FEDERAL COURT OF AUSTRALIA

Triple Zero Victoria v Morton-Pederson [2025] FCA 419

Appeal from:	*Morton-Pederson & Ors v Emergency Services Telecommunications Authority* [2023] VMC 7
File number(s):	VID 668 of 2023
Judgment of:	**MCEVOY J**
Date of judgment:	30 April 2025
Catchwords:	**INDUSTRIAL LAW** – appeal from Magistrates' Court of Victoria – where magistrate found that certain employees covered by the *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2015* and the *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2019* were entitled to be paid a mentoring allowance in accordance with those agreements – where these employees were also paid a workplace trainer increment in accordance with the agreements – whether magistrate erred in construction the agreements – whether employees are entitled to be paid both a mentoring allowance and a workplace trainer increment – appeal allowed – magistrate erred in construction of the agreements – orders of magistrate set aside
Legislation:	*Fair Work Act 2009* (Cth), s 565(1) *Federal Court of Australia Act 1976* (Cth), s 28(1)
Cases cited:	*Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 *Australian Broadcasting Corporation v Australian Public Sector, Professional and Broadcasting Union* (1992) CAR 545 *Boensch v Pascoe* (2019) 268 CLR 593 *Construction Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* (2012) 203 FCR 371 *Dearman v Dearman* (1908) 7 CLR 549 *Fox v Percy* (2003) 214 CLR 118 *Health Services Union of Australia v Vision Australia* (2000) 98 IR 376

	James Cook University v Ridd (2020) 278 FCR 566 *King v Melbourne Vicentre Swimming Club Inc* (2021) 308 IR 171 *Kucks v CSR Limited* (1996) 66 IR 182 *Minister for Immigration and Border Protection v SZVFW* (2019) 264 CLR 541 *Morton-Pederson & Ors v Emergency Services Telecommunications Authority* [2023] VMC 7 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 *Warren v Coombes* (1979) 142 CLR 531 *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536
Division:	Fair Work
Registry:	Victoria
National Practice Area:	Employment and Industrial Relations
Number of paragraphs:	83
Date of hearing:	21 March 2025
Counsel for the Appellant:	Chris O'Grady KC and Leigh Howard
Solicitor for the Appellant:	Lander & Rogers
Solicitor for the First and Second Respondents:	Dan Dwyer on behalf of the Communications Electrical and Plumbing Union
Counsel for the Third Respondent:	Eugene White
Solicitor for the Third Respondent:	Victorian Ambulance Union

ORDERS

VID 668 of 2023

BETWEEN:	**TRIPLE ZERO VICTORIA** Appellant
AND:	**TRISTAN MORTON-PEDERSON** First Respondent
	JASON SMITH Second Respondent
	SYLIVA SCANLAN Third Respondent

ORDER MADE BY: **MCEVOY J**

DATE OF ORDER: **30 APRIL 2025**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Magistrates' Court of Victoria at Melbourne on 11 August 2023 in proceedings N10981635, N10981792, and MAG-CI-220031609 be set aside.
3. Proceedings N10981635, N10981792, and MAG-CI-220031609 in the Magistrates' Court of Victoria be dismissed.

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

REASONS FOR JUDGMENT

MCEVOY J:

1 On 2 June 2023 a Victorian magistrate determined that Workplace Trainers employed by the Emergency Services Telecommunications Authority (**ESTA**) are entitled to a Mentor Allowance under two applicable enterprise agreements when they perform mentoring duties as part of their Workplace Trainer role: *Morton-Pederson & Ors v Emergency Services Telecommunications Authority* [2023] VMC 7.

2 The ESTA, which has since been re-named Triple Zero Victoria, brings an appeal to this court pursuant to s 565(1) of the *Fair Work Act 2009* (Cth). The issue presented by the appeal is whether the learned magistrate erred in finding that Workplace Trainers are entitled to the Mentor Allowance when they perform mentoring duties as part of their Workplace Training role, despite already being compensated by a Workplace Training increment as part of their annual salary.

3 Mr Tristan Morton-Pederson, Mr Jason Smith and Ms Syliva Scanlon are the workers who were the plaintiffs in the proceedings in the Magistrates' Court. They are, respectively, the first, second, and third respondents to this appeal.

4 For the reasons that follow I have determined that the learned magistrate erred in his legal construction of the relevant enterprise agreements on certain grounds advanced by the appellant. The appeal will therefore be allowed, the orders made by the Magistrates' Court set aside, and the proceedings in the Magistrates' Court will be dismissed.

BACKGROUND

5 The appellant employs persons to attend to emergency telephone calls and dispatch emergency services for police, the State Emergency Service, fire and ambulance services across Victoria. Some of these employees are employed as Workplace Trainers. Other employees are engaged from time to time to mentor other employees.

6 The two enterprise agreements which are relevant to these proceedings are the *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2015* (**2015 Agreement**) and the *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2019* (**2019 Agreement**). These agreements confer entitlements on, relevantly, the appellant's Workplace Trainers and Mentors. Workplace

Trainers are paid to perform training duties through a Workplace Training increment as part of their annual salary (see clauses 21.6.1-21.6.3, 21.8.12-21.8.15, 21.1 and 21.2 of the 2015 Agreement, and clauses 25.2, 25.3, 25.4.12-25.4.15 of the 2019 Agreement), whilst a Mentor is paid, in addition to the salary attaching to their classification, an hourly allowance on each occasion they perform mentoring duties (see clause 21.10 of the 2015 Agreement and clause 25.11 of the 2019 Agreement).

7 The proceedings before the learned magistrate concerned three concurrent claims that were made by the present respondents as employees of the appellant for the payment of the Mentor Allowance under 2015 Agreement and the 2019 Agreement. At the times relevant to the claims, all three employees were appointed as Workplace Trainers. They contended in the Magistrates' Court that they should have been paid the Mentor Allowance, in addition to the Workplace Training increment paid as part of their annual salary, at the times that they performed mentoring duties. The appellant argued that the Workplace Training increment paid as part of their annual salary is intended to, and has always, compensated them for all training duties, including mentoring.

8 The learned magistrate found for the three employees, ordered compensation, and imposed civil penalties on the appellant that totalled $30,000. Compensation was agreed between the parties, and was done by reference to the appellant's records which showed each occasion the employees had performed mentoring duties on their shifts.

9 In the proceeding in the Magistrates' Court the parties tendered a statement of agreed facts, which they jointly adopted as a chronology in this court.

10 The appellant relies on the evidence of two of its employees before the learned magistrate, being that of Ms Michelle Smith, a Senior Strategic Advisor, and Mr Mario Matic, a Senior Manager Learning & Performance. The appellant also relies on written submissions dated 13 February 2025, and reply submissions dated 6 March 2025.

11 The first and second respondents rely on written submissions dated 27 February 2025. The third respondent relies on the witness statement of Ms Scanlon dated 31 March 2023, and written submissions also dated 27 February 2025.

THE TERMS OF THE ENTERPRISE AGREEMENTS

The 2015 Agreement

12 The 2015 Agreement covered and applied to the parties between 14 April 2016 and 29 April 2020.

Workplace Trainer entitlements in the 2015 Agreement

13 Clause 21.6 of the 2015 Agreement stated:

> **21.6 Workplace Trainer – Arrangement pre 1 March 2017**
>
> 21.6.1 An Employee who is selected as a Workplace Trainer and who successfully completes an accredited Certificate IV in Assessment and Workplace Training shall receive an annual allowance. This amount will be added to the Employee's salary for all purposes for the duration of the appointment as a Workplace Trainer.
>
> 21.6.2 The annual allowance for a Workplace Trainer is $5,824.
>
> 21.6.3 Annual Review of Workplace Trainers:
>
> (a) Each Workplace Trainer's performance as a Trainer will be reviewed annually (in September) or more frequently when necessary as part of addressing identified improvement requirements.
>
> (b) Following that review, retention in the role of Workplace Trainer will be dependent on meeting performance requirements.
>
> (c) If a Workplace Trainer is not successful in the annual performance review, he/she shall be entitled to assistance, advice and retraining from ESTA in order to reach the necessary standard. This will be provided immediately and the Employee shall be required to meet the standard within six months or be removed from the role of Workplace Trainer.
>
> (d) Where, after the six month period, an existing Workplace Trainer is not to continue in that role, payment of their Workplace Trainer allowance will cease from the date of notification.
>
> 21.6.4 Reduction in the Number of Workplace Trainers
>
> (a) When the number of Workplace Trainers is to be reduced, ESTA will:
>
> (i) advise all Workplace Trainers;
>
> (ii) select the Workplace Trainers to be ceased in that role; and
>
> (iii) provide the selected Employees with three months' notice that they will cease to be a Workplace Trainer and that their allowance will cease at that time.
>
> 21.6.5 Increase in the Number of Workplace Trainers
>
> (a) Where there is a need to fill a role of Workplace Trainer as a result of:
>
> (i) an increase in the number of Workplace Trainers required, or

(ii) the need to replace an existing Workplace Trainer,

the role will be advertised throughout ESTA.

21.6.6 Team Leaders

(a) Team Leaders are not eligible to be or remain as Workplace Trainers.

21.6.7 Casual Employees

(a) Casual Employees are not eligible to be or remain as Workplace Trainers.

21.6.8 Part-Time Employees

(a) Part-time Employees are eligible to be selected as Workplace Trainers subject to the following additional provisions:

(i) A Part-time trainer will be required to work the hours reasonably scheduled for training and associated requirements, consistent with Full-time trainers, as determined by ESTA from time to time.

(ii) A Part-time Employee who is required to work additional hours, up to Full-time hours, in order to undertake their training responsibilities will do so at single time rates of pay.

14 Clause 21.7 of the 2015 Agreement stated:

21.7 Call-taker WPT and Call-taker and Dispatcher WPT – Arrangements post 1 March 2017

21.7.1 No later than 1 March 2017, ESTA will reduce the number of Workplace Trainers in accordance with clause 21.6.4 ("**Selection Process**").

21.7.2 ESTA will reduce the pool of existing Workplace Trainers to the number required to fill the new Call-taker WPT and Call-taker and Dispatcher WPT positions. As a result of the Selection Process, ESTA will engage one Call-taker WPT or Call-taker and Dispatcher WPT per team (i.e. 25 in total).

21.7.3 If insufficient existing Workplace Trainers elect to take up the positions outlined in clause 21.7.2, the remaining positions will be offered to the broader operational workforce. The reduction in numbers and subsequent appointments to new positions will occur no later than 1 March 2017 and will be actioned concurrently with introduction of the Assistant Team Leader positions.

21.7.4 For the avoidance of doubt, once the positions of Call-taker WPT and Call-taker and Dispatcher WPT commence:

(a) the position of Workplace Trainer and the allowance that attaches to that position will no longer exist; and

(b) clause 21.6 (and any other reference to 'Workplace Trainers" in this Agreement) will no longer have any effect.

21.7.5 ESTA will not compel multi-skilled Call-taker WPT and Call-taker and Dispatcher WPT to train in their additional service if they do not have a sufficient level of comfort in their own skill level to do so.

21.7.6 Any Workplace Trainer who is not selected by ESTA for the Call-taker WPT and Call-taker and Dispatcher WPT positions will continue to be employed in their existing classification.

15 Clause 21.8 of the 2015 Agreement stated, relevantly:

21.8 Salary Criteria

Payment of the salaries specified in 21.2 shall be in accordance with the following provisions:

21.8.12 Call-taker WPT Level 3

The salary for Call-taker WPT Level 3 shall be paid upon successfully being appointed into a Call-taker WPT Level 3 role; successfully completing an accredited Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker Level 3.

21.8.13 Call-taker and Dispatcher WPT Level 3

The salary for Call-taker and Dispatcher WPT Level 3 shall be paid upon successfully being appointed into a Call-taker and Dispatcher WPT Level 3 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker and Dispatcher Level 3.

21.8.14 Call-taker WPT (Multi-skilled Employee) Level 4

The salary for Call-taker WPT (Multi-skilled Employee) Level 4 shall be paid upon successfully being appointed into a Call-taker WPT (Multi-skilled Employee) Level 4 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker Level 4.

21.8.15 Call-taker and Dispatcher WPT (Multi-skilled Employee) Level 4

The salary for Call-taker and Dispatcher WPT (Multi-skilled Employee) Level 4 shall be paid upon successfully being appointed into a Call-taker and Dispatcher WPT (Multi- skilled Employee) Level 4 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker and Dispatcher Level 4.

16 Clauses 21.1 and 21.2 of the 2015 Agreement stated:

21.1 **Variations**

The following variations will apply to base salaries with effect from the date indicated and are as follows:

Positions	**31 October 2015 (Year 1 Base Salary)**	**31 October 2016 (Year 2 Base Salary)**	**31 October 2017 (Year 3 Base Salary)**
Trainee, and Levels 1, 2 and 3	3%	3%	3%
Call-taker Level 4	3.25%	3.25%	3.25%
Dispatcher Level 4	3.25%	3.25%	3.25%
Call-taker WPT, Call-taker and Dispatcher WPT Level 3	N/A	N/A	3%

Call-taker WPT, Call-taker and Dispatcher WPT Level 4	N/A	N/A	3.25%
Assistant Team Leader	N/A	N/A	3%
Team Leader Levels 1 and 2	5%	3%	3%

21.2 **Schedule**

The variations in base salaries outlined in sub-clause 21.1 will result in the following operative base annual salaries:

CLASSIFICATION					
Position	**Level**	**Base Salary pre increase**	**Year 1 Base Salary**	**Year 2 Base Salary**	**Year 3 Base Salary**
Trainee Call-taker		$40,488	$41,703	$42,954	$44,242
Call-taker	1	$45,549	$46,915	$48,323	$49,773
Call-taker	2	$50,610	$52,128	$53,692	$55,303
Call-taker	3	$54,101	$55,724	$57,396	$59,118
Call-taker	4	$57,591	$59,463	$61,395	$63,391
Call-taker WPT*	3	N/A	N/A	$63,220	$65,116
Call-taker WPT*	4	N/A	N/A	$67,219	$69,404
Trainee Dispatcher		$48,865	$50,331	$51,841	$53,396
Dispatcher	1	$54,974	$56,623	$58,322	$60,072
Dispatcher	2	$61,081	$62,913	$64,801	$66,745
Dispatcher	3	$64,571	$66,508	$68,503	$70,558
Dispatcher	4	$68,061	$70,273	$72,557	$74,915
Call-taker and Dispatcher WPT*	3	N/A	N/A	$74,327	$76,557
Call-taker and Dispatcher WPT*	4	N/A	N/A	$78,381	$80,928
Assistant Team Leader*		N/A	N/A	$77,500	$79,825
Team Leader	1	$74,490	$78,215	$80,561	$82,978
Team Leader	2	$77,980	$81,879	$84,335	$86,865

* Position to commence on 1 March 2017.

Mentor entitlements in the 2015 Agreement

17 Clause 6 of the 2015 Agreement stated, relevantly:

> **Mentor** means an Employee who is responsible for and acts as a guide and adviser to another Employee during their training / development phase while monitoring their performance and assessing their individual learning needs and providing constructive feedback. "Mentor" also means an Employee who provides on-shift familiarisation to Employees who are complying with a prerequisite training course requirement or whilst the Employees are in training.

18 Clause 21.10 of the 2015 Agreement stated:

> **21.10 Mentor Allowance**
>
> 21.10.1 A Mentor Allowance shall be paid to all ESTA accredited Mentors while they

are performing their mentoring duties.

21.10.2 The current hourly allowance will be increased from $2.90 as follows:

(a) from the beginning of the first pay period commencing on or after 31/10/2015 - $2.99;

(b) from the beginning of the first pay period commencing on or after 31/10/2016 - $3.08; and

(c) from the beginning of the first pay period commencing on or after 31/10/2017 - $3.17

Ancillary clauses in the 2015 Agreement

19 Clause 12 of the 2015 Agreement stated, relevantly:

12 Hours of Work

12.1 Ordinary Hours of work shall be an average of up to 38 hours per week, inclusive of all categories of leave and exclusive of the hours accrued in accordance with sub clause 14.1.

12.7 There will be no requirement for Workplace Trainers or Mentors to make up hours as a result of conducting their training or mentoring duties.

20 Clause 22.2 of the 2015 Agreement stated, relevantly:

22.2 Shift Penalty Application

22.2.5 Where a Workplace Trainer, Mentor or other Employee is required to change from their normal rostered shift(s) in order to either conduct or participate in ESTA training, and for the period of that change the amount of shift penalty (or penalties) payable would be less than that which would have been payable had the change not taken place, the Employee shall be paid the penalty (or penalties) which would have been paid but for the change.

21 Clause 24.7 of the 2015 Agreement stated:

24 Overtime

24.7 Where a Workplace Trainer, Mentor or other Employee is required to change from their normal rostered shift(s) in order to either conduct or participate in ESTA training, and, for the period of that change the amount of "rostered Overtime" would be less than that which would have been payable had the change not taken place, the Employee shall be paid the "rostered Overtime" which would have been paid but for the change. Any additional Overtime incurred whilst training would only be payable for the hours in excess of their normal shift rostered hours.

The 2019 Agreement

22 The 2019 Agreement, which commenced to operate on 30 April 2020, covers and applies to the parties.

Workplace Trainer entitlements in the 2019 Agreement

23 Clause 25.2 of the 2019 Agreement states:

> 25.2 **Classifications and rates of pay – 17 June 2009 to 14 August 2020**
>
> The following operative Base Salaries will apply from the commencement of this Agreement to 14 August 2020.

Classification	Level	Base Salary before commencement of Agreement	Effective 17 June 2019	Effective 1 July 2020
Trainee Call-taker		$44,242	$45,348	$46,481
Call-taker	1	$49,773	$51,017	$52,292
Call-taker	2	$55,303	$56,686	$58,103
Call-taker	3	$59,118	$60,596	$62,111
Call-taker	4	$63,391	$64,976	$66,600
Call-taker WPT	3	$65,116	$66,744	$68,412
Call-taker WPT	4	$69,404	$71,139	$72,917
Trainee Dispatcher		$53,396	$54,731	$56,099
Dispatcher	1	$60,072	$61,574	$63,113
Dispatcher	2	$66,745	$68,414	$70,124
Dispatcher	3	$70,558	$72,322	$74,130
Dispatcher	4	$74,915	$76,788	$78,707
Call-taker and Dispatcher WPT	3	$76,557	$78,471	$80,432
Call-taker and Dispatcher WPT	4	$80,928	$82,951	$85,024
Off-Shift WPT		$90,702	$92,970	$95,294
ATL		$79,825	$81,821	$83,866
Team Leader	1	$82,978	$85,052	$87,178
Team Leader	2	$86,865	$89,037	$91,262

24 Clause 25.3 of the 2019 Agreement states:

> 25.3 **Classifications and rates of pay – from 15 August 2020**
>
> From 15 August 2020, the following classifications and rates of pay will apply. All increments in the table below that apply to an employee will be added to that employees [sic] Base Salary.

Initial Salary	15 August 2020	1 July 2021	1 July 2022
Trainee Call-taker (base upon which all increments are applied)	$46,481	$47,643	$48,834
ATL Level 1	$83,866	$85,963	$88,112
ATL Level 2 (Multi-skilled)	$89,303	$91,536	$93,824
Team Leader	$97,182	$99,612	$102,102

Increment	Starting amount	1 July 2021	1 July 2022
1 year Call-taker	$6,000	$6,150	$6,304
2 year Call-taker	$4,000	$4,100	$4,203
1 year Dispatcher	$6,000	$6,150	$6,304
2 year Dispatcher	$2,000	$2,050	$2,101
ERTCOMM Call-taker	$2,500	$2,563	$2,627
NETCOMM Call-taker	$2,500	$2,563	$2,627
CFA Call-taker	$2,500	$2,563	$2,627
MFB Call-taker	$2,500	$2,563	$2,627
Vicpol Call-taker	$2,500	$2,563	$2,627
SES Call-taker	$2,500	$2,563	$2,627
ERTCOMM Dispatcher	$2,500	$2,563	$2,627
NETCOMM Dispatcher	$2,500	$2,563	$2,627
MFB Dispatcher	$2,500	$2,563	$2,627
CFA Dispatcher	$2,500	$2,563	$2,627
Vicpol Dispatcher	$2,500	$2,563	$2,627
SES Dispatcher	$2,500	$2,563	$2,627
On-shift WPT	$6,000	$6,150	$6,304
Off-shift WPT (paid in addition to the On-shift WPT increment)	$5,000	$5,125	$5,253
3 years of service increment	$1,000	$1,025	$1,051

25 Clause 25.4 of the 2019 Agreement states, relevantly:

> **25.4 Classification structure – from commencement to 14 August 2020**
>
> Payment of the salaries specified in clause 25.2 shall be in accordance with the following provisions:
>
> 25.4.12 Call-taker WPT Level 3 - salary shall be paid upon: successfully being appointed into a Call-taker WPT Level 3 role; successfully completing an accredited Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker Level 3.
>
> 25.4.13 Call-taker and Dispatcher WPT Level 3 - salary shall be paid upon: successfully being appointed into a Call-taker and Dispatcher WPT Level 3 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker and Dispatcher Level 3.
>
> 25.4.14 Call-taker WPT (Multi-skilled Employee) Level 4: - salary shall be paid upon: successfully being appointed into a Call-taker WPT (Multi-skilled Employee) Level 4 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker Level 4.
>
> 25.4.15 Call-taker and Dispatcher WPT (Multi-skilled Employee) Level 4 - salary shall be paid upon: successfully being appointed into a Call-taker and

Dispatcher WPT (Multi-skilled Employee) Level 4 role; successfully completing Certificate IV in Assessment and Workplace training; and gaining and maintaining accreditation as a Call-taker and Dispatcher Level 4.

26 Clause 25.6 of the 2019 Agreement states:

25.6 **Classification structure – from 15 August 2020**

25.6.1 On 15 August 2020 all employees will transition to a new classification structure provided that where disadvantage would occur as a result of transition to the new classification structure, the employee's salary will be 'grand parented' (i.e. they will continue to receive their existing salary until they would be entitled to a greater amount under this Agreement or any successor). Grand parented employees will be entitled to annual salary increases in accordance with the salary increases outlined in this agreement.

25.6.2 Under the classification structure commencing from 15 August 2020, all Employees' salaries will be built on the classification of Trainee Call-Taker with additional increments (some of which are time-based and some of which are skills-based) payable in accordance with the table below.

25.6.3 All new employees engaged by ESTA will be engaged in one of the following primary streams consisting of two skill sets:

(a) Police and SES; or

(b) CFA and MFB; or

(c) Ertcomm and Netcomm.

Increment	**Event which triggers entitlement to increment**
1 Year Call-taker	1 year from date of commencement of employment as a Call-taker
2 Year Call-taker	2 years from date of commencement of employment as a Call-taker
1 Year Dispatcher	1 year from date of classroom signoff on first Dispatcher sills increment
2 Year Dispatcher	2 year from date of classroom signoff on first Dispatcher sills increment
ERTCOMM Call-taker	Date of classroom signoff
NETCOMM Call-taker	Date of classroom signoff
CFA Call-taker	Date of classroom signoff
MFB Call-taker	Date of classroom signoff
VicPol Call-taker	Date of classroom signoff
SES Call-taker	Date of classroom signoff
ERTCOMM Dispatcher	Date of classroom signoff
NETCOMM Dispatcher	Date of classroom signoff
MFB Dispatcher	Date of classroom signoff
CFA Dispatcher	Date of classroom signoff
VicPol Dispatcher	Date of classroom signoff
SES Dispatcher	Date of classroom signoff
On-shift WPT	Date of contract as on shift WPT
Off-shift WPT	Date of contract as Off-shift WPT (this increment will always be in addition to the On-shift WPT increment)
3 Years of Service	3 years from date of commencement of employment

Mentor entitlements

27 Clause 6 of the 2019 Agreement states, relevantly:

> **Mentor** means an Employee who is responsible for and acts as a guide and adviser to another Employee during their training / development phase while monitoring their performance and assessing their individual learning needs and providing constructive feedback. "Mentor" also means an Employee who provides on-shift familiarisation to Employees who are complying with a prerequisite training course requirement or whilst the Employees are in training.

28 Clause 25.11 of the 2019 Agreement states:

> **25.11 Mentor Allowance**
>
> 25.11.1 A Mentor Allowance shall be paid to all ESTA accredited Mentors while they are performing their mentoring duties.
>
> 25.11.2 The Mentor Allowance of $3.17 per hour will increase by 2.5% on the first Pay Period on or after 17 June 2019, 1 July 2020, 1 July 2021 and 1 July 2022 to the following amounts:
>
> (a) 1 July 2019 - $3.25;
>
> (b) 1 July 2020 - $3.33;
>
> (c) 1 July 2021 - $3.41; and
>
> (d) 1 July 2022 - $3.50.

Ancillary clauses in the 2019 agreement

29 Clause 26.2 of the 2019 Agreement states, relevantly:

> **26.2 Shift Penalty Application**
>
> 26.2.5 Where a Workplace Trainer, Mentor or other Employee is required to change from their normal rostered shift(s) in order to either conduct or participate in ESTA training, and, for the period of that change the amount of shift penalty (or penalties) payable would be less than that which would have been payable had the change not taken place, the Employee shall be paid the penalty (or penalties) which would have been paid but for the change.

30 Clause 28.7 of the 2019 Agreement states:

> **28 Overtime**
>
> 28.7 Where a Workplace Trainer, Mentor or other Employee is required to change from their normal rostered shift(s) in order to either conduct or participate in ESTA training, and, for the period of that change the amount of "rostered Overtime" would be less than that which would have been payable had the change not taken place, the Employee shall be paid the "rostered Overtime" which would have been paid but for the change. Any additional Overtime incurred whilst training would only be payable for hours in excess of their normal shift rostered hours.

RELEVANT PRINCIPLES

31 As the appeal concerns the correctness of the learned magistrate's interpretation of the 2015 Agreement and the 2019 Agreement, rather than a challenge to a discretionary or evaluative decision, it is the correctness standard of review which applies. That is to say, the construction of the agreements given below is either correct or not, and this court will intervene if it concludes that the construction is erroneous: see, for example, *Minister for Immigration and Border Protection v SZVFW* (2019) 264 CLR 541 at [41], [43], [46], [48]-[49] (Gageler J), citing *Warren v Coombes* (1979) 142 CLR 531.

32 The applicable principles when construing industrial instruments are stated succinctly by the Full Court in *James Cook University v* ***Ridd*** (2020) 278 FCR 566 at [65] (Griffiths and SC Derrington JJ) in the following terms:

> The relevant principles applicable to the interpretation of an enterprise agreement may be stated as follows:
>
> (i) The starting point is the ordinary meaning of the words, read as a whole and in context (*City of Wanneroo v Holmes* (1989) 30 IR 362 at 378; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [53]; *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]).
>
> (ii) A purposive approach is preferred to a narrow or pedantic approach — the framers of such documents were likely to be of a "practical bent of mind" (*Kucks v CSR Ltd* (1996) 66 IR 182 at 184; *Shop, Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [16]; *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]). The interpretation "turns upon the language of the particular agreement, understood in the light of its industrial context and purpose" (*Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2]).
>
> (iii) Context is not confined to the words of the instrument surrounding the expression to be construed (*City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [53]). It may extend to "… the entire document of which it is a part, or to other documents with which there is an association" (*Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518; *Australian Municipal, Administrative, Clerical and Services Union v Treasurer of the Commonwealth* (1998) 82 FCR 175 at 178).
>
> (iv) Context may include "… ideas that gave rise to an expression in a document from which it has been taken" (*Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518).
>
> (v) Recourse may be had to the history of a particular clause "Where the circumstances allow the court to conclude that a clause in an award is the product of a history, out of which it grew to be adopted in its present form …" (*Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 at 518).

(vi) A generous construction is preferred over a strictly literal approach (*George A Bond & Company Ltd (in liq) v McKenzie* [1929] AR (NSW) 498 at 503-504; *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 at [57]), but "Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties" (*City of Wanneroo v Holmes* (1989) 30 IR 362 at 380).

(vii) Words are not to be interpreted in a vacuum divorced from industrial realities but in the light of the customs and working conditions of the particular industry (*City of Wanneroo v Holmes* (1989) 30 IR 362 at 378-379; *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197]).

33 There is no dispute between the parties as to the applicability of these principles of interpretation, and the third respondent refers also to *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [2] (Gleeson CJ and McHugh J), [30] (Gummow, Hayne and Heydon JJ), and [66] (Kirby J); and *King v Melbourne Vicentre Swimming Club Inc* (2021) 308 IR 171 at [40]-[44] (Collier, Katzmann and Jackson JJ).

GROUNDS OF APPEAL

34 The appellant's case is that, applying these principles, the learned magistrate should have found that while Workplace Trainers may undertake mentoring as part of the broader Workplace Trainer role, Workplace Trainers are separate roles to the role of a Mentor (as defined) under both agreements. Thus, it is said, when Workplace Trainers undertake mentoring as part of their broader role, they are not entitled to the Mentor Allowance.

35 Accordingly the appellant advances the following grounds of appeal:

1. The learned Magistrate erred in the legal construction of the *Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2015 and he Emergency Services Telecommunications Authority Operational Employees Enterprise Agreement 2019* (**Agreements**) in finding that Workplace Trainers were and are entitled to the Mentor Allowance provided in each enterprise agreement when mentoring, in addition to their ordinary salary. The proper construction being they were and are not so entitled.

2. Further to Ground 1:

   (a) The Magistrate failed to give any or sufficient weight to the fact that clauses of the Agreements that provide for the payment of the Mentor Allowance state that the Mentor Allowance is payable while ESTA accredited Mentors "are performing <u>their</u> mentoring duties" (emphasis added);

   (b) The Magistrate failed to give any or sufficient weight to the evidence before him to the effect that mentoring formed part of the ordinary duties allocated to Workplace Trainers as part of their substantive position;

(c) The Magistrate failed to give any or sufficient weight to the wages provided to Workplace Trainers, paid to compensate Workplace Trainers for, among other things, mentoring;

(d) The Magistrate failed to give any or sufficient weight to the fact that mentoring duties are performed by employees other than Workplace Trainers;

(e) The Magistrate failed to give any or sufficient weight to the context provided by the whole of the Agreements, in particular the distinctions that the Agreements draw between Workplace Trainers and Mentors for the purpose of administering payments;

(f) The Magistrate failed to give any or sufficient weight to the terms of the predecessors to the Agreements which informed the purpose of the Mentor Allowance and the origins of the role of Workplace Trainer;

(g) The Magistrate erred in his conclusion that the evidence before him established a common inadvertence between the parties subject to the Agreements as to whether the Mentor Allowance was payable to persons employed as Workplace Trainers;

(h) The Magistrate failed to construe the provisions governing the payment of the Mentor Allowance by reference to the ordinary and natural meaning of the term "allowance" being: a payment made in addition to wages on account of some extenuating or qualifying circumstance;

(i) The Magistrate failed to construe the provisions governing the payment of the Mentor Allowance by reference to the industrial usage of the term "allowance" being: a payment intended to:

1. reimburse an employee for actual expenditure incurred; or

2. compensate an employee for some condition associated with the work.

This is as opposed to wages, which are intended to compensate an employee for work that is performed as part of their ordinary duties.

36 In substance it is the appellant's case that the learned magistrate failed correctly to interpret the text of the agreements in light of their relevant context and purpose.

Grounds 1 and 2(a)-2(d)

The appellant's submissions

37 Insofar as grounds 1 and 2(a)-(d) are concerned, the appellant emphasises the definition of Mentor in clause 6 of both the agreements, as extracted above.

38 The appellant submits that there are two categories of employees who perform work falling within the definition: Workplace Trainers (as is evident from the current and historically applicable position description), and call takers or dispatchers who are accredited mentors and who are allocated mentoring duties.

39 The appellant's case is that in this context clause 21.10.1 of the 2015 Agreement and clause 25.11.1 of the 2019 Agreement, which are in identical terms, are significant. As has been mentioned, they provide that:

> A Mentor Allowance shall be paid to all ESTA accredited Mentors while they are performing **their mentoring duties**.
>
> (Emphasis added.)

40 The appellant submits that the phrase "their mentoring duties" is important because it indicates that the "mentoring duties" that attract the allowance are duties that sit outside the employee's normal or ordinary duties. This, it is contended, suggests that it is mentoring undertaken when a call taker or dispatcher acts as a "mentor" (a role outside of their normal job description) as opposed to a Workplace Trainer (whose job description includes tasks falling within the definition of Mentor and whose remuneration includes an annual Workplace Training increment, as to which see clause 21.6.1 of the 2015 Agreement and clause 25.4 of the 2019 Agreement) that attracts the Mentor Allowance.

The respondents' submissions

41 The third respondent answers the appellant's case on grounds 1 and 2(a)-2(d) as follows. First, she submits that the appellant does not deal separately with what are the clear words creating the obligation to pay the mentoring allowance. The first and second respondents make the same point. Secondly, the third respondent submits that the appellant's contention that there are two categories of employee who perform work within the work of a "Mentor" as defined in clause 6 of both agreements (Workplace Trainers on the one hand and call-takers or dispatchers who are accredited as mentors and who are allocated mentoring duties on the other) is contrary to the findings of the learned magistrate. It is said that the learned magistrate found that mentoring work as defined in clause 6 of each of the agreements is not part of the job description of Workplace Trainers (see, for example at [117]-[127] of the learned magistrate's reasons).

42 The third respondent submits that while this court must make up its own mind as to facts, it should not do so as if it were trying the matter at first instance. The third respondent contends that even if there is, or may be, a different view as to the facts, this does not create an appellable error.

43 The third respondent's position is that insofar as grounds 1 and 2(a)-2(d) are concerned, the appellant fails to explain why the learned magistrate erred in his findings at [117]-[127]. And to the extend the appellant relies on the phrase "their mentoring duties" to suggest that the

Mentor Allowance is not paid if a person performs mentoring as part of their normal duties, the third respondent says that this fails to grapple with the uncontested evidence that mentoring is given by specific allocation (as to which the third respondent refers to the learned magistrate's finding at [116]).

44 Thus the third respondent submits that in the context of both of the agreements it should be accepted by the court that persons who are required to perform mentoring duties are generally rostered on to do so (although occasionally they may be directed to perform such duties on an *ad hoc* basis) and the obligation to mentor is to mentor a particular employee. In these circumstances the third respondent submits that it is not open to the appellant to assert that "their mentoring duties" means anything other than the facts as found by the learned magistrate (at [116]).

45 Further, the third respondent submits, the appellant's assertion that a Workplace Trainer is not entitled in those circumstances to the payment of a mentor allowance because their job description "includes tasks falling within the definition of Mentor" ignores the plain findings of the learned magistrate that the definition of Mentor and the job description of Workplace Trainer were not identical, in particular the finding that they were effectively different.

46 The first and second respondents rely substantially on the third respondents' submissions as to grounds 1 and 2(a)-2(d). Their principal submission in this regard is that the language of both agreements is clear and unambiguous and there is no reason for the court to enquire further into the relevant context to find support for the conclusion that Workplace Trainers are not entitled to be paid a Mentor Allowance.

The proper construction of the agreements

47 Insofar as the respondents submit that the appellant's ground one alleges an error of fact or an error made in the exercise of a discretion, I do not accept that this is so. As the appellant submits, this appeal does not involve an examination of witness credibility or reliability, and the conclusion of the learned magistrate is not entitled to deference of the kind the respondents suggest. Axiomatically, and as the appellant submits, the duty of an appellate court is to decide the case – the facts and the law – for itself: *Warren v Coombes* at 552 (Gibbs ACJ, Jacobs and Murphy JJ). The court must conduct a real review of the trial and the judge's reasons, and cannot excuse itself from "weighing conflicting evidence and drawing [its] own inferences and conclusions": *Fox v Percy* (2003) 214 CLR 118 at [25] (Gleeson CJ, Gummow and Kirby JJ) citing *Dearman v Dearman* (1908) 7 CLR 549 at 564 (Isaacs J).

48 It is for this court on appeal to determine the proper meaning of clause 21.10.1 of the 2015 Agreement, and clause 25.11.1 of the 2019 Agreement. In this regard I accept the appellant's submission that the respondents do not address the reality that both agreements draw an explicit distinction between Workplace Trainer and Mentor. I accept that the agreements draw these distinctions because they proceed on the basis that at a particular point in time it is possible to be a Mentor or a Workplace Trainer, but not both. I accept also that this conclusion is buttressed by the fact that the clauses establish an allowance for "their mentoring duties" rather than an allowance simply for "mentoring duties". I accept that the phrase "their mentoring duties" is significant because it indicates that the "mentoring duties" that attract the allowance are duties which sit outside the employee's usual duties. This is not so for a Workplace Trainer.

49 The appellant is correct to submit that distinctions are not to be drawn between particular Mentors and the form of their mentoring duties for the purpose of the Mentor Allowance, and that there is an explicit distinction drawn in the agreements between the position of a call taker or dispatcher undertaking responsibilities and a Workplace Trainer.

50 For these reasons it must be accepted that it is mentoring undertaken when a call taker or dispatcher acts as a Mentor, as opposed to a Workplace Trainer, that attracts the Mentor Allowance.

51 Grounds 1 and 2(a)-(d) must therefore succeed. This conclusion would be sufficient for the appeal to be allowed, the learned magistrate's orders of 11 August 2023 to be set aside, and the proceedings in the Magistrates' Court to be dismissed. Nonetheless, in deference to the parties' submissions there is utility in also addressing the appellant's grounds 2(e), and 2(h)-(i), given their connection to grounds 2(a)-(d). In all the circumstances it is unnecessary to consider the appellant's grounds 2(f)-(g): see *Boensch v Pascoe* (2019) 268 CLR 593 at 600-601 [7]-[8] (Kiefel CJ, Gageler and Keane JJ), 629-630 [101] (Bell, Nettle, Gordon and Edelman JJ).

Grounds 1 and 2(e)

The appellant's submissions

52 The appellant submits that its position insofar as grounds 1 and 2(a)-(d) is concerned is reinforced by other provisions in the agreements that proceed on the basis that the positions of Workplace Trainer and Mentor are discrete and attract different benefits. Clauses 12.7, 22.2.5 and 24.7 of the 2015 Agreement and clauses 26.2.5 and 28.7 of the 2019 Agreement, within the body of each individual clause, make discrete reference to persons who are Workplace

Trainers and persons who are Mentors. The appellant submits that this supports the construction that two distinct roles are established, and that the pay and conditions in the agreements for those roles are arranged accordingly. Once again, it is the appellant's position that these clauses make clear that at a particular time an employee can be a Workplace Trainer or a Mentor, but they cannot be both.

53 Further, the appellant submits that the fact that the agreements separately define a Workplace Trainer, (see clauses 21.6.1 – 21.6.3, 21.8.12 – 21.8.15, 21.1 and 21.2 of the 2015 Agreement and clauses 25.2, 25.3, 25.4.12 – 25.4.15 of the 2019 Agreement), notwithstanding the fact that elements of their role fall within the definition of Mentor, supports the position that these are two different roles. It is said that the distinction between the roles for the purposes of administering pay also suggests that this is so.

The respondents' submissions

54 The third respondent submits that the appellant is not correct to proceed on the basis that there is an identity between clause 6 of the agreements defining "Mentor" and the job descriptions of Workplace Trainers. She submits also that there is no proper basis to make contrary findings to those of the learned magistrate in this regard. It is also the third respondent's position that insofar as the appellant seeks support for this proposition from the fact that the agreements define a Workplace Trainer (clauses 21.6, 21.8 and 21.1 of the 2015 Agreement and 25.2, 25.3, 25.4.12 – 25.4.15 of the 2019 Agreement) these clauses, whilst referring to Workplace Trainers, do not provide a definition of the duties to be undertaken by the Workplace Trainers but rather set out the circumstances which must exist prior to them being paid the Workplace Training annual increment.

55 The first and second respondents submit generally that the learned magistrate was correct in finding that, as Workplace Trainers, they perform mentoring duties in addition to Workplace Training duties and are therefore entitled to paid the Mentor Allowance for the occasions on which they do so.

The significance of distinctions drawn by the agreements between Workplace Trainers and Mentors for the purpose of administering payments

56 It must first be observed, consistently with the appellant's submissions, that insofar as the third respondent submits that Workplace Trainers receive "the workplace training annual allowance" this is not correct. I accept that under the agreements Workplace Trainers are paid a salary (which includes an annualised Workplace Training increment) for the performance of their

skills in their day to day duties, including their mentoring skills. That the agreements do not contain a description of the duties of a Workplace Trainer is of no consequence. As the appellant submits, the agreements do not define the entire employment relationship between the appellant and its employees (for example, the position descriptions which define an employee's duties are clearly relevant in this regard). I accept that the agreements only seek to prescribe the pay and conditions which attach to particular positions and that the scope of what the positions may require will generally be informed by the contract of employment and other relevant documents (such as the position descriptions). I also accept that the proper interpretation of enterprise agreements must take account of this context: see *Construction Forestry, Mining and Energy Union v Wagstaff Piling Pty Ltd* (2012) 203 FCR 371 at [50] (Buchanan and Katzmann J); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 287-288 (Wilson J).

57 To the extent that the first and second respondent submit further that there is necessarily a distinction between Workplace Trainers and Mentors because a Workplace Trainer's duties are performed in a classroom environment and Mentoring is performed in a "live environment", during their shift, I do not accept this submission. As the appellant submits, and as can be seen from the clauses of the agreements which are extracted above, the relevant clauses draw a clear distinction between an on-site Workplace Trainer and an off-site Workplace Trainer. I accept the appellant's submission that a Workplace Trainer's duties (found in the relevant position description) may be performed both in a classroom and on-site during a shift or "live environment" because employees require continued training by Workplace Trainers even after their classroom training, and that the distinction the first and second respondents seek to draw is artificial.

58 I accept therefore that another aspect of the learned magistrate's error in his construction of the agreements was that he failed to give any or sufficient weight to the context provided by the whole of the agreements insofar as they draw a distinction between Workplace Trainers and Mentors for the purpose of administering payments.

59 Grounds 1 and 2(e) succeed also.

Grounds 1 and 2(h)-2(i)

The appellant's submissions

60 In support of these further grounds the appellant notes that the additional payment for being a Mentor is expressed as an allowance (see clause 21.10 of the 2015 Agreement and clause 25.11 of the 2019 Agreement). It is submitted, by reference to the *Macquarie Dictionary* and the evidence of Mr Matic, that an allowance ordinarily means pay "in addition, as to a wage, et cetera, on account of some extenuating or qualifying circumstance." It is the appellant's position that the longstanding industrial practice of paying an allowance is for compensation of two kinds: expense-related and condition-related allowances. The appellant submits that expense-related allowances seek to reimburse for actual expenses incurred (such as travel, tools and meals allowances), whilst condition-related allowances are to compensate for the particular nature or location of the relevant work itself (that is, disabilities, special skills or duties, or locality allowances). The appellant makes reference in this regard to the *Wage Fixing Principles Case* (1978) 211 CAR 268 [Principle 8], and notes that the Workplace Trainer position has developed in line with this understanding, referring in this regard to the evidence of Ms Smith. It is submitted that a wage (even where augmented by an annualised increment) has a different purpose, which is to compensate for the employee's application of skill and knowledge that is required for the job. The appellant refers to observations in the industrial context that "in the ordinary course skill and knowledge which is endemic to a classification should be contained in a wage rate": see *Australian Broadcasting Corporation v Australian Public Sector, Professional and Broadcasting Union* (1992) CAR 545; *Health Services Union of Australia v Vision Australia* (2000) 98 IR 376 at [47].

61 The appellant submits that the evidence established that the job of a Workplace Trainer extended to mentoring duties, and that the learned magistrate erred in finding to the contrary (at [117]-[130]).

62 In this respect the appellant notes that:

(a) the definition of Mentor in clause 6 of agreements has a number of elements:

(i) "act[ing] as a guide and adviser to another Employee during their training/development phase";

(ii) "monitoring their performance and assessing their individual learning needs and providing constructive feedback"; and

(iii) "provid[ing] on-shift familiarisation to Employees who are complying with a prerequisite training course requirement or whilst the Employees are in training";

(b) the most recent Workplace Trainer position description describes duties of a Workplace Trainer as extending to:

(i) "provid[ing] constructive, supportive feedback to learners";

(ii) "assess[ing] competency-based training modules";

(iii) "assess[ing] performance of personnel utilising [the appellant's] training curriculum";

(iv) "perform[ing] training needs analysis of personnel";

(v) "identify[ing] training needs"; and

(vi) "mak[ing] recommendations to fill learning gaps.

63 The appellant submits that consistently with the object of providing Workplace Trainers with a salary (and not an allowance), the position description goes on to describe duties as encompassing the performance of "[o]ther duties as directed by the Manager ESTA Learning Centre, consistent with the above duties and responsibilities". It may be accepted that this description is in the position descriptions which currently apply to Workplace Trainers, and also in those which have applied historically to them between April 2011 and February 2017. All were all in evidence before the learned magistrate.

64 The appellant submits that the position description establishes that there is a mentoring dimension to the job of a Workplace Trainer, and that the core features of mentoring as expressed in clause 6 (guiding, advising, monitoring, assessing) find expression in the position description. Further, it is submitted that the fact that the language is not exact is not material, having regard to the fact that the purpose of clause 6 is to describe qualifying criteria for a payment of an allowance, whereas the purpose of the position description is to describe exhaustively what skills and knowledge can be used from time to time to make up the substantive position of Workplace Trainer.

65 The appellant submits that the learned magistrate's approach to this issue (at [117] – [121]) reflects the narrow and pedantic approach to industrial instruments that this court has eschewed, referring in this regard to *Ridd* at [65(ii)], citing *Kucks v CSR Limited* (1996) 66 IR 182 at184 (Madgwick J); *Shop Distributive and Allied Employees' Association v Woolworths*

SA Pty Ltd [2011] FCAFC 67 at [16] Marshall, Tracey and Flick JJ); and *WorkPac Pty Ltd v Skene* (2018) 264 FCR 536 at [197] (Tracey, Bromberg and Rangiah JJ).

66 The appellant points also to the second respondent's concession in cross examination before the learned magistrate that the Workplace Trainer position description language was describing mentoring duties, which it is said was consistent with the evidence going to the established practice within the appellant, about which there was no dispute. Workplace Trainers, the appellant submits with reference to the evidence of its senior managers Ms Smith and Mr Matic, have always performed mentoring duties, and have never been provided with the Mentor Allowance when doing so. The appellant contends, again relying on the evidence of these two senior employees, that historically there has been no objection to this practice from within the appellant's Workplace Trainer cohort (aside from the second and third respondents).

67 Fundamentally, the appellant submits that it is inconsistent with the purpose of an allowance to provide it to someone for the performance of duties that make up their substantive position.

The respondents' submissions

68 The third respondent submits that the appellant's grounds 1 and 2(h)-(i) proceed on the incorrect basis that the duties of a Mentor as defined are identical with the position description of a Workplace Trainer.

69 The third respondent contends also that this is contrary to the findings of the learned magistrate and there is no proper basis for regarding those findings of fact, and the fact that there is a "mentoring dimension to the job of a workplace trainer" is not to the point.

70 The third respondent submits that even if (which it denies) the mentoring position were to be identical with part of the Workplace Trainer job descriptions, the plain words of the respective clauses of the agreements setting out when a mentor allowance is to be paid are not qualified by that coincidence.

71 As has been mentioned, it is the third respondent's submission, adopted by the first and second respondents, that the words of each of the two agreements are clear. That is, that the clauses mandate the payment of a mentor allowance when two criteria exist: a person must be an accredited mentor; and, secondly, they must perform mentoring duties. The respondents submit that they are accredited mentors. It is their position that they are rostered to perform, have performed, and continue to perform mentoring duties on discrete occasions which are duly recorded by the appellant.

72 In other words it is the respondents' position that even if there is an identity between the two positions there is no basis to suggest that an allowance should not be paid in the circumstances described in the agreements. They maintain that there is no inconsistency in paying an employee an allowance when they perform a particular aspect of their duties, and that allowances are not paid to employees who are not performing their duties.

73 The first and second respondents submit, in addition, that the appellant's grounds of appeal fail to distinguish between Mentoring (as defined) as a task and as a classification for the purposes of the agreements. It is said that Mentoring is a task and not a classification and therefore does not attract a wage. In this regard it is submitted that under the agreements a Workplace Trainer may be qualified as a Mentor but not be entitled to any additional remuneration. The first and second respondents submit that the Workplace Trainer increment is better understood as a payment for a skill or qualification (being a Certificate IV qualification), whereas the Mentor Allowance on the other hand is compensation for a task performed. It is only when a Workplace Trainer is performing Mentoring duties that the Mentor Allowance is payable to them, which the first and second respondents submit Workplace Trainers perform on occasion and not continuously.

74 The respondents submit finally that the appellant's contentions ignore the words of the clause which require the allowance to be paid to "all" employees who are accredited mentors who perform mentoring duties. It is said that the appellant's contentions require that no meaning should be given to the word "all", or that it is unnecessary in the clause, and that words used should be given meaning and effect, referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (McHugh, Gummow, Kirby and Hayne JJ).

The nature and purpose of an allowance

75 I accept the appellant's submission that it is inconsistent with the purpose of an allowance as that term is generally understood in this context to provide it to an employee for the performance of duties that make up their substantive position. For this reason I accept that the appellant has also made out grounds 1 and 2(h)-2(i), that is that the learned magistrate erred in his construction of the agreements by failing to construe the provisions governing the payment of the Mentor Allowance by reference to the ordinary and natural meaning of the term "allowance" and the industrial usage of that term.

76 The appellant is correct to observe that the respondents' submissions do not come to terms with the distinction that the Workplace Trainer position description seeks to describe what skills and knowledge the appellant may call on from time to time, and that the definition of Mentor in clause 6, on the other hand, is describing qualifying criteria for an allowance payment that attaches to positions that do not entail mentoring.

77 It is also correct that the respondents have not engaged with the second respondent's admission in cross examination that the Workplace Trainer position description contemplates mentoring duties. I accept the appellant's submission that the respondents fail to explain why the agreements should be taken to mean that Workplace Trainers should, in effect, be paid twice for performing such duties – once through their Workplace Training increment included in their annualised salary, and again through payment of the Mentor Allowance.

78 It is also relevant to record, as appellant submits, that the first and second respondents observations as to the distinction between an allowance and a wage in the industrial context supports, rather than undermines, the appellant's position. As the first and second respondents observe, a wage for a position is generally intended to provide compensation for skills and knowledge inherent in the role, whereas an allowance is a payment in compensation for some additional skill, knowledge, or hardship. I accept the appellant's submission that this is precisely why Workplace Trainers have not been paid, and are not required to be paid, the Mentor Allowance for their mentoring duties.

79 It may further be observed, as the appellant does in its submissions in reply, that the first and second respondents' contention that Workplace Trainers receive their wage only because they possess a Certificate IV qualification cannot be reconciled with the terms of clause 21.6 of the 2015 Agreement which continues the payment of the allowance to the duration of the appointment as a Workplace Trainer (see also clause 25.4 of the 2019 Agreement). Nor can it be reconciled with the evidence of the position descriptions, which describe the position as one that involves the application of a diverse range of skills and knowledge, rather than one which simply requires a certificate IV qualification.

80 Insofar as the first and second respondents submit that in all of the circumstances that payment of the Mentor Allowance to Workplace Trainers is a sensible industrial outcome, for the reasons given I do not accept that this is so.

81 Grounds 1 and 2(h)-2(i) must also succeed.

CONCLUSION

82 It follows from the appellant's success with grounds 1 and 2(a)-2(e) and 2(h)-2(i) that the appeal must be allowed. Consistently with the relief sought by the appellant in its notice of appeal, the orders made by the Magistrates' Court at Melbourne on 11 August 2023 in proceedings N10981635, N10981792 and MAG-CI-003109 should be set aside and those proceedings dismissed (see s 28(1) of the *Federal Court of Australia Act 1976* (Cth)). The appellant is correct to observe that the stay ordered by Besanko J on 18 September 2023 is automatically discharged upon these orders being made.

83 There will be no order as to costs.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy.

Associate:

Dated: 30 April 2025