with the defendant the plaintiff had already qualified as a pilot on B76, PN68, Cessna 337, C401/411 and PA23 aircraft types. (See Exhibit P3)

11. At T61 and 62 the plaintiff gave the following evidence:

> "All right so you start – I don't understand what, if anything, was said in relation to your terms and conditions, in relation to your employment?---That was it, "Do you work casually", I said yep.
>
> …….
>
> Well, you were told how many hours, how much an hour you'd be paid for flying or?---No, I didn't know what I was going to get paid

until I actually received – until I filled out the book and – which was left in the pay office and the money went into my account…."

12. I find that in this initial discussion with Bruce Moncrieff there was no actual discussion as to what the terms of the plaintiff's employment was to be other than that he would be working casually. Specifically there was no discussion about rates of pay or conditions of employment. Further, I find that there was no mention of any Award that might relate to his employment.

13. Whilst this seems unusual, it is also in accord with the evidence of Shane Archer. He was initially employed for about 3 months to do the baggage for the defendant. He then became employed as a casual night pilot with the defendant from May 1997 until January 1998. At T244 he gave the following evidence:

> "Were you given an employment contract when you first started with Kakadu Air Services?---No.
>
> How did you know you were employed by Kakadu Air Services?---Told to turn up on a certain day and start.
>
> Okay, what were you told you were being paid?---Didn't know until we received the first pay cheque."

14. It was a factual issue in the case as to whether the plaintiff was aware of the existence of the *Pilots (General Aviation) Award* (hereinafter referred to as "the Award") when he commenced employment with the defendant or at any time prior to his ceasing that employment. In this regard the plaintiff gave the following evidence in cross-examination at T132 to 133:

> "Thankyou. And do you recall your previous employers did they remunerate you in accordance with the Award, the Pilots General Aviation Award?---Yes, they did.
>
> Are you a member of the Federation of Air Pilots?---Yes, I am.
>
> Australian Federation of Air Pilots?---Yes, I am.

Do you know when you became a member?---Yes, I became a member four weeks or three weeks after I left the employment of Kakadu Air Services.

…….

But it seems to me that was above the Award because you knew what the Award was?---Well, I know what the Award is now…….

…….

When you started to work with Kakadu Air Services I'd like to submit that you knew what the Award stipulated, did you know what the Award said in relation to rates of remuneration and hourly rates and conditions of employment?---I didn't and I never found out about it because there was never any Award around and it was always the intention of the employer to keep the Award away from the employees so that he could take advantage of them. I found out about the Award…

HIS WORSHIP: I'm not sure you can say that. You can't say what's in someone's mind?---Okay. I first found out about the Award when Bruce Moncrieff wrote on that time card, which is exhibit P10, he made it clear that there was an Award. That was about three of four months before I left the employment of Kakadu Air Services."

And at T 134 to 135:

"Surely it would have been relevant for you to know what was being offered?---I get taught to fly. I paid – I've probably paid almost $90,000 to learn how to fly an aircraft. In all that time that I've learnt to fly an aircraft I was not taught what I should be getting or what sort of remuneration I should be earning. I learned to fly aeroplanes. It's not my position to – if I work for an employer I expect him to know what I should be getting paid not vice versa.

And what do you mean by that, do you mean that the employer should be paying you in accordance with the Award?---Well, if there's an Award present which it is, it's evident now, I believe that I should be paid.

And that was your attitude when you came up here?---No, not at all. I didn't even know – I didn't even know there was an Award, as I keep saying. I didn't know there was an Award and I started work for Kakadu Air. We're going around in circles. I keep saying I started

working for Kakadu Air and I was employed and I was employed to fly aircraft and I flew aircraft."

15. I accept the plaintiff's evidence in this regard. I specifically find that at the time the plaintiff commenced working with the defendant he was not aware of the Award, nor was he aware that there might be any Award which might be relevant to his employment with the defendant. This evidence is also consistent with the evidence of Damien Keen who was employed as a casual pilot in Jabiru with the defendant from about 5 December 1996 until 18 October 1997. At T47 he gave the following evidence:

> "So, was there a copy of the – or have you ever seen a copy of the General Aviation Award for pilots?---I have but that wasn't until my next employer.
>
> So before you started working for Kakadu Air or when you got – when you commenced, did you know of a General Pilots Award?---No.
>
> And from what you're saying, you only found out about the pilot's Award after you completed or commenced employment with your second employer?---Yes.
>
> So that leads into an open question; did you ever see the Award at Kakadu Air Services?---No."

Mr Keen was asked no questions in cross-examination, and his evidence is unchallenged. I accept it.

16. The other former casual pilot who was called to give evidence (Shane Archer) gave the following evidence at T244 to 245:

> "Were you ever – or did you ever see a copy of the General Aviation Award? I'll show you a copy if you like. Have you ever seen, to your knowledge an Award – a pilot Award – when you were at Kakadu Air?---I did about – eight months into – into – about four months into my employment. One of the other pilots sent away for one from – from – I think (inaudible) sent away for one after four months with Kakadu Air.
>
> All right, so you didn't have one in the so-called donga?---No.

Okay?---This was the first one I saw one.

Now tell me about this donga……..Again, did you ever see a copy of the Award in there?---No, I didn't.

Did you ever see a copy – a company copy of the Award anywhere?---No, that's why the other pilot sent away for them.

His Worship: Who sent away?---A bloke called Andrew (inaudible)."

17. As the evidence of Mr Archer progressed into cross-examination it became apparent that a pilot at Jabiru, named Andrew purchased a copy of the Award and it arrived in about December 1997. Mr Archer read it in part and he assumed that Andrew did also. He never showed it to the plaintiff or discussed it with him. He did not know if Andrew did. That copy of the Award was not available in the donga for other pilots to read. He confirmed (consistently with the plaintiff's evidence and records) that the plaintiff was not working in Jabiru at this time, but did visit on occasions. There is no evidence to suggest that the plaintiff became aware of the Award before he said that he did, and I accept his evidence that he did not.

18. In the course of the evidence, it was suggested that a copy of the Award was in the pilots' lounge (donga) at the Jabiru airfield. Eva Hockey (who was the payroll clerk for the defendant, and did the accounts from about November 1995) said at T273:

"Did you see a copy of the Award in the staff donga?---Yes, I did.

When did you see the copy of the Award?---There was a copy of a little red award book in the donga, it was quite tattered and torn and it was in the – it was usually left near the desk or on the desk.

And can you recall roughly when that was?---I can't give you an exact date but it wasn't – on '96 some time. I can't give you an exact date but it would have been during that year."

19. The plaintiff and the only other pilots called in the whole case (Archer and Keen) expressly denied the truth of this assertion. Surprisingly (or maybe not) the "little red award book" was never produced by the defendant into

evidence or shown to the plaintiff or any witness in the case. There was no evidence as to why this wasn't done. There was no evidence to explain where the "little red award book" was now, or why it could not be produced. The defendant's list of documents as signed by Mr Spamer and filed in the Court on 10 December 2001 did not discover any copy of the Award as ever having been in the possession custody or power of the defendant. If it had been it would clearly have been a document "relating to questions in this proceeding" and should have been discovered. If it truly ever existed then it should have been discovered, even if it was no longer in the defendant's possession. In the light of these glaring omissions I am unable to accept the evidence of Ms Hockey as truthful, and reject it.

20. Finally, Bruce Moncrieff (who was the defendant's chief pilot at all material times) was not called to give evidence. He was clearly a very relevant and material witness (not only on this issue, but many other issues in the case). He was a witness who I would have expected the defendant to call if he were available. No evidence was introduced to suggest that he was not reasonably available to be called. The evidence was silent on this. In the absence of any explanation I infer that if he had been called his evidence would not have assisted the defendant's case (*Jones v Dunkel* (1959)101 CLR 298 @ 308).

21. For these reasons I find on the balance of probabilities that there was no copy of the Award in the pilots' lounge (or donga) during the whole period that the plaintiff was employed for the defendant in Jabiru. I further find on the balance of probabilities that no "little red award book" was ever in the possession of the defendant, or in the pilots' lounge (or donga). I find that the defendant was in breach of the Award in this regard as clause 5 states:

> "An employer shall at all times have prominently exhibited and available for inspection by his pilots at his place or places of business, a legible copy of this Award and copies of all relevant variations to it."

I strongly suspect that this breach was deliberate and intentional.

22. I further find that the plaintiff was never told about the Award by the defendant (except for the notation on ExP10, which was a time card for the week ending 10/2/98) at any time during his employment with the defendant. The defendant did not make the Award known to the plaintiff, and no Award was reasonably available for his inspection during his service with the defendant. The first the plaintiff became aware that there might be an Award applicable to him was in about February of 1998 when his weekly time card (ExP10) was endorsed:

> "You may wish to check what the award states if he flies (causally) on type. He has to be paid the full week at the higher rate regardless of the hours flown."

23. Having been made aware of the possible existence of an Award for the first time, I find the plaintiff made his own inquiries in order to try and obtain a copy. He did not see an Award until after he had left his employment with the defendant. He did not receive the full Award, as became obvious, as he was initially unable to provide a full copy of an Award with all relevant amendments to the court, but this eventually became possible as the trial progressed. The Award and relevant amendments was tendered and became Exhibit P2.

24. The plaintiff tendered his letter of resignation (dated 11 May 1998 – Exhibit D2) to the defendant, and I find on the evidence that by that date, the plaintiff still did not have a copy of the Award. I find that the defendant did not pay the plaintiff his proper entitlements as at the date of his termination and it was because of this that the plaintiff then obtained a copy of the Award for the first time. Upon going through the Award, the plaintiff formed the view that he had been underpaid by the defendant during his period of employment and wrote the detailed letter of grievance dated 10 June 1998.

25. Pursuant to section 5(3)(c) of the *Workplace Relations Act* (hereinafter referred to as "the Act"), matters pertaining to the relationship between

flight crew officers and their employers are industrial issues. As such an Award can be made.

26. I find that the Award as amended from time to time was applicable to and binding upon the plaintiff and the defendant during the whole period that the plaintiff was employed by the defendant. It set out the plaintiff's minimum entitlements. It was always open to the defendant to pay above the Award, but it was not open to it to pay the plaintiff less than his Award entitlements.

27. Pursuant to clause 2 of B004 made on 19 May 1987:

> "The award known as the *Pilots (General Aviation) Award 1904* shall be binding according to its terms upon the Australian Federation of Air Pilots and upon the respondents named in the schedule to this award."

28. Kakadu Air Services Pty Ltd is listed in the schedule as a respondent under the heading Northern Territory. Pursuant to section 149 of the Act the defendant is therefore bound by the Award. The Award is "final and conclusive" (section 150 of the Act).

29. The plaintiff did not know what he was actually going to get paid as a casual employee until he received his first pay. Although this would seem unusual, I accept that the plaintiff was more interested in obtaining flying experience than on wages. He was keen to progress through the industry as quickly as possible, and expected his income to increase as he did so. He had a legitimate expectation that he would be paid appropriately.

30. Because of the accommodation situation in Jabiru, the only permanent accommodation which the plaintiff could obtain was with the employer who had a house in Jabiru for the use of pilots. This house appears to have been rented by the defendant from the housing commission. In relation to rental, he had amounts varying from $60.00 to $80.00 per week deducted from his pay for some pay periods. However, at some stage a separate agreement was

reached whereby in lieu of paying rent the plaintiff would do the cleaning of the house.

31. I find (from Exhibit P4) that the plaintiff was paid as a casual pilot $35.00 an hour for each hour of flying of a single engine aircraft, $42.64 an hour for each hour of flying a twin engine aircraft and $12.00 an hour if he conducted a bus wash.

32. I find that in accordance with V029 (Exhibit P2) when flying a single engine plane he should have been paid at the rate of $37.46 an hour and not the $35.00 that he was, in fact, paid. However, the plaintiff is not seeking to recalculate all his entitlements during the whole period of his employment and specifically was not seeking to recalculate what he was paid as a casual. I find this to have been a very generous concession, and indicative of what I considered to be the plaintiff's reasonable approach.

33. In relation to the period of casual hire, his claim was limited to a claim under clause 36 of the Award (Exhibit P2). Under the heading "Casual Hire" as amended by V018a clause 36(i)(iv) states as follows:

> "A pilot who is to be employed on a casual basis shall be paid a minimum of four hours flying pay at the rate prescribed in para (iii) of this subclause for each tour of duty. Provided that where the duration of the tour of duty is four hours or less, a minimum of two hours flying pay shall apply.
>
> Provided that a pilot employed for casual flight instruction shall be engaged for four hour periods with a maximum of two such four hour periods in any one period of 24 hours and shall be paid a minimum of two hours flying pay for each such four hour period."

34. This amendment came into force on the first pay period on or after 10 December 1991. The original clause which related to this area was clause 36(i)(vi) which states:

> "A pilot who is to be employed on a casual basis shall be paid a minimum of four hours pay at the rate prescribed in para (v) of this subclause on each occasion that he is so engaged."

35. The original clause appears to be less problematical than the amended version. The addition of the proviso does not assist in making the intended meaning clear.

36. Tour of duty is not defined in the Award. Duty time is defined in clause 8 of the Award to mean "all time on duty in accordance with the ANOs and this Award". I find that the ANO's have now been replaced by the Civil Aviation Orders and in those orders "tour of duty" is defined to mean "period between the time a flight crew member commences any duties associated with his or her employment prior to making a flight or series of flights until he or she is finally relieved of all such duties after the termination of such flight or series of flights and includes reserve time at the airport."

37. The managing director of the defendant (Bob McDonald) gave evidence before me. Although he does not appear to have been working in Jabiru at any relevant time when the plaintiff was employed there casually, he purported to try and give evidence as to what the situation was. He purported to give evidence as to the lack of any seniority amongst casual pilots at Jabiru. I expressly reject that evidence. Damien Keen gave the following evidence on "seniority" at T47:

> "Okay. As a casual, how many casuals – can you recall how many casuals there may have been when you first started?---I think there's at least four above me and there's another – there was another two or three below me so ---
>
> When mean "above" you---?---In senior, had been there before I got there. A seniority type thing.
>
> Okay, so you were there for almost 11 months – 10 and a half months. When you mean seniority, can you explain to me what that would mean for a casual pilot?---The people who had been in – had been out there – based at Jabiru the longest, would have – there was sort of seniority list and the way it sort of worked was that the older – the people who'd been there the longest had the highest seniority and had first dibs at where the flights came up for the day and they'd

then subsequent work down the list and then til everyone's had a go at flying and then it'd go back to the top again."

This evidence is consistent to the evidence of the plaintiff and I accept it. Either Mr McDonald did not know what was happening within the company or he was being deliberately untruthful.

38. Mr McDonald also purported to give evidence to the effect that casual pilots were not expected or required to be at the Jabiru airport beyond the time of any booked flights. I expressly reject that evidence. Damien Keen gave the following evidence in relation to duty hours at T49-50:

> "So what time would you turn up of a day, a normal average day?---A normal day would be 7 o'clock start to pre-flight the aircraft, get them ready. If not –if – unless there was a previous like a 7 o'clock departure for an early flight.
>
> And what time would you normally finish?---Wet season, generally around when the first thunder storms come through so it could be anywhere between 3:30 to 4:30 but it was generally you couldn't fly after, I think, 4:30 because of the holding requirements with the weather. Dry season you'd – you'd be there till 5, occasionally there'd be a bus company come through at 5. There may be one or two flights then, depending on the, you know, people.
>
> …….
>
> So, it's fair to say that some days you would turn up – how would you get paid if you worked to – say start at 8 o'clock and you finished at---?---You got paid per hour – per flying hour that you did.
>
> Are there any times where you would've done no flying at all?---Yep, quite a few times, yeah.
>
> So, it is – and would you agree that you would have perhaps worked an 8 or 10 hour day and received no money for it?---Yes."

Shane Archer also gave the following evidence at T246:

> "You were a casual. Was it possible for you to do a scenic flight or to turn up to pre-flight an aeroplane and if there was no flight for an hour or two, you'd just mosey on to Jabiru and wait for a telephone

> call to do a scenic flight and you'd come back---?---No, I was always asked to stay at the airport.
>
> Did Bob specifically ask it?---Bob never did, no.
>
> So who would?---The senior base pilot or chief pilot.
>
> So in your recollection can you ever recall any times in your period of service where you would go into Jabiru and wait there for a scenic flight?---Into the airport or into the town?
>
> Into the township and wait there?---No."

39. Again, the evidence of Keen and Archer is consistent with the evidence of the plaintiff, and inconsistent with the evidence of Mr McDonald. I accept the plaintiff's evidence. I found the plaintiff to be a generally honest and reliable witness who tried to give his evidence fully and as accurately as his documentation, records and memory would permit. I did not form as favourable an impression of Mr McDonald as a witness. It is fortunate that the plaintiff did keep such good independent records as the defendant's documents were at best unreliable.

40. I find that the plaintiff was required to attend at the Jabiru airstrip in the mornings to pre-check the planes ready for use. It was not possible for the plaintiff to simply arrive for any pre-booked flight and then leave again at the conclusion of any flight. I find it was part of his duties to ensure that planes were ready and available for scenic flights at any reasonable time.

41. I therefore expressly find that on any day when the plaintiff flew casually for the defendant, he was on duty at the airport for at least four hours, irrespective of how many hours flying he actually engaged in. I therefore find that for each day that the plaintiff was paid less than four hours minimum pay during this period of casual employment, he was underpaid.

42. Pursuant to 179(1) of the *Act*:

> "Where an employer is required by an award, order or certified agreement to pay an amount to an employee, the employee may, not later than six years after the employee was required to make the payment to the employee under the award, order or agreement, sue for the amount of the payment in the court or in any court of competent jurisdiction."

43. Accordingly, as the claim was instituted on 2nd May 2001, the plaintiff is only able to pursue underpaid amounts arising on and from 3rd May 1995. Based on the plaintiff's time book (Exhibit P4), I set out the following calculations of the plaintiff's underpayment. However, where in addition to flying time the plaintiff has been paid for amounts of other duties, I consider it only fair that these be deducted from the plaintiff's entitlement. I therefore find that for the following days the plaintiff is entitled to:

6/5/95	1.9 hours	less $15.00
7/5/95	2.0 hours	less $6.00
8/5/95	2.0 hours	less $25.00
9/5/95	1.8 hours	
14/5/95	1.5 hours	
15/5/95	2.0 hours	less $15.00
16/5/95	1.8 hours	
19/5/95	2.0 hours	
20/5/95	0.7 hours	
21/5/95	1.9 hours	less $18.00
24/5/95	0.3 hours	
25/5/95	1.9 hours	
26/5/95	2.0 hours	
27/5/95	1.5 hours	
28/5/95	1.7 hours	less $6.00
29/5/95	2.1 hours	
31/5/95	2.0 hours	
1/6/95	1.8 hours	
3/6/95	1.8 hours	
4/6/95	1.8 hours	less $12.00
6/6/95	3.0 hours	
7/6/95	3.0 hours	less $6.00
8/6/95	2.4 hours	less $6.0
9/6/95	3.0 hours	
10/6/95	1.7 hours	less $12.00
11/6/95	1.9 hours	less $18.00
14/6/95	3.5 hours	
15/6/95	2.5 hours	less $6.00

16/6/95	1.8 hours	
18/6/95	2.5 hours	less $12.00
21/6/95	2.5 hours	
22/6/95	2.0 hours	
23/6/95	2.8 hours	
24/6/95	1.7 hours	
25/6/95	2.1 hours	
27/6/95	1.5 hours	
28/6/95	2.0 hours	
30/6/95	0.9 hours	
1/6/95	0.8 hours	less $9.00
4/6/95	1.4 hours	
5/6/95	1.1 hours	
Total	78.6 hours @ $37.46 per hour	
Total	$2,944.36	
Less	$166.00	
Total Owing	$2,778.36	

44. I find that the defendant is indebted to the plaintiff for underpaid casual wages for the dates listed above in the total sum of $2,778.36.

45. Before moving away from the topic of casual hire, I note clause 36(I)(ii) of the Award which states:

> "Employment of more than one pilot on casual hire at the same time by an employer is prohibited."

Despite this very clear and blatant embargo, I find that the defendant employed numerous persons on casual hire at the same time in Jabiru during the period the plaintiff was so employed. My impression overall was that the defendant made no real attempt to comply with the Award and only did so when it suited it's purposes.

46. My observations of Bob McDonald in the witness box confirm the evidence of the plaintiff and other witnesses (at T49, 193 and 248) that he would not have been an approachable employer. I find that if the plaintiff or any other

employee had taken concerns or complaints to Mr McDonald, then their continued employment may have been at risk.

47. I turn now to consider the question of hard lying allowance. The plaintiff ceased to be employed as a casual pilot and became a full-time pilot on 6 July 1995.

48. Clause 25 of the Award in its original form was as follows:

> "(a) (i) when a pilot in the course of his employment is absent on layover from his base, he shall be provided by his employer with such first-class accommodation and meals as are provided in the area, provided that the cost of such first-class meals shall not normally exceed the allowances prescribed herein.
>
> (ii) (1) to the extent possible, a list of approved places of accommodation and arrangements for meals shall be compiled on the basis of mutual consultation between the employer and his pilot.
>
> (2) A party proposing a change to the existing accommodation or meal arrangements shall notify the other party of the proposal. If no agreement is reached the party seeking the change may refer the proposal direct to a grievance board for determination and in such circumstances the existing arrangement shall continue until the grievance board determines the issue.
>
> <u>First-class accommodation and meals</u>
>
> (b) (i) On layover a pilot will be provided with first-class accommodation and meals during the period specified at no cost to the pilot and additionally the layover allowance as per subclause (f) hereof will be paid.
>
> (ii) the employer may provide first-class accommodation only and by mutual agreement with the pilot, pay the specified meal and layover allowances as per subclause (f) hereof.
>
> <u>Other than first-class accommodation</u>

(c) on the layover where no first-class accommodation is available the employer shall provide the best accommodation available, meals or meal allowances as prescribed in subclause (f) hereof, a layover allowance and a hard line allowance of $38.10 in respect of each layover."

49. The amounts for meals and layover allowance and hard lying allowance have been amended from time to time. Amendment V026 (with effect from 14 April 1994) increased the allowances to:

Breakfast $12.20

Lunch $13.70

Dinner $31.80

Layover allowance $13.00

Hard lying allowance $55.00

50. Amendment V0333 further altered the amounts with effect from 27 February 1997 to the following amounts:

Breakfast $13.30

Lunch $14.90

Dinner $34.70

Layover allowance $14.20

Hard lying allowance $60.00

51. On all the evidence it is clear that the plaintiff was only able to claim a $9.00 meal allowance as that was the maximum that the defendant was prepared to pay. This is clearly in breach of the Award and a flagrant breach. There is simply no justification for the defendant's attitude.

52. The evidence of the plaintiff was that when he was based in Jabiru, he had occasions when he was required to overnight away from his usual accommodation. By reference to his log books (Exhibits P3 and P9) the

plaintiff was able to identify which nights he was away from his usual base and where he over-nighted. I accept his evidence on all these aspects. No contrary evidence was called.

53. When the plaintiff was based in Jabiru and was obliged to overnight in Darwin, he was required by the defendant to stay at Unit 13, 18 Seale Street, Darwin. He was given no choice. This was a unit owned by the defendant.

54. It appears that in the early part of 1991 the defendant entered into an agreement with the Australian Federation of Air Pilots (ExP14). This agreement was dated 19th April 1991 and was in the following terms:

> "Pursuant to clause 11, Enabling Authority, of the *Pilots (General Aviation) Award 1984,* it is agreed between the Australian Federation of Air Pilots and Kakadu Air Services of Jabiru that for the purposes of clause 25A(ii)(a):
>
> (1) Accommodation provided at Unit 13, 18 Seale Street, Darwin and Unit 4, 244 Victoria Highway, Katherine, satisfy the requirements of accommodation to be provided in accordance with the Award.
>
> (2) The parties also agree that a meal is to be provided of a reasonable standard at these premises to satisfy the requirements of clause 25 F. Consultation will take place between the Company and the Federation representative where a dispute exists on the standard of meal provided in the first instance.
>
> This Letter of Agreement will exempt the Company from claims in respect to allowances under clause 25 of the *Pilots (General Aviation) Award, 1984* for overnights at Darwin and Katherine only. The agreement will be subject to renewal every six months except where raised by the Federation representative over Company non-adherence to the agreement. The agreement shall not be used by any other party as a precedent for the purposes of supplying accommodation and meals in accordance with the Award."

55. I find (based on Exhibit P14) that this agreement expired in April 1992 and no further agreement has been entered into between the defendant and the Australian Federation of Air Pilots. I find that the plaintiff was never

informed by the defendant of this agreement or the existence of any agreement. Further, the plaintiff did not know of the existence or terms of the Award and therefore did not know what his entitlements were. I find that the defendant did stay at the unit in Darwin when he over-nighted in Darwin, but he was given no option to reside anywhere else and simply stayed where he was directed. I find that ExP14 did not bind the plaintiff, nor did it have any effect on his entitlements.

56. During the time that the plaintiff over-nighted in Darwin the unit was occupied as the principal residence of the daughter of Bob and Ngaire McDonald. In addition, the daughter's partner also apparently resided there also. There were two other bedrooms and a further place for people to sleep on the landing. One of the other bedrooms appears to have been permanently occupied by the chief pilot. Although initially (prior to the plaintiff commencing employment) some meals were provided to the pilots, this practice had long desisted and at best there might be food in the fridge. I find that when the plaintiff over-nighted in Darwin he did not get a room to himself and on occasions he had to sleep on the landing. Further, he was not provided with any meal at the Darwin unit.

57. In relation to staying at Seale street, Damien Keen gave the following evidence at T52:

> "Okay, can you please explain to us about the overnight accommodation in Darwin?---It was a unit in, I think, from memory, I think it was Seale Place in Fannie Bay from memory. And I believe Bob's daughter lived there and I think Mick also lived there as well, her husband. Two bedroom – sorry, two storeys. Downstairs was a lounge, living room, kitchen. Upstairs was – I think it was a three bedroom upstairs. I know one bedroom had two – it has a double bed and a single bed, I think. Yeah, a double and single bed. And there was like quite a large landing area which had two single beds up against the wall. And the bathroom was upstairs, yeah.
>
> So, who was living there at the time?---I believe Mick and Bob's daughter, I think, Sheree ???, is it – was living there at the time.

You believe or were they there?---Well, there was a lot of their stuff hanging around there so – didn't often see them but like there'd be clothes in the bathroom still on the floor, there'd be model airplanes, quite large model airplanes under the stairwell, things like that, and then the fridge. Look, the place was being lived in so.

Were there occasions where there was perhaps more than one person, did you ever have to sleep on the landing beds at all?---I have a vague recollection, I think I did sleep on the landing once. I couldn't tell you how many people were there but I did share – I know I shared a bedroom with someone, can't remember who that person was."(emphasis added)

58. Mrs McDonald also gave evidence about Seale street at T25-26 as follows:

"Okay. So there's three rooms – three bedrooms, one with one single bed, one with a double bed for yourself and Bob and two single beds, and there's two beds on the landing?---There was two beds on the mezzanine floor, correct.

Which is basically open. During a period of time there – during the time that your daughter came in 1996 – sorry, in December 1995, as you tabled, through to May '96 where I was overnighting in Darwin which room was occupied by her and her partner?---Okay. Cheryl and her – her husband took over the room that Bob and I had because we did not stay there when we came into town while they were there. So it still left remaining the spare room – the two bedrooms and another spare room with a single room in it – bed in it and the two beds on the mezzanine floor.

Fair enough. And during that period the chief pilot, Bruce Moncrieff, also was staying; is that correct?---That's correct.

So there was two bedrooms and a single room by himself – Bruce took the single room, and then the beds on the landing?---Correct.

Was there any occasion where there was more than one pilot come in off a scenic flight required to overnight in Darwin?---Yes, there would have been.

So they would have to sleep either in the same room or one sleep on the landing and one sleep in the bedroom; is that correct?---Correct.

Okay. Would you classify that as first class accommodation?---No, but I think it was – it was definitely adequate."(emphasis added)

59. The opinion of Mrs McDonald (or any other witness) as to whether any particular accommodation was first class or not does not assist. That is a decision for me based on all of the evidence. In any event, first-class accommodation is defined in the Award as follows:

> "Shall mean accommodation which is, as a minimum, quiet and free from factors which may reduce adequate rest and must provide a separate room for each pilot with air-conditioning and/or heating as appropriate to the area."

60. It is therefore the meaning as defined that is applicable to the facts in this case, and not any general meaning or understanding of the term. I find that the unit in Seale street, Darwin was not first-class accommodation as defined. The plaintiff did not have a separate room. He was required to either share a room with whoever else might be there or sleep on a landing. In my view, it was not "quiet and free from factors which may reduce adequate rest".

61. When the plaintiff moved to Darwin (which I find occurred on the 24th day of July 1996) thereafter he had occasions when he was required to overnight in Katherine and Jabiru. I again accept his evidence as to what nights he over-nighted at those various places.

62. In Katherine again the plaintiff was given no choice of accommodation. He was obliged to stay at the Palm Court Backpackers accommodation as he was directed to stay there by the defendant. There was no proper basis for this direction. Ngaire McDonald in the course of her evidence confirmed that the Palm Court Backpackers was not first-class accommodation. However, in that regard she appears to be relying on her general understanding of the phrase rather than applying her mind to the definition in the Award. In any event, again that is a matter for me to decide.

63. Damien Keen gave evidence in relation to the Katherine accommodation at T48:

> "Basically it was a backpackers – it was fairly old sort of place. It was air-conditioned, beds, just like a normal sort of backpackers we were given a room to ourselves but that was – yeah, that was pretty much it, just a basic backpacker accommodation.
>
> Was there any coffee or tea provided?--- In the communal kitchen.
>
> Okay. Was there an ironing board or an iron?--- In the communal kitchen, I think it was, from memory. Down next to – I think, coming off the kitchen actually was a laundry type area, pay your $2 whatever it is and I think there was irons and an ironing board down there, from memory."(emphasis added)

64. I find that the accommodation in Katherine was at the lower end of the accommodation options that were available. There were numerous other options available which would have provided a better and more reasonable standard. However, whilst that might be relevant to the general meaning of "first class" it is not necessarily determinative in this case. On the evidence there is no occasion referred to when the plaintiff had to share a room whilst he was over-nighting in Katherine. Further, there is no evidence that he had disturbed sleep, or that his ability to have an adequate rest was in any way reduced. Accordingly, although the accommodation was not first-class accommodation (as that term would be generally understood), I am unable to be satisfied on the balance of probabilities that it was not first-class accommodation as defined in the Award. Accordingly, the plaintiff is unsuccessful on this aspect of his claim.

65. When the plaintiff over-nighted in Jabiru, he was required to stay in the Housing Commission premises which the defendant rented and which was the permanent accommodation of the Jabiru based pilots.

66. Ms McDonald (who was called in the plaintiff's case) gave the following evidence in relation to the Jabiru accommodation at T24-25:

> "Ngaire, for a period after I stated commencement with Kakadu Air Services I was then based in Darwin and I had to overnight in Jabiru; can you please explain where I was accommodated?---Yes. You were accommodated in a three bedroom house - a Housing

Commission house which Kakadu Air Services pays rent for, and while you were there you had one of those rooms.

Okay. Would you consider that as being first class accommodation?---The housing was adequate. Its a three bedroom home. Its a home with - where I live its the same sort of home that I live in. It had beds, it had everything in there. So I would - I would say, yes, it was adequate.

Was linen provided?---No, linen wasn't provided. But when - when people - when people live in houses they quite often have their linen with them and because you were there quite frequently then you had your own room and there was no reason why you couldn't have your own linen kept there and there was a washing machine to do your washing.

Okay. So if - it was a three bedroom house, as you said, but that was shared with pilots who were already working at Kakadu or Jabiru?---That's correct.

So there might have been an incident where there might have only been one room?

---As far as I can remember you had your own room.

Okay. Would I have been the only pilot to have overnighted there?---No.

No. There could have been perhaps - - -?---There could have been two more other pilots, yes.

Okay. Each of which would have had to bring their own linen. Can I ask why Kakadu Air Services didn't accommodate pilots at the Gagudju Crocodile Hotel?

---Well, we were never asked to. We chose to have our own accommodation. I felt that it was better for the pilots to have their own room in a home that we considered a home because you were there so regularly that it would have been more stable for you to have a room and a home, that you could have your TV and (inaudible) or whatever.

So just for the record, you felt that it was a better option for the pilots to stay in this accommodation and not be put up at the Gagudju Crocodile Hotel?---I felt that it was better, yes, because it was - because its not - it wasn't just another hotel room.

Okay. So there was no conciliation with the pilots or any agreement struck with pilots with respect to accommodation at Jabiru?---No. And neither was it brought up. Not at any stage was - was I ever asked, Why am I not staying at the Crocodile Hotel?. The accommodation that was given was adequate. Everything was there for you and never was it questioned.

I'm sorry, you keep saying everything, but you've just demonstrated that there wasn't any linen and actually there was no pillows there either. We were required to bring our own things?---Well certainly. But again, no- one came to me and said, Ngaire, we do not have any pillows or linen in here.

You've just acknowledged though that there wasn't - so you already knew that there was no pillows or anything?---No, but no-one - I mean, we didn't provide it.

Yes?---No. But not at any stage did anyone come to me and say, There is no linen or pillows. Had they have done that I would've probably said, Well, okay, you need to buy - you have a room, you buy it and we'll reimburse you and there's – that's it. It's there for you." (emphasis added)

And in cross-examination she added at T28:

"Ngaire, could you please elaborate on the housing in Jabiru where the pilots stayed. Could you just explain in more detail as to what the house looked like, what was in it, what facilities were provided?---Certainly.

And the equipment and all those sorts of things?---Certainly. It's a Housing Commission house. It has three bedrooms. It has shower, toilet, a living room, dining room and kitchen. The place was equipped with cooking equipment, knives and forks. There was lounge suites put in there. There was a dining room table and chairs. There were beds, side - what do you call them?

Side tables?---Yes, side tables, shower curtains, curtain racks. Everything was - everything was provided in that apart from the linen side of it. We did not provide the linen.

Did it have air-conditioners?---Yes, in the bedrooms. Yes.

Ceiling fans - did it have ceiling fans?---Yes.

Who cleaned it?---They did.

The people living there?---Yes."(emphasis added)

67. In closing submissions the plaintiff said:

> "Yes, we were made to, in most cases in Darwin, stay either in a 2-bedroom, or on the landing, there was two beds on the landing and sometimes on the couch. In Jabiru we - there was one room there, that was separate by a door and an air-conditioner, but we had to bring our own linen and in most cases, when there was more than one of us, one of us would have to sleep on the couch, in the TV room.
>
> And as for the backpackers accommodation I couldn't say that that was first rate, we'd have to bring - well as we did in Jabiru, we'd have to bring our own soap and towels, and all the rest, and you were right next to the swimming pools, you'd hear people running up and down for all hours of the night.
>
> There was an actual occurrence where I had to actually rest with another backpacker because, at the time, the people didn't realise that we were flying in, so I just kept my things close to myself and didn't worry, didn't really bother me at the time, then I realised that that's in contravention to the General Aviation Award.
>
> I don't believe - so that first class accommodation was available in places like Darwin, there was an adequate hotel in Jabiru, the Crocodile Hotel and in Darwin(?) there were better accommodation than the Palm Court Backpackers, sometimes it maybe not have been possible in the dry season, but most times it would have been."

68. Unfortunately for the plaintiff what he said in closing submissions is not what came out in evidence. In his case he did not really address the criteria in the definition. He may not have been aware of the definition at the time that he gave his evidence.

69. I am unable to find on the evidence that the accommodation in Jabiru was not first-class accommodation as that term is defined in the Award. No occasion was pointed to in evidence when the plaintiff was not provided with a separate air conditioned bedroom as required. Further, no occasion of disturbed sleep was identified. He is therefore not entitled to a hard lying allowance whilst over-nighting in Jabiru.

70. I accept the plaintiff's claim that he is entitled to be reimbursed for a dinner allowance at the applicable rate for each night that he over-nighted in Darwin, Katherine or Jabiru. He is not claiming for breakfast the next day and I consider this to be very reasonable. In addition, the plaintiff is allowing $9.00 (being the meal allowance which the defendant was prepared to pay) on the assumption that it might have been paid. I think the evidence is reasonably clear that in fact the plaintiff did not always claim the meal allowance. On other occasions the plaintiff bought food for the general household and was re-imbursed when a claim was put in. However, I think that the plaintiff is reasonable in his demands.

71. When the plaintiff over-nighted in Darwin he was not provided with a meal. It was up to him to purchase his own. There may have been some occasions when there might have been some food in the fridge, but it is to be remembered that the unit was the permanent accommodation of others. Helping oneself to someone else's fridge is not something that most people would be comfortable with. Further, in my view there is a difference between food and a meal. Unprepared food items are not a meal until someone prepares it. To expect the plaintiff to prepare a meal for himself whatever time he might arrive is not contemplated in the Award, and would not be reasonable in any event.

72. Likewise, in Jabiru there were times when the plaintiff purchased food items for the household as a whole. He would be re-imbursed for these purchases. Again, this was not a meal.

73. I find that during the period that the rates in V026 applied the plaintiff over-nighted 88 times in Darwin, 8 times in Katherine and 7 times in Jabiru, making a total of 103 total over-nights.

74. The plaintiff is therefore entitled to 103 times $22.80 (being $31.80 less $9.00) for meal allowance which equals $2,348.40.

75. In addition, the plaintiff is entitled to hard lying allowance of 88 times (for Darwin only) $55.00 which equals $4,840.

76. Further, during the period that V033 applied I find that the plaintiff over-nighted in Jabiru nine times and in Katherine six times. Therefore, after 27 February 1997 the plaintiff is entitled to dinner allowance of 15 times $25.70 (being $34.70 less $9.00) which equals $385.50. I am not satisfied that the plaintiff is entitled to any hard lying allowance for these trips.

77. I therefore find that the defendant owes the plaintiff the total sum of $7573.90 for underpayments made pursuant to clause 25 of the Award.

78. I note that the amounts allowed already exceed the maximum under the *Small Claims Act* of $10,000.00. This possibility was raised with the plaintiff in the course of the hearing and he formally abandoned any amount in excess of $10,000.00. The opportunity to transfer the matter to the Local Court was offered to the plaintiff, but he did not wish to avail himself of that opportunity. Though it is not necessary for me to proceed further, in the event that I am wrong in relation to any of these findings, I will continue to consider each of the plaintiff's claims.

79. The next claim by the plaintiff is for change of pilot classification. The plaintiff asserts that he was a Nomad captain flying an RPT route and that he was retired from that status by the defendant. Bob McDonald in his evidence consistently denied that the plaintiff was ever a Nomad captain. Mr McDonald maintained his denial despite being shown Exhibit P11. Exhibit P11 is an original letter on Kakadu Air letterhead signed by Mr McDonald. It is undated but is in the following terms:

> "Dear Angelo,
>
> The Nomad aircraft is to be retired from RPT status and returned to Jabiru as an air (tour) charter aircraft.

> Accordingly, there is no further requirement for your title Nomad Captain RPT.
>
> Your wage is to be adjusted to your current duties, that being RPT Captain Cessna 402 aircraft, with additional duties, being those on Banderainte Co-Pilot.
>
> As the RPT Captain wage is the highest (over Banderainte Co-Pilot), you will find next week's pay adjusted accordingly."(emphasis added)

80. I am unable to accept the evidence of Mr McDonald on this topic and reject it. I find that his denials are mischievous and false. There was simply no reason for ExP11 to have been written if what Mr McDonald said in evidence was true. I find that the plaintiff was a Nomad Captain and that he was demoted for operational reasons.

81. Pursuant to clause 40(b)(iv) of the Award:

> "When there is a reduction of establishment on, or phase out or withdrawal of an aircraft type and the pilot is demoted, in accordance with clause 49, to a category or classification attracting a lower remuneration, he shall be given the following minimum notice of the transfer or paid his existing salary for the period, of which the notice falls below that specified.
>
> (b) Over one year but up to three years gap six weeks."

82. I find that the plaintiff was not given the six weeks notice that he was required to be given, nor was he paid the higher pay for six weeks as he should have been. Again the defendant has acted in contravention of the Award. I accept the plaintiff's evidence as to the correct method of calculation and what he should have been paid and that he is owed six weeks at $128.00 per week making a total of $768.00. I find that the defendant is indebted to the plaintiff in this amount.

83. The next claim is that he commenced duties as RPT Captain on a Nomad on 8th January 1997. I accept the evidence of the plaintiff in this regard, which

evidence is supported by Exhibit P3. However, he was not paid at the higher level until 21st May 1997.

84. I find that the plaintiff should have been paid at the higher rate, which I find was $128 per week higher than what he was paid. He is accordingly entitled to an extra 18 weeks at $128.00 per week making a total of $2,306.00. I find the defendant is indebted to the plaintiff in this amount also.

85. The next claim relates to Exhibit P10 for the week ending 10 February 1998 when the Chief Pilot, Mr Moncrieff, correctly noted that the plaintiff should be paid for the whole week at the higher rate. I find that this is the case, the defendant was put on notice by Mr Moncrieff. The defendant should have known that it was obliged to pay but has failed to comply with the Award. I accept the plaintiff's method of calculations and find that for that week the plaintiff was underpaid the sum of $60.00 by the defendant. I find that the defendant is indebted to the plaintiff in this amount.

86. The next claim relates to the plaintiff flying the aircraft PN-68. He was checked by the Chief Pilot Moncrieff on this aircraft on 1st February 1996. He began flying RPT operations from 2nd February 1996 on this aircraft but he was not awarded the RPT and instrument rating allowance until he relocated to Darwin on 24th July 1996. In accordance with the Award and V018 I find that he should have been paid both of these amounts. He should have been paid 20 weeks at ($871.00 per annum divided by 52 weeks which equals) $16.75 per week for the RPT work. This equals $335. In addition he should have been paid 20 weeks at ($3,482.00 per annum divided by 52 weeks which equals) $66.96 for instrument rating allowance. This equals $1339.23. Accordingly, the plaintiff was underpaid the sum of $1,674.23. I find that the defendant is indebted to the plaintiff in this amount also.

87. The final claim relates to late payment of his salary upon termination. Pursuant to clause 16(b) of the award:

> "All monies due to a pilot on termination of the employment including recreation leave payments as prescribed in subclause 43(h), shall be paid to him on the day of termination or forwarded to him by registered post on the next ordinary business day. Where monies due are posted to the pilot, interest shall compound on such monies at the rate of 12% per day for each complete ordinary business day falling between the day of termination and the day of posting."

88. It is admitted on the pleadings that the plaintiff ceased employment for the defendant on or about the 25th day of May 1998. I further find that he did not receive the full amount of his entitlements on termination by way of holiday payments until 5th April 2001 (almost three years later).

89. It is clear from Exhibit P7 that by no later than the 9th day of June 1998 the defendant (or somebody within it's employ in the accounting area) was fully aware that they had omitted to pay the plaintiff for some 41.73 hours of annual leave. I find that Exhibit P7 was a document created by the defendants and that it could only have been created from the defendants' personnel records.

90. I find that the actions of the defendant in failing to pay the plaintiff his rightful entitlements to recreation leave must therefore have been deliberate. I find that $624.60 was deliberately withheld from the plaintiff by the defendants for reasons which the defendant only knows. This amount should have been paid on 25th May 1998 but, assuming some error or over-sight might have been initially made, it certainly should have been paid by no later than the 9th day of June 1998.

91. Despite this, I do not think that clause 16(d) of the Award assists the plaintiff. The penalty rate therein referred to only relates to amounts which are posted. It is clear from the evidence in this case that the amount wasn't posted, it was actually delivered to the Department of Industrial Relations and paid to them on behalf of the plaintiff. Whilst the philosophy of the clause is relatively clear, given the penalty nature of it, I consider it would require a strict interpretation. Accordingly, as the monies were delivered

and not posted, I do not find that the specific clause is applicable. However, I consider that the philosophy of the Award (in wishing to severely penalise employers who do not pay a worker's entitlements upon completion of the contract of service) should be borne in mind when considering the question of interest generally.

92. There are other rights to interest up to judgment pursuant to s 179A of the *Act*. Subsection (1) of that section is as follows:

> "In exercising its powers under subsection 178(6) or in a proceeding under s 179, the court or court of competent jurisdiction must, upon application, unless good cause is shown to the contrary, either:
> (a) order that there be included in the sum to which an order is made or judgment given, interest at such rate as the court or court of competent jurisdiction, as the case may be, thinks fit on the whole or any part of money for the whole or any part of the period between the date when the cause of action arose and the date on which the order is made or judgment entered; or
>
> (b) without proceeding to calculate interest in accordance with para (a), order that there be included in the sum for which an order is made or judgment given, a lump sum instead of any such interest."

93. In the instant case, given my finding that the failure to pay the worker's entitlements upon termination (or as soon as the error was detected) appears to have been deliberate, I consider that a punitive rate of interest (in the order of 100% per annum) is appropriate and that it should compound for each year (or part thereof) until paid. I would allow an amount of $3,900 for interest on the late payment upon termination.

94. In addition there is the question of interest generally. Clearly the plaintiff was not paid his proper entitlements under the Award during the period of his employment with the defendant. The defendant was at all material times fully aware of the existence of the Award and that it was bound by it. It appears to have had little regard for the Award or it's obligations as it's breaches were too many to be explicable by mistake or oversight. I consider that in light of the philosophy underlying the Award interest should be at a

rate which would not put the defendant in a better financial position than if he had complied with the Award. I would therefore allow interest on outstanding entitlements (excluding the interest on underpaid termination pay which I have already allowed) up to the date of this judgment. However, this should only be allowed in relation to the amount owing (if any) after considering any set off or counterclaim by the defendant. I will now turn to consider that aspect, and will return to interest later in these reasons.

95. In the course of the hearing the defendant filed in Court a Notice of Further Amended Defence. This pleading was in the following terms:

> "The Defendant intends to defend the claim against him and pleads as follows in respect of each numbered paragraph of the plaintiff'' particulars of claim:
>
> 1. Admitted.
>
> 2. Denied.
>
> 3. Denied in that the Pilots (General Aviation) Award 1984 as varied from time to time (hereinafter referred to as "the Award") did not stipulate the hours of work performed by the plaintiff. Denied also on the basis that the Award did not constitute all the terms and conditions of the contract of employment between the plaintiff and the defendant, details of which appear at paragraph 8 below.
>
> 4. Admitted.
>
> 5. Denied.
>
> 6. Admitted.
>
> 7. Denied in that the defendant was not bound by the Award by citation, but was bound to observe and entitled to rely upon the terms and conditions of the contract of employment between the plaintiff and the defendant, details of which appear at paragraph 8 below.
>
> 8. Denied in that the defendant has fully discharged all its obligations to the plaintiff in accordance with the contract of employment between them, details of which appear below.

CONTRACT OF EMPLOYMENT

Prior to and during the plaintiff's term of employment with the defendant, the defendant offered and the plaintiff accepted expressly or by implication, that the following terms and conditions would apply in relation to the employment of the plaintiff:

(a) That the defendant shall remunerate the plaintiff at least to the extent required under the Award.

(b) That the defendant could remunerate the plaintiff by the defendant paying the plaintiff wages and by the defendant (at the cost of the defendant) providing the plaintiff with food, meals, accommodation, the use of a motor car and additional flight training or flying time or pilot endorsements, the total value of which is equal to or exceeded the plaintiffs entitlements under the Award.

(c) That the plaintiff would (in consideration for receiving additional flight training or flying time or pilot endorsements) be required to work out the cost of his pilot endorsements over a period of at least one year in lieu of paying any money to the defendant by way of bond and that the component of cost of the plaintiff's pilot endorsements not worked out would constitute consideration in favour of the plaintiff.

The contract of employment was verbal and the terms and conditions were either express or implied.

DISCHARGE OF CONTRACTUAL OBLIGATIONS

The defendant fully discharged all its obligations under the contract of employment.

The plaintiff did not discharge all his obligations under the contract of employment as he did not work out or fully work out the cost of his pilot endorsements.

The overall or total consideration received by the Plaintiff from the defendant was equal to or exceeded the entitlements of the plaintiff under the Award.

9. Denied in that the defendant discharged all its obligations to the plaintiff under the Award or the contract of employment and

neither any entitlements nor any damage nor any interest is due or owing by the defendant to the plaintiff.

10. In terms of Section 179 of the Workplace Relations Act, the plaintiff may not sue for any entitlement under an award or agreement which became payable more than 6 years prior to the law suit and any such money claimed is not recoverable from or due or payable by the defendant.

11. The defendant relied upon conduct by the plaintiff accepting the remuneration (such remuneration as detailed in paragraph 8 hereof) and as a result of such reliance offered the plaintiff further flight training or flying time or pilot endorsements during the term of the plaintiffs employment and the plaintiff should be estopped from denying that the value his of additional flight training or flying time or pilot endorsements formed part of his remuneration and the plaintiff should also be estopped from denying that the value of his additional flight training or flying time or pilot endorsements constituted real value or a benefit to him in lieu of any other entitlements the plaintiff may have had under the relevant Award. Any denial as detailed above is unconscionable on the part of the plaintiff and is to the detriment of the defendant.

ORDERS SOUGHT BY THE THIRD DEFENDANT

1. That the plaintiffs claim against the defendant be dismissed.

2. That costs be awarded in favour of the defendant against the plaintiff."

96. The contract of employment as pleaded in paragraph 8 did not appear at all in the defendant's first Defence which was filed on 12 July 2001. The original pleading did no more than admit, deny or not admit. It was pleaded for the first time in the Amended Defence which was filed on 29 November 2001. I find that the allegation of the alleged contract being "express" to be false. There was no credible evidence of any discussion having taken place with the plaintiff along the lines alleged, and therefore none of the terms alleged could have been "express". I find this assertion in the pleading to be fanciful at best.

97. The fact that the defendant is seeking to rely upon a "verbal" agreement is itself a breach of the Award, because clause 36 states as follows:

> "(a) A pilot shall be employed, to perform duties as directed, on a contract for permanent hire, or a contract for casual hire in accordance with subclause (i) of this clause, but on no other basis.
>
> (b) Within seven days of his commencement in employment a pilot shall be provided by his employer with a Letter of Employment in the format shown in Appendix III confirming the pilot's term of employment."

On the evidence it is clear, and I find, that the plaintiff was never provided with a Letter of Employment at any time during his period of employment. Neither of the other two former pilots who gave evidence received such a document either.

98. There was no evidence of the plaintiff ever having the use of any motor vehicle at any time during his employment. I reject this part of the defence.

99. As to paragraph 8(c) it is clear from the evidence (and I find) that this (or anything like it) was never discussed with the plaintiff at any time during the period of his employment with the defendant. Further, it was never raised with the plaintiff at the time that he gave his notice of resignation. I find that it was first raised after the plaintiff had put in a claim for underpayment. I do not accept that this claim is genuine. It appears to have been "created" after the plaintiff had the "audacity" to challenge that he had been not paid in accordance with the Award.

100. At T249 Shane Archer gave the following evidence in relation to flight training (which was not challenged in cross-examination):

> "Now when you came to Kakadu Air, were you ever told that you'd be charged for any training or any flying that you did for the company?---No.
>
> And when you left were you ever charged for any training you did with the company?---No.

Was anything ever mentioned?---No."

101. The only other pilot (apart from the plaintiff) to give evidence (Damien Keen) was not asked any questions on this topic. The defendant's chief pilot was not called and I infer that his evidence would not have assisted the defendant's case. There was no evidence of any pilot who had been employed by the defendant at any time (let alone during the period that the plaintiff was employed) ever being required to pay for or account for any "additional flight training or flying time or pilot endorsement". There was no evidence to suggest that this was or had ever been the practice of the defendant at any time. There was no evidence to suggest that the defendant had ever required any pilot to pay "any money to the Defendant by way of bond". There was certainly no evidence to suggest that anything like this had ever been raised or discussed with the plaintiff at any time during his employment with the defendant.

102. In any event, it would appear that what the defendant is asking the court to infer as a term of the contract of employment may be expressly contrary to the Award in any event. Clause 24 of the Award states as follows:

> "(a) The employer shall be responsible for providing facilities to enable pilots employed by him on permanent hire to reach and maintain proficiency in such ground courses and such aeronautical skills as are required by the employer.
>
> (b) (i) Where the employer requires a pilot to obtain any licence, rating, endorsement, initial instrument rating or type endorsement, subject to subclause (c) of this clause, the employer shall pay all costs associated with obtaining such rating or endorsement.
>
> (ii) An employer who elects to arrange or provide training as described in paragraph (i) of this subclause for a pilot in his employ, other than at the request of that pilot and in the absence of an actual operational requirement for such training or on the understanding that it would be beneficial for the pilot's continued employment, shall offer such training in accordance with clause 49, and at no cost to the pilot.

(iii) An operator who arranges or provides for a pilot who is not currently in his employ, training of a type mentioned in paragraph (i) of this subclause on the understanding that such training will qualify the pilot to commence employment with that operator, shall be deemed for all purposes of this Award to be the pilot's employer as from the date of commencement of such training if the training is carried out in an aircraft operated by the deemed employer. Provided that where the aircraft used for such training is not one operated by the deemed employer he shall pay the training costs in full and the pilot's employment shall commence subsequent to completing the training.

(iv) Paragraphs (ii) and (iii) of this subclause shall not be construed to mean that a flying school shall be required to meet the cost of a pilot's training when such training has been provided at the request of the pilot for the purpose of upgrading or gaining a new qualification. This shall be so whether the pilot is at the time, employed by that school or not.

(v) Where a qualification gained by a pilot employed by a flying school under the provisions of paragraph (iv) hereof is utilised by the employer within 3 months of the pilot gaining such qualification, the cost of the training involved in obtaining the qualification shall be refunded to the pilot by the employer.

(c) No pilot shall be required by his employer to obtain any subsequent aircraft endorsement to his licence or instrument rating in his own time or at his own expense where such endorsement or rating is required of the pilot by the employer.

(d) Any required currency or proficiency training as prescribed in subclause (a) of this clause, shall not normally be conducted at the conclusion of a normal tour of duty."

103. Mr McDonald gave the following evidence:

"Before you start with that, do you want to say something about the cost of training and endorsing in relation to the Nomad as far as that the cost associated with Angelo?---Again in the interest of expediency as we've been through this matter previously and there's no doubt well come there'll become a great deal of argument from Angelo. I concede that the cost of training for aircraft up to and

including the Nomad not be challenged. I however, would like to be acknowledged that there is a real cost and the cost is not always born by the employer. The employer has a choice of who he employs and who he endorses. I accept the comments made by Your Honour that that is part of a responsibility of employment to grow their employees in terms to training and the normal manner that that is done by an employer is nowadays and back in 96 and 97 and as we going into turbine powered aircraft which costs a lot or money and were going up to utilise your ATPL type licence, in other words, your becoming a senior pilot over and above the lower end of the GA scale that a pilot is accepted into that level is acknowledging that he is taking the responsibility to the company as well. The company normally applies either a workplace agreement and/or a document which relates to the cost of that training. Its expected to be acknowledgment as - acknowledged by the employee that if he receives that training then that he is also acknowledging the cost of that training and is prepared to amortise the cost of that training over the specified period. It seems that most of those periods are 24 months on a pro rata basis, where training maybe $10,000 and if a pilot was to leave in 12 months through that 24 month period, then he would be expected to pay back some of that training."

104. There was no workplace agreement in this case. There was no "document" ever signed by the plaintiff or even shown to the plaintiff in relation to anything touching upon the aforementioned evidence. I attempted to find out what was the factual basis of the assertion by Mr McDonald. In answer to my attempt to obtain specifics he said:

> "Dealing with the time the Angelo was flying back in 95 to 98. What document was there between yourselves and Angelo relating to him bearing any cost or possible liability for costs in relation to training?---It was a verbal agreement that he would he would fly at that time.
>
> When was that agreement made; who was present?---It was private he he agreed to take on the additional responsibilities of Nomad sorry, Banderainte initially co-pilot and subsequent captain.
>
> What was said, where, when was it said and where was it; what time; what date; who was present?---There is no written agreement.
>
> You said it was oral where what date was it; when was this discussion?--- I'm unable to state categorically the date, whether it would be in accordance with the commencement of that training.

You tell me when that was?---The the training for co-pilot endorsement occurred in January 1997. And then moved to the captain on the same aircraft, commenced in March 1998.

Who was the conversation in January 97 between?---It would be between myself and Angelo. Anyone else present?---I'm unable to state.

Where was it?---It would have been at Arnhem Air or Darwin.

What was said?---I cant be specific on the wording but would be an insinuation that he has been chosen to go ahead with the endorsement and that he would be expected to fulfil an obligation to the company to continue to fly the aircraft through a reasonable period of time. Kakadu Air never had a formal agreement with its pilots. Its from the earliest part of employment with pretty much every employee of Kakadu Air you were entitled to growth through the company.

Well, there need to be more than an insinuation if you want to rely on an agreement which you say hes to get some $12,000 knocked off his claim, you're going to have to come up with some very clear words?---I'm unable to give them.

Because I have to know - if there was an agreement, I have to know what the terms of the agreement were and it cant be what you thought it was. It has to be I can only determine from what was said?---I in terms of the figure as on this paper claim acknowledging that he Angelo amortised his time on the aircraft as a co-pilot. He had very rapid promotion on that, he did do some 340 hours, I think it was, somewhere in that area, I'm guessing. And he did that over a year. My concern is that of the captain endorsement which he was very hungry for and we discussed it and he was the appropriate pilot to go into that seat as he'd done the other time as a co-pilot and he was ready and he was willing to go ahead with that endorsement." (emphasis added)

This last answer was clearly not responsive to the question. I find that there was no specific conversation or agreement with the plaintiff as alleged. I find that there was no discussion or agreement between the parties of any obligation being created in return for the plaintiff having the opportunity to fly the Banderainte aircraft. The decision for the plaintiff to be the one to fly this aircraft was based upon operational requirements, and the fact that the plaintiff was probably the best pilot for the position.

105. At best I find that the defendant (through Mr McDonald) may have had an expectation that the plaintiff would stay in their employ longer than he did. However, there was no agreement between the parties that the plaintiff would stay with the defendant for any set period. Further, there was no agreement that there would or might be any financial consequence to the plaintiff if he left his employment before any set date. There was no evidence of any standard or usual industry conditions that would be implied into the employment contract herein. Mr McDonald gave further evidence as to his expectations as follows:

> "All right, how many hours did he fly the Banderainte for after 10 March?--- That's a the figures I believe are approximately 40 from previous discussions in this court. I've I've from an earlier period, I don't have those figures in front of me for the it was actually up to around 46 but that would be he did fly the aircraft a couple of times after handing his resignation on 11 May. There was a couple of flights and I have them here. In fact, I could probably add - these figures are probably the same. Hes flown on May 12, May 13 and May 15. Those are the days that we probably were not able to under appreciating my situation that I had to try and get somebody else into the aeroplane and that we only had one chief in training captain. He was very busy and it was of no purpose whatsoever to waste his time on an endorsement that wasn't going to see the company any further(?). So he would have had to have moved his efforts into into another area to cover the loss of Angelo. So, the the 12th, 13th and 15th flights from my point of view seemed to be an assumption that there was nobody else to do the job. And thereafter, we would have had somebody else in that aircraft or made other plans for it.
>
> How many hours do you say he would've or should've flown it before he fulfilled his obligation?---50. Assuming that the chief in training captain was happy with his performance.
>
> So you'd say once he'd flown at 50, he wouldn't owe you anything?---(Inaudible) no, he would still he would owe me the cost, that is endorsement cost and it would be the normal situation with another company which puts it in writing and we don't, would be amortised over the normal 24 months."

Again, I find that there is no basis for this. Whether this was something that Mr McDonald believed in 1997 is unnecessary to decide. There simply was

no agreement express or implied on the subject at all. However, for reasons which I will turn to soon, I find that there was some mutuality of expectation between the plaintiff and defendant, but I further find that this was not sufficient to form any binding or enforceable agreement which should attract damages for any breach.

106. The real reason for Mr McDonald's complaint about the plaintiff leaving the employ of the defendant eventually came out. He said:

> "So all that in all, why do you say that he should have to pay you money now for the training as captain on the Banderainte?---He achieved, according to these figures, 44.2 hours. All of that we see as a cost to get - get here into the chair. We have - would have to go back and I can't again state without going through our records whether we did to get another pilot up because the negotiations had continued with Airnorth. It was a positive cost to us. It was a real cost. It was real dollars. The company was not gone. It continued for some time. And he had the endorsement on Nomad as well. That aeroplane continued for some time afterwards operating out of Darwin but Banderainte commenced some work on doing charters to Troughton Island after the sale to Airnorth. There was other work that we could've perhaps got for that aircraft had we had a pilot for it. I also have sympathised with all of my staff. We were devastated as a couple, Ngaire and I, to see the end of Arnhem Air. Nobody - it wasn't a pretty situation and we didn't like that at all. However, we were still in the aviation business. We were available for hire. We were looking for alternate work and for that particular aircraft, but Bruce Moncrieff stayed. And I believe that there is a, if not a real and moral issue involved here, in Angelo - and particularly the way it occurred, just disappearing and ran out of brain power - just gone. A flight one day without permission, notice in our hand the next day and gone. Particularly after Angelo achieved a lot with the company. I respect his situation as a career pilot. In fact that hasn't been demonstrated in this court. He was an absolute career pilot, took any opportunity that was possible and I respect the situation where he found himself in. However, it was real money and it compromised our situation."

107. The plaintiff also gave evidence on this topic as follows:

> "Mr Bilalis, as you said before you were flying the Banderainte before you resigned and you hadn't completed your 50 hours. In relation to your training can I call it I'll call it Banderainte training

in relation to your Banderainte training, were there any flights that were totally at the expense of Kakadu Air Services, in other words were there non-revenue flights for the purposes of your training?---Yes, there were.

Now, is it it's true isn't it that that would have been a cost to Kakadu Air Services, the cost of flying their planes specifically for your training, is that correct?---I agree, yes.

Thank you. Do you agree that when an employer such as Kakadu Air Services spends money on training a pilot that there's an expectation by the pilot sorry, I beg your pardon, I withdraw that. That there's an expectation on the part of the employer that the pilot be that the pilot continue employment in order for the employer to recover that cost?---Of course. If he didn't think I was staying he wouldn't have endorsed me, yes, if that's your question.

THE WITNESS: Your Honour, let me just say I'm a very honest person and I'm not here because I wouldn't have done I wouldn't have wasted Bobs resources training me for the five hours on the type, because that's what he's legally have to do the 50 hours has got nothing to do with that's all just part of the cost that's part of the operators certificate. CASA has made an agreement with Bob. I wouldn't have done the five hours which took over which took about two months to do I might add, which was supposed to have started three months earlier I wouldn't have done it if I knew that I was leaving, okay. And when I came up to Bob - - -

You agree with that, sorry?---I I didn't plan on leaving, I mean and at that stage I didn't know Bob was selling the company either.

Yes, what else did you want to say?---So I had a situation where the company's going up for sale and there wasn't much flying. The plane was sitting out there most days not doing any flights. I'm pre-flighting out the aircraft and having it sitting there, but we were usually taking the smaller twin-engine aircraft. We had discussion with Bob on that I believe it might be that day, I'm sure it was the date when I handed in my letter of resignation. I said, Bob, I just want to tell you that I'm resigning. And Bob said, Yes, I already know. And then he said something like, Oh, you know not much gets by me in this town. And I said, Fair enough. And he said, You don't need to leave because this company's going to you know the Banderainte still going to be here. And I said, Well, you know you put the company up for sale. And that was basically the way it went. He was disappointed and he said, Well, you know I wont continue

your training anyway, you know you're not going to fly the Banderainte as a captain. And Bruce kept me flying it, you know.

MR SPAMER: In other words, as far as supervision is concerned, after 50 hours of supervision you no longer have to be supervised. You do not have to have further flights under supervision. You may've had to do other things to become the command pilot, but in terms of supervised flights the 50 hours would've been sufficient. That is true, is it not?---If you say if you put the words Kakadu Air in there, Ill agree to that.

So in other words you would've that was a requirement of the defendant, of Kakadu Air?---Of Kakadu Air, yes, it was at that time.

At that time?---For Kakadu Air.

And you knew that at the time, did you not?---Yeah, of course I know the Civil Aviation orders, which we've exhibited. I know the Civil Aviation regulations, which I've exhibited.

But I thought you said it was a requirement of Kakadu Air Services?---It is.

Well, what's it got to do with the regulations?---Regulations only say five hours. My endorsement my log book says I was endorsed to be a captain on the Banderainte from March the 10th 1998. I didn't have to get the 50 hours to be a captain. I could've left there and got a job in Fiji flying Banderainte. I could've got a job in - - -

But the point is it was a requirement of Kakadu Air Services?---Yes.

That you do 50 hours?---Yes.

MR SPAMER: Mr Bilalis, you did know, did you not, that there would be an expectation on the part of Kakadu Air Services that you would continue with your employment when you are being trained in the Banderainte in an aircraft which is the largest aircraft they had? Do you agree that there would have been an expectation that you would stay on?---Of course and I - - -

HIS WORSHIP: And there'd be an expectation by him that they wouldn't sell the business.

THE WITNESS: Your Honour, let me just say I'm a very honest person and I'm not here because I wouldn't have done I wouldn't have wasted Bobs resources training me for the five hours on the

type, because that's what he's legally have to do the 50 hours has got nothing to do with that's all just part of the cost that's part of the operators certificate. CASA has made an agreement with Bob. I wouldn't have done the five hours which took over which took about two months to do I might add, which was supposed to have started three months earlier I wouldn't have done it if I knew that I was leaving, okay.

At the time you didn't know that?---I knew that for a fact and Bob was trying to tell me in a meeting that, Oh, were still going to have the Banderainte, were still going to operate it, were still paying for it. I said, Well, in the if you when I look when I start talking about my logbook I only flew the Banderainte - in the last three months I hardly ever flew it, the plane just sat there. There weren't enough people, Bob didn't want to fly it."(emphasis added)

108. The evidence of the plaintiff that 5 hours flying time was all that was required and that he achieved the rating of captain on the Banderainte from 10 March 1998 was not challenged. I accept this evidence. The 50 hour "requirement" was something that the defendant required, but there is no evidence as to why this was the case.

109. I find that the plaintiff was an honourable man. He was a career pilot and was keen to advance within the industry. He made no secret of this, and it was at all times something of which the defendant was aware. He would not have stayed with the defendant indefinitely, and there was nothing to suggest that the defendant expected him to. Any such expectation would have been unreasonable in any event. At some point he would be looking to pilot larger commercial aircraft, and this opportunity was unlikely to arise in the employ of the defendant.

110. On the evidence I find that the plaintiff was keen to move into the Banderainte, as it was an endorsement which would benefit his career path. He was grateful to the defendant for the opportunity when it presented itself. At the time that he moved into the Banderainte the plaintiff had no plans to move on. There was no evidence to suggest that he was looking at alternative employment. The plaintiff appreciated that if he got to do the

flying hours on the Banderainte in preference to other pilots then it was only reasonable that he fly the aircraft for a reasonable period. This was not the subject of any express discussion or agreement. Rather it was (I find) a matter of the plaintiff's own beliefs based on fairness. In some regards it also matched what Mr McDonald believed to be fair.

111. If matters had stayed as they were then the plaintiff would have stayed with the defendant longer than he did. However, a major change occurred. That part of the defendant's operation which involved the Banderainte (namely RPT routes) apparently was causing some (unexplained) financial difficulties. The defendant decided to sell that part of it's operation. The defendant informed it's chief pilot and some other employees (such as the maintenance staff) of it's plans. However, the pilots were not told initially of the pending sale. In particular the plaintiff was not told what was happening.

112. The plaintiff was aware that the flying hours on the Banderainte were down, and that the aircraft wasn't being used much due to passenger numbers. However, the first that the plaintiff knew about the defendant's possible plans was when he was shown the Australian newspaper. His evidence on this was in the following terms:

> "He didn't tell you that the company was for sale?---No, I read about it. He actually told the engineers two days before he told the pilots, but the engineers didn't know until the day the newspaper article came out and he then put the pilots together two days after the newspaper article came out in The Australian on the Friday, Arnhem Airline is up for sale."

And further:

> "You do know. I put it to you that Arnhem Air itself is not a company. Its simply a business, a trading name?---I'm not a business person. I don't all I knew is I read it in The Australian and - - -

Yes, so Mr Bilalis sorry. I've cut you off. You wanted to say that you read it in The Australian?---I read about it in The Australian. Bob spoke to the engineers that day and told the engineers. We were we weren't summoned together and told, we were just - basically hearsay. The chief pilot said, Hes getting rid of Darwin. That's all.

How do you know Bob spoke to the engineers?---Cause the engineers told me that he had a word with them the day before the - - -

Right. I put it to you that this so-called sale of Arnhem Air did not concern you at all? ---In what way? I mean, my objective - - -

And it was I put it to you that this proposed or this alleged sale of Arnhem Air that you'd heard about or read about in the and read about in the paper, that that in itself wasn't a concern as far as your employment with Kakadu Air was concerned, was it? You were you weren't - - -?--- Bruce Moncrieff told me on the way out to Maningrida that the company was for sale. He was laughing and he showed me The Australian. Right? My guts fell because I thought, Jesus Christ, what's going to happen with me?. Okay? That's basically what happened and I was expected to fly the rest of the day with that feeling in the back of in my stomach and with that in my head. What am I going to do with my life? Yes. And in evidence, the company was gone three months later, so I think everything I thought was going to come true, did come true.

Did you think that was going to come you thought before that everything you thought would come true sorry. Before before you had certain expectations, didn't you?---No, not before The Australian. That all just bang. On the way to Maningrida, bang, Here, go, have a look at this. Thanks very much, Bruce.

Was there an article in the paper?---The Australian on the Friday. You pull out The Australian on a Friday, that's got everything to do with aviation. Anything. If you want to know about aviation or about jobs, that's the - - -All right, I take your point. So you read about it in the paper and it was of great concern to you because you thought you were going to lose your job?---Yes, my livelihood was at stake, yes.

Did you you didn't have you had that concern. You've just said you've had that concern at the time but you did not discuss it with Bob, did you?--- No, I didn't discuss it with Bob.

But you could've discussed it with him, couldn't you?---Of course I could've.

> You could've discussed it with Ngaire, could you not?---No, not with Ngaire . I never saw Ngaire, she was in Jabiru.
>
> Right. So you say Ngaire was unavailable, but I suppose she would've been available over the phone, would she not have been?---Yes.
>
> So you could've spoken to her if you'd wanted to?---When I gave Bob the letter he told me all about the company.
>
> And then you could've spoken with Bob, Bob was available, but you didn't, and you had this burning concern in your inside you and in and didn't discuss it with him? ---As I said in February, that's correct. Arnhem Air was the Titanic. We could see the iceberg coming and everyone was jumping."

It is clear that the plaintiff was taken by complete surprise by the proposed sale, and felt let down by the defendant. The plaintiff went on to explain the reason for his concerns. He said:

> "What do you mean by big and what's big and what's whole?---Well, I came to Kakadu Air as an employee as a casual and basically Bobs operation was just Jabiru. He had some pilots staying in Darwin where he'd fly out full-timers and they'd do the scenic flights with us, then they'd go back into Darwin and take passengers. Arnhem Air started about eight months later. I had the RPT hours but I was kept in Jabiru for another year because he didn't want to lose someone senior and anyone else there to be looked after, the casuals that were there. Arnhem Air existed and became a bigger company, it was the RPT part of the company. With RPT gone - - -
>
> But hang on, Arnhem Air was never a company, you - - -?---Arnhem Air was being sold. Arnhem Air was the hangar, it was all the - - -
>
> Yes, but it wasn't a company?---It was the RPT routes.
>
> Mm mm?---As as we know now and which is what I feared, we would go back to living in Jabiru flying single engine planes, and you know most of almost all the twin-engines were gone.
>
> Its a totally different - - -?---That's what the company would the company the position that I was holding at the time was no longer going to be there, do you understand that? I would have had to go..."

And further:

"No, you didn't know that?---I did know that.

All you knew was that a part was being sold off?---No, Arnhem Air was being sold off, the actual RPT operation, the whole hangar, everything was up for sale. All that was going to be left was the Jabiru base, the single-engine aircraft doing scenic flights. I had progressed past that.

You didn't know that at the time, did you?---Of course I did.

You know it now?---No - - -

At the time you didn't know that?---I knew that for a fact and Bob was trying to tell me in a meeting that, Oh, were still going to have the Bandarandi, were still going to operate it, were still paying for it. I said, Well, in the if you when I look when I start talking about my logbook I only flew the Bandarandi - in the last three months I hardly ever flew it, the plane just sat there. There weren't enough people, Bob didn't want to fly it.

But there were other planes to fly?---Yeah, but they were going, that's what I was saying, Arnhem Air was up for sale. Arnhem Air was like was the RPT jewel of the company. I progressed into the company and moved onto the RPT. I didn't want to go back to flying single-engine aeroplanes. I didn't want to live back in Jabiru, and that's where it all is now."

And further:

"There was no-one else left to fly the Bandarandi. It was soon gone. So I didn't believe that the conversation with Bob was entirely going to be honest and I took it with a grain of salt. I was offered a job with Pearl Aviation which is I believe was a better choice and I stuck with it. Aviation is very difficult if you're not in the field and you've been out of the field for quite a long time, its even three or four months, you start forgetting things and getting very rusty. Its very easy to be out of the occupation for a number of years and unless you've got good credentials its very difficult to get back into it. So I took what I could at the time and took the casual position with Pearl Aviation, which they subsequently offered me promotions in the company, gave me the same opportunities as Bob did. Actually I was only with Pearl for eight months and I got an endorsement on a Super KingAir which was faster, higher, more pay all of that. And I only stayed on it for four months and then I left"

113. In the circumstances I consider that the plaintiff's decision to look for alternative employment was a reasonable one. As it turned out Air North bought the rights to the RPT routes that had been operated by Arnhem Air. The Banderainte had been in operation from the commencement of Arnhem Air operations in November 1995 through until the cessation of the RPT operations in the earlier part of 1998. The Banderainte was sold within a few months. It was understandable that the plaintiff did not wish to go back to living in Jabiru, which was a real possibility. It was further understandable that the plaintiff did not wish to go back to flying light passenger aircraft. This also was a real possibility.

114. On the evidence I find that (with the exceptions that I will refer to shortly) all flying that the plaintiff undertook whilst in the employ of the defendant was as required by the defendant for it's operations. Such flights were either for direct financial reward to the defendant or for the defendant's own purposes. The fact that by flying the plaintiff was able to increase his flying hours was an inevitable consequence. However, the defendant was engaged in a commercial operation and not a benevolent training ground for it's pilots.

115. On 11 January 1997 (ExP3), 27 January 1997 (ExP3) and 10 March 1998 the plaintiff flew check flights with the senior pilot in the Banderainte. The total of these flights is approximately 5 hours. All remaining hours (about 40 hours) on this aircraft were for the operational requirements of the defendant.

116. There was no agreement between the plaintiff and defendant as to the plaintiff ever having to contribute any money towards his flying the Banderainte, or indeed any other aircraft. Both parties had some expectations. The defendant expected the plaintiff to stay and fly the Banderainte for a reasonable period. The plaintiff expected that he would do this also, and was willing to do this but in return expected that he would be

afforded a reasonable opportunity to fly the aircraft. I find that this reasonable opportunity was removed by the defendant's decision to sell. It is no part of this claim to decide whether this decision was reasonable or not. The fact is that it was a significant and major change. The loss of the RPT routes would return the business operations of the defendant to predominantly charter and scenic flight work.

117. If the defendant seriously expected that it would have sufficient work to make the retention of the Banderainte commercially viable then I would have expected it to have acted differently than it did. Keeping the defendant would have been a priority. I would have expected the defendant to discuss it's operational plans with the defendant well before any advertised sale. Further, I would have expected the defendant to have explained to the plaintiff what his ongoing role would be. It did neither. On the evidence it appears that the first and only time that the defendant tried to address these issues was when the plaintiff handed his resignation to Mr McDonald. By then it was far too late, and it was understandable that the plaintiff would doubt the truth of any assertions.

118. The reality was as stated by the plaintiff. Namely that the Banderainte was being used very sparingly even while the defendant still had the RPT routes to service. Once they were gone the retention of this aircraft was even less likely to be viable.

119. I find that the decision of the plaintiff to resign was a reasonable one given the defendant's changed circumstances (namely the proposed sale of the Arnhem Air side of the business). It was the defendant who "moved the goal posts". This in my view, had the effect that any legitimate expectation that the parties may have had was no longer applicable. In any event I find that there was never a meeting of minds such that the expectations of the plaintiff and defendant ever formed a contract or a term of a contract.

120. I am not satisfied on the balance of probabilities that the defendant is entitled to recover any money from the plaintiff for any alleged cost of training. I dismiss this aspect of the Further Amended Defence. Even if the defendant was entitled to recover something I would be unable to quantify it in any event. The defendant's figures were "rubbery" at best.

121. In his closing address Mr Spamer referred to "two zones of facts". I have had difficulty understanding this submission. The fault may be mine. Doing the best that I can, I understand that he was saying that one "zone of facts" was the plaintiff's claim for meal allowance, hard lying allowance etc. I have already dealt with these issues above and made my findings.

122. The other "zone of facts" was said to be what was the plaintiff's total remuneration/wages for the whole period from 1 July 1995 until 26 May 1998. Mr Spamer asserted that the plaintiff had an obligation to prove exactly what he was paid for every week of his employment and how this was calculated. He went on to assert that if the plaintiff didn't do this (and the plaintiff did not do it in his case) then the plaintiff had to lose. It is this submission in relation to the second "zone of facts" that I do not understand.

123. In his claim the plaintiff has expressly limited his claim to the specific matters that I have referred to above and made findings upon. It was no part of the plaintiff's claim that he was alleging a general deficit in terms of his wages. As it was not part of his claim then it was (I find) unnecessary for him to traverse it. There is the very general pleading in the Further Amended Defence that "The overall or total consideration received by the Plaintiff from the Defendant was equal to or exceeded the entitlements of the Plaintiff under the Award". There were no particulars to support this allegation. Mr Spamer seems to be asserting that by this (or maybe some other pleading of the defendant) the plaintiff is vested with an evidential and legal onus. I reject this submission. No authority for it was put before me. In

effect Mr Spamer was asserting that the plaintiff would have to prove a negative.

124. As a general proposition he who asserts must prove. If any evidential burden was created it was in my view upon the defendant. If the defendant truly asserted that the plaintiff was paid more than he was entitled to such that some set off was warranted then the defendant could (and should) have introduced evidence to that effect. It did not.

125. It is alleged in paragraph 8(a) of the Further Amended Defence “That the Defendant shall remunerate the Plaintiff at least to the extent required under the Award”. The plaintiff agrees with this, and so do I. In relation to each of the entitlements in the Award they set out the minimum entitlements. It is open to an employer to pay above award rates in respect to any particular entitlement. It is however not open to an employer to pay under award rates in respect to any entitlement.

126. It was no part of the pleadings or evidence that the plaintiff had agreed to accept an under award entitlement on one matter in order to receive an over award payment in another. If there had been such evidence then I am not sure that such an agreement would be binding or enforceable in any event. But as that does not form part of the evidence before me it is unnecessary for me to rule on this aspect.

127. Further, I reject and dismiss paragraph 11 of the Further Amended Defence. The plaintiff does not deny that his opportunity to fly with the defendant and get his flying hours up and increase his endorsements was a real value to him. He expressly acknowledges it in his evidence. But likewise, the plaintiff provided flying services which were a real value to the defendant. It is impossible to say on the evidence that the "real value" of one was greater than the other. To the extent that the defendant is seeking any equitable relief in this paragraph there is an old maxim that “he who comes to equity must come with clean hands”. The defendant’s hands are not clean.

It has committed numerous breaches of the Award. It has treated the Award with scant regard.

128. There was no agreement either express or implied that the plaintiff ever agreed to accept under Award benefits in lieu of "flight training or flying time or pilot endorsements". At no relevant time was the plaintiff aware of the Award. Even if there had been such an agreement (which there wasn't) I would have reservations as to it's legality and enforcability in any event.

129. I reject the whole of the Further Amended Defence.

130. Mr Spamer also raised the lack of proper notice for the resignation as required by the Award, and seems to be seeking a set-off. This is not raised in the pleadings. That should be enough to dismiss it by itself but since this was a small claim I will consider it briefly. Clause 36(c) of the Award states as follows:

> "The employment of a pilot engaged on permanent hire shall, subject to the provisions of subclause (a) of clause 44 – redundancy procedures, be terminable either:
>
> (i) by the employer or the pilot giving four weeks' written notice except where the pilot has completed less than twelve months of continuous service in which case two weeks' written place shall apply; or
>
> (ii) by payment to the pilot or forfeiture by the pilot from salary due, of an amount equal to four weeks' salary as the case may be in lieu of notice as aforesaid.
>
> Provided that a period of notice may be reduced or waived by mutual agreement in which case salary shall be paid up to and including the last day of work and provided further that nothing in the Award shall derogate from an employer's rights at common law to terminate a pilot for reasons which are to be stated in writing to the pilot at the time of dismissal, nor derogate from a pilot's right to grieve his dismissal in accordance with the Grievance Procedure."

131. The plaintiff handed to the defendant his notice for resignation (ExP15) which was dated 11 May 1998. Although the defendant was disappointed by

the plaintiff's decision to leave it accepted the resignation. As found earlier, at this time the plaintiff was not aware of the Award conditions, and therefore was not aware of clause 36(c). Also as found earlier the defendant was aware of the Award and was expressly named in it. The defendant could have insisted on four weeks' notice from the plaintiff but there is no suggestion on the evidence that it did so. The plaintiff was seeking to give two weeks notice (without realising that more might be required) and the defendant accepted it (when it knew or ought to have known that four weeks' notice was required). In those circumstances I find that the defendant has expressly or impliedly agreed to reduce or waive any notice beyond that which was given. The defendant had two weeks to check the Award and to raise clause 36(c) with the plaintiff. It failed to do so. I reject this claim.

132. There are some other aspects of the evidence which require some comment. In the course of the case the defendant produced very few documents and it was fortunate that the plaintiff maintained such good records. At some stages it was clear that the plaintiff actually had some documents which might have been a part of the defendant's records (such as ExP4 and ExP10). It was lucky that he did as I doubt that the defendant would have discovered or produced them to the court.

133. In the course of the trial the defendant did produce various spreadsheets. Some of these purported to be the defendants records as to what was actually paid to the plaintiff plus some calculations as to what the defendant suggested should have been paid (such as ExP12 and ExD12). Another of these (ExD13) purported to be a cut and paste of what the plaintiff actually was paid. It was suggested that for each pay period the computer would generate a pay slip and the same records were then maintained on the computer in electronic form. Again it was fortunate that the plaintiff still had retained a few of his pay slips. When the plaintiff's pay slips were compared to the defendant's computer records and spreadsheets there were some marked differences. These differences were unable to be explained by

Mr McDonald in his evidence when they were pointed out to him. The differences remain unexplained. The explanation may be sinister. On the evidence at to how ExD13 was created an explanation based upon error or incompetence would not (in my view) be possible. Even if the defendant's accounting systems were shoddy the group certificated and ExD13 should still be identical. If there were errors then the same errors should appear in both. This however is not the case.

134. For 18/02/98 the pay slip ExP17 discloses:

Gross pay	641.20
Less Tax	156.20
Net pay	485.00

ExD13 states for the same pay period:

Gross pay	653.20
Less Tax	158.20
Net pay	495.00

This difference is unexplained.

135. For 15/04/98 the pay slip ExP18 discloses:

Gross pay	641.20
Less Tax	156.20
Net pay	485.00

ExD13 states for the same pay period:

Gross pay	713.20
Less Tax	183.20
Net pay	530.00

This difference is unexplained.

136. For 22/04/98 the pay slip ExP19 discloses:

Gross pay	641.20
Less Tax	154.20
Net pay	487.00

ExD13 states for the same pay period:

Gross pay	641.20
Less Tax	156.20
Net pay	485.00

This difference is unexplained.

137. I am unable to accept the documents produced by the defendant as being accurate business records, and I am unable to have any faith in them.

138. In summary I find that the plaintiff would be entitled to receive the following amounts:

$2,778.36	for underpaid casual wages
$2,733.90	for dinner allowances
$4,840.00	for hard lying allowances
$ 768.00	for demotion from Nomad Captain RPT
$2,306.00	for being captain of Nomad from 8/1/97
$1,674.23	for instrument rating allowance on RPT
$ 60.00	in relation to ExP10
$3,900.00	interest on late termination pay
$19,060.49	TOTAL

139. As noted above the plaintiff has abandoned anything in excess of the small claim limit, namely $10,000.

140. Rule 25.04 of the Small Claim Rules allows the court to include in a judgment interest at a rate that it considers appropriate on the whole or a part of the sum for the whole or a part of the period between the date the cause of action arose and the date of judgment. I also note that under Rule 25.04(2)(a) this rule does not authorise the giving of interest on interest. But I note that the interest part of the judgment is only $3900, and $9060.49 of the plaintiff's entitlement has been abandoned. Given the way that this matter has proceeded and the fact that the plaintiff has been successful I consider that he should receive interest at the rate of 6% per annum from the date of his termination (25.5.98) until judgment herein (published on 12.12.02) on the full amount of $10,000.

141. I therefore calculate interest as follows:

$10,000 x 6% = $600 per annum.

25.5.98 to 24.5.02 = 4 years

25.5.02 to 12.12.02 = 202 days = 0.55 of a year

therefore $600 x 4.55 = $2730.

142. I enter judgment for the plaintiff against the defendant in the sum of $12,730 inclusive of interest up to the date of judgment herein. Interest on the judgment debt will continue to accrue until paid in full in accordance with Rule 25.02(1) of the Small Claim Rules.

143. The remaining issue is the question of costs. If I have a discretion to award costs then I would award them in favour of the plaintiff. If I am unable to award costs but am able to award expenses then I would order them in favour of the plaintiff. However, the defendant relies upon section 347 of the Act. That section is in the following terms:

(1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) shall not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.

(2) In subsection (1):

costs includes all legal and professional costs and disbursements and expenses of witnesses.

144. The effect of this section is, in my view, that I am unable to award costs or disbursements or witness expenses to the plaintiff. The defendant did not "institute" these proceedings. If it were intended to be able to award costs against a defendant then I would expect the words "or defended" to appear immediately after the word "instituted". As they don't I consider that the matter is clear.

145. I will grant liberty to both parties to relist this matter at 14 days notice to the other party (and at a time convenient to myself) in the event that any consequential order is sought.

146. These reasons are to be published by posting them to the plaintiff, and to the defendant care of Mr Spamer. This has been done to avoid further expense to the parties because the plaintiff is resident interstate. He has already attended in Darwin on three separate occasions for the hearing of this matter. I now publish these reasons.

Dated this 12th day of December 2002.

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D. TRIGG
STIPENDIARY MAGISTRATE