

SUPREME COURT OF QUEENSLAND

CITATION: *Australian Institute of International Understanding Limited v Mitsui* [2021] QSC 346

PARTIES: **AUSTRALIAN INSTITUTE OF INTERNATIONAL UNDERSTANDING LIMITED**
(plaintiff)
v
MAKOTO MITSUI
(defendant)

FILE NO/S: BS No 2587 of 2016

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2021

DELIVERED AT: Brisbane

HEARING DATE: 1, 2, 3, 4 November 2021

JUDGE: Martin J

ORDER: **1. Judgment for the plaintiff in the sum of \$195,721.50.**
2. I will hear the parties on costs.

CATCHWORDS: CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – REMEDIES AND PENALTIES FOR BREACH OF DUTY – COMPENSATION – where the plaintiff alleges that six actions taken by the defendant constitute breaches of the defendant’s fiduciary and statutory duties – where the defendant argues that, by virtue of his position, he was authorised to direct staff to pay him various allowances and his employment contract contained a term, implied by custom and practice, that authorised him to receive several payments – whether the defendant improperly used his position to gain an advantage for himself

EMPLOYMENT LAW – TERMINATION AND BREACH OF CONTRACT – TERMINATION OR BREACH – GENERALLY – where the defendant counterclaims for unpaid accumulated long service leave, unpaid accumulated annual leave, reimbursement of health insurance payments and underpayment of salary – where the plaintiff admits that the defendant is entitled to some unpaid long service leave

but denies that there was any agreement for the payment of health insurance costs – whether the plaintiff breached the employment contract

Civil Proceedings Act 2011, s 58

Corporations Act 2001, s 181, s 182, s 1317H

Criminal Code, s 408C

Limitations of Actions Act 1974, s 10

BCI Finances Pty Ltd (In Liq) v Binetter (No 4) (2016) 348 ALR 227

Health Services Union v Jackson (No 4) (2015) 108 ACSR 156

COUNSEL: AS Macpherson (Solicitor) for the plaintiff
Defendant appeared for himself

SOLICITORS: Corney & Lind Lawyers for the plaintiff

- [1] The plaintiff (AIIU) is a not-for-profit company based in Brisbane. It operates a business of offering cultural exchange programs, primarily between Japan and Australia, for students aged between 15 and 18.
- [2] The defendant (Mr Mitsui) was a director of AIIU between 4 April 2005 and 15 April 2015. During that period, the defendant was also employed as Managing Director and, separately, as General Manager of the plaintiff. The plaintiff terminated the defendant’s employment for a “serious breach” of his obligations under the employment contract and “serious misconduct” on 4 December 2015.
- [3] In its Amended Statement of Claim, AIIU seeks common law or equitable damages for breach of contract and breach of fiduciary duties, monies had and received, and compensation under s 1317H of the *Corporations Act* 2001 (“the Act”). At the trial, it relied on its claim for compensation.
- [4] AIIU alleges that six actions taken by Mr Mitsui constitute breaches of the express and implied terms of the employment contract or the defendant’s fiduciary and statutory duties:
- (a) by email dated 8 October 2013, the defendant instructed the plaintiff’s accounting staff to pay him a position allowance and backdate the payment to 1 August 2013 (“Position Allowance”),
 - (b) from 1 July 2012 until 4 December 2015, the defendant was paid and retained certain amounts described as director’s remuneration (“Director’s Remuneration”),
 - (c) from 1 January 2014 until 4 December 2015, the defendant was paid and retained certain amounts described as travel cash (“Travel Cash”),
 - (d) from 1 July 2013 until 4 December 2015, the defendant used the plaintiff’s credit card to make purchases or withdraw money for which the defendant failed to provide appropriate evidence to verify the fact that such purchases and withdrawals were expenses reasonably incurred, for personal

expenditure, otherwise than for expenses reasonably incurred, or other than for expenditure required to discharge his functions (“Credit Card Use”),

- (e) from 1 January 2013 until 31 December 2013, the defendant was paid and retained an amount described as a bonus (“Bonus”), and
 - (f) on 17 June 2015, the defendant was paid and retained an amount described as annual leave at an hourly rate above his ordinary hourly rate (“Additional Annual Leave”).
- [5] The plaintiff claims that it has lost about \$196,000 in money misappropriated by Mr Mitsui. This claim would, ordinarily, be within the jurisdiction of the District Court. But the plaintiff seeks compensation under s 1317H of the Act and so can only be heard in this court or the Federal Court of Australia.
- [6] The defendant has a counterclaim for the following:
- (a) unpaid accumulated long service leave – \$21,333,
 - (b) unpaid accumulated annual leave – \$5,414.11,
 - (c) reimbursement of health insurance payments made by the defendant – \$35,319.31, and
 - (d) underpayment of salary – \$8,888.96.
- [7] AIIU admits that Mr Mitsui is entitled to \$15,339.98 in unpaid long service leave and seeks to set that off against the amount it says is owing to it.
- [8] AIIU denies that there was any agreement for the payment of the defendant’s health insurance costs but, if there was such an entitlement, then it relies on s 10(1)(a) of the *Limitation of Actions Act* 1974. Thus, it pleads, that any such claim is “unenforceable ... from no later than early 2011”. The Defence and Counterclaim was filed on 22 February 2019. If it applies, it will prevent the recovery of any sum owing before 22 February 2013.

The defendant

- [9] Mr Mitsui was unrepresented. His first language is Japanese. In the assessments I have made, I have taken into account that he was not completely comfortable with asking and answering questions in English. On the other hand, the documents which have been exhibited demonstrate that he has as good a grasp of written English as many unrepresented people who appear in this Court.

The employment contract

- [10] AIIU employed Mr Mitsui in various roles. In 2005, he was working for a related company in Japan – ASI – when he showed interest in the work done by AIIU. He was offered a job with AIIU by Mr Masaru Kurahashi, a director and Chair of the board of directors of AIIU. Mr Kurahashi also held high positions with ASI. There was some debate about the precise positions held by Mr Mitsui after he started working for AIIU, but that does not bear upon the issues to be decided.

- [11] Mr Mitsui became Managing Director of AIIU on 1 June 2013. The employment contract between the plaintiff and defendant was in writing, constituted by a letter from the plaintiff (under the defendant's hand) and dated 1 June 2013.
- [12] Mr Kurahashi, in his capacity as Chair of the Board of AIIU, had authorised Mr Mitsui to write a letter to himself (the letter of 1 June 2013) formalising his appointment as Managing Director. The defendant accepted the terms and conditions on 29 July 2013. There is no dispute between the parties that the letter of 1 June 2013 evidences the employment contract terms between Mr Mitsui and AIIU.
- [13] It provides for, among other things, the commencement date, the defendant's salary, leave entitlements, superannuation, and other benefits, as well as terms relating to termination and variation. The following terms are particularly important:
- (a) "Your base salary will be \$118,224.08 (\$59.83/hour) ... Hours of work are generally 8.30 am to 5.00 pm Monday to Friday. However, for staff positions these hours vary according to volume of work on hand and on occasion out of hours work may be required without payment of over time. Your salary is payment for all work done by you despite the number of hours worked on any day."
 - (b) "Expense Reimbursement – You will be reimbursed for expenses reasonably incurred by you in the performance of your duties subject always to presentation of appropriate evidence to verify your claims."
- [14] The agreement also provides: "The Company may vary the terms of this contract of employment from time to time. You will be notified of any variations."
- [15] The parties are, principally, in dispute about the following:
- (a) whether Mr Mitsui's employment was varied from being Managing Director to General Manager in April 2015 with a corresponding reduction in remuneration,
 - (b) whether, by virtue of Mr Mitsui's position, he was authorised to direct AIIU to pay him the Position Allowance, Director's Remuneration, Travel Cash, Bonus and Additional Annual Leave,
 - (c) whether his contract of employment contained a term, implied by custom and practice, that Mr Mitsui was authorised:
 - (i) to be paid Travel Cash and spend it on expenses without providing appropriate evidence to verify that such expenses were reasonably incurred for work purposes, and
 - (ii) to make purchases or withdraw money from AIIU accounts without having to provide appropriate evidence to verify that such purchases and withdrawals were expenses reasonably incurred for work purposes, and
 - (d) whether AIIU agreed to pay Mr Mitsui's health insurance costs.
- [16] I will deal first with the various allowances which have been in dispute.

Position Allowance

- [17] The substantive claim for this allowance has been met by the defendant repaying the entire amount, but it must still be considered because AIIU claims interest on the amount while it was unpaid.
- [18] By an email of 8 October 2013, Mr Mitsui instructed the people in AIIU's accounting section to pay him a Position Allowance of \$923.08 a fortnight, with that payment being backdated to 1 August 2013. Those payments were made, and Mr Mitsui retained the allowance which amounted to \$55,692.48. Mr Mitsui admits that the payment of that allowance was not authorised by the express or implied terms of the employment agreement and that it was not authorised by either the Board of AIIU or otherwise.
- [19] On 29 October 2018, Mr Mitsui pleaded guilty in the Brisbane District Court to dishonestly causing a detriment to AIIU with a circumstance of aggravation, namely that he was a director of AIIU.¹ The charge concerned the payment of the "position allowance". The plea of guilty was made on the basis, as explained by Mr Mitsui's counsel at the hearing, that it "wasn't something that was passed by the chair of the board and that's what makes it fraudulent". Mr Mitsui said that he decided to pay himself the allowance for three reasons:
- (a) he was working excessive hours,
 - (b) other directors had resigned, and
 - (c) because he was not receiving his health insurance payments.
- [20] Mr Mitsui made restitution of the whole amount (without interest) and, on that basis, was sentenced to three years imprisonment suspended for three years and six months.
- [21] No argument was advanced against the making of an order that interest be paid on the relevant sum until restitution took place.

Director's Remuneration

- [22] From 1 July 2012 until his employment was terminated, Mr Mitsui was paid an amount called "director's remuneration". It amounted to \$17,000. This payment was inconsistent with his contract of employment. It was not authorised by Mr Kurahashi or the Board of AIIU.
- [23] Mr Mitsui pleads that Mr Kurahashi had told him that he was responsible for all the operations of AIIU. From that, he says, he can infer that he was authorised to cause such payments to be made. He could not say how this could occur in light of the express term in his contract of employment – "Your salary is payment for all work done by you ...".
- [24] Mr Mitsui argued an alternative ground, i.e., the payment "was authorised by the Board by agreement of two directors out of three directors". The contention that the payment of this amount was authorised by two of the three directors is not

¹ *Criminal Code*, s 408C.

supported by the evidence. He argues that he and Ms Lesley Spencer authorised the payment in a conversation between the two of them in 2012. At that time, Ms Spencer was a member of the Board of AIIU and its Business and Operations Manager.

[25] In Mr Mitsui's Seventh Affidavit, he said:

“In regard with conversation between Ms Spencer and I about the remuneration, the outline of the conversation was that,

Ms Spencer said ‘Did you tell Mr Kurahashi about the remuneration?’

Mr Mitsui said: ‘No, Mr Corney said we can decide by ourselves about an important issue considering AIIU benefits. We can have a reasonable reward for our contribution which is more than our duties. Our continuous efforts with a reasonable reward brings a benefit to AIIU.’

Ms Spencer said ‘OK’.”

[26] Mr Graham Corney is a solicitor who has been heavily involved with AIIU. He was a director for 23 years until 2010 and was reappointed to the AIIU Board on 15 April 2015. The alleged conversation with Mr Corney was not pleaded by Mr Mitsui in his Defence and was not put to Mr Corney in cross-examination. Ms Spencer denies that that conversation took place.

[27] In his questions and his submissions, Mr Mitsui appears to argue that Ms Spencer's failure to actively object to the payment should be interpreted as an agreement between the two of them as directors.

[28] The behaviour of Mr Mitsui with respect to this payment echoes his behaviour concerning the “position allowance”. With respect to this payment, he maintains that there was an agreement with Ms Spencer. But that is inconsistent with the email he sent to Ms Spencer on 7 August 2012, in which he records that the payment of the Director's Remuneration was “in accordance of board provision”. There was no Board agreement to that effect. Mr Kurahashi gave evidence that he “was not aware that [Mr Mitsui] had directed AIIU accounts staff to pay him additional amounts over and above his salary”.

[29] Further, Mr Mitsui agreed in cross-examination that he had not disclosed to either the Board or Mr Kurahashi that he was being paid “director's remuneration” and that he accepted that Mr Kurahashi would not have approved.

[30] Mr Mitsui pleaded that there was also implied authority based on business custom or practice. There was no evidence called to support that.

[31] I do not accept that there was any proper approval for this payment to be made, and I find that it was made in breach of his contract.

Travel Cash

[32] This part of the plaintiff's claim (and the credit card claim) falls to be considered in light of the express term in the contract:

“You will be reimbursed for expenses reasonably incurred by you in the performance of your duties subject always to presentation of appropriate evidence to verify your claims.”

- [33] Mr Mitsui admits that he caused AIIU to make payments amounting to \$46,500 to him for the calendar years of 2014 and 2015. Those sums were described as “travel cash”. His case was that he obtained cash in advance of the times when he would travel on behalf of the plaintiff. It is not unusual for an employee to obtain, in advance of appropriately authorised expenditure, cash for that purpose. In the ordinary course, that expenditure would be acquitted, and any balance returned. That did not occur in this case. There was no adequate acquittal, and no “unspent” money was returned.
- [34] In his first affidavit, the defendant exhibited what he said was a summary of his use of the travel cash. It is little more than a work of fiction. He sets out, for example, the alleged expenses incurred with respect to an amount of \$3,000 obtained in April 2014. The amount spent on entertainment was \$600, the amount spent on travel meals was \$200, the amount spent on stationery was \$100, the amount spent on educational materials was \$200 and so on across the entire document. Every expense is in round numbers. He accepted, in cross-examination, that he was guessing at the figures. He could not explain how the cash advance always matched exactly the amount expended. He could not provide any evidence to verify his assertions.
- [35] I have, in considering this matter, taken into account the onus on the plaintiff to prove its case with respect to the provision of the cash to Mr Mitsui. The onus, of course, is on the plaintiff to prove these matters to the reasonable satisfaction of the Court. There is, though, a well-accepted category of cases where a defendant has greater or better means of producing evidence relating to those facts. In those circumstances, a defendant will come under an evidential burden, i.e., an onus of adducing evidence. It was summarised in this way by Gleeson J in *BCI Finances Pty Ltd (in liq) v Binetter (No 4)*:²
- “[123] Where a fact is peculiarly within the knowledge of a party to litigation, slight evidence of that fact may suffice to prove the fact unless that evidence is explained away by the party with the knowledge of the fact: *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 375; 64 ALR (CN) 1201; *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at [121]; *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Ex parte Ferguson*; *Re Alexander* (1944) 45 SR (NSW) 64 at 67, 70.”
- [36] In this case, it is Mr Mitsui who has knowledge of the facts concerning the expenditure of the cash. He does not discharge the onus upon him by providing what is, at best, an unreliable reconstruction.

² (2016) 348 ALR 227.

Credit Card Use

- [37] This claim by the plaintiff is in a similar category to that of the “travel cash” claim. The plaintiff knows that the money has been spent and has proved the extent of the expenditure. The plaintiff has established that the defendant did not provide, in the majority of instances, an acceptable receipt or another document that would prove the nature of the expenditure. The onus falls on the defendant to establish that the payments made using the plaintiff’s credit card were properly incurred.
- [38] It was a term of Mr Mitsui’s employment that he provide receipts for expenditure incurred by him. I accept the evidence from Ms Spencer that she frequently asked Mr Mitsui for receipts and that he, for the most part, failed to provide them. She gave evidence that after AIIU’s auditor expressed concern about the absence of receipts, “Mr Mitsui did, for a period of time, provide documentation for his credit card expenditure.” This occurred from about April 2009 until about September 2010. After that, she said that she raised the issue of documentation with him about every month but that he would frequently reply with words to the effect: “I’m the Managing Director, that’s not necessary.”
- [39] Ms Spencer examined all the relevant credit card entries. She was able to identify some receipts which demonstrate that the expenditure was allowable as being a true business expense. There were, though, many transactions that were unsupported by receipts and which did not fall within the ordinary types of expenditure one would associate with a business of the nature of the plaintiff.
- [40] After disclosure in this matter, Mr Mitsui provided some receipts, and a large number were accepted as potentially proper business expenditure. The spreadsheet in which these amounts are set out is very detailed and categorises the expenditure under various headings. Mr Mitsui accepts that the schedules provide an accurate record of the transactions he made on the credit card. He accepts that there are a large number of receipts that are in Japanese (and untranslated) or are illegible. He has accepted that from 2013 onwards, he did not provide any receipts for expenditure on his credit card.
- [41] Mr Mitsui provided a schedule of expenditure, but it is nothing more than a reconstruction of what he says occurred. There was no evidence led by him that corroborates any of his claims in respect of any transactions. There was no evidence that any of the transactions were authorised by the Board of AIIU.
- [42] In his evidence at trial, Mr Mitsui said that he had never used the company credit card for his “private use”. That is contradicted, though, by a large number of entries. His monthly home telephone charges were paid by credit card. Those charges covered not only his mobile phone but also his home phone, his internet charges and the mobile phones held by his wife and daughter. His wife and daughter were not employees of AIIU. Other examples include him charging for meals that occurred during ordinary business hours, even if he was the only person involved. On other occasions, he claimed for meals eaten with his wife when she was in hospital. On other occasions, he claimed for all of the fuel purchased for his car.
- [43] Mr Mitsui used the card on many occasions to purchase wine, gift cards and souvenirs. He was unable to demonstrate, with respect to any of these transactions, how they were business expenses or for the plaintiff’s benefit. While the plaintiff

accepts that Mr Mitsui would be entitled to claim for restaurant expenses when travelling, there were many occasions on which claims were made when he was in Brisbane. On some occasions, these occurred on weekends, or twice in one day, or were said to be for staff meetings, but he was unable to identify who might have attended or for what purpose. He was particularly unconvincing when being cross-examined about these matters and was unable to provide any satisfactory answer for the manner in which he had incurred expenditure.

[44] Other examples included:

(a) Parking expenses –

(i) There were 19 transactions in 2015 at the University of Queensland. He said that these related to business meetings, but he could not explain the purpose of those meetings or name any attendees. It is more than coincidental that Mr Mitsui was studying at the University of Queensland at that time. I find that it is more likely than not that he was parking at the University for his own benefit and not the company's.

(ii) There were transactions at the Greenslopes Private Hospital. His wife was being treated at the hospital at the relevant time. In what I regard as a deliberate untruth, he said that his attendance at the hospital was a legitimate expense because his wife was an AIIU volunteer.

(b) Cable television. The defendant claimed just over \$1,000 in respect of the provision of cable television to his home. He said that Mr Kurahashi had approved that expense so he could “get the right information about what’s going on in Japan.” Mr Kurahashi denied this. It is completely implausible, and I do not accept that the defendant’s account is truthful.

(c) Travel to Japan. Mr Mitsui had to travel to Japan for business purposes on a number of occasions. On at least one occasion, he travelled to Japan and charged the expenses to the credit card – but he could not demonstrate any business purpose for his travel. During the period in which he travelled, he was on bereavement leave following his father’s death. I do not accept that any of the expenditure on that occasion was business-related.

[45] There were many circumstances considered in evidence arising from his use of the company credit card. There were expenses such as the purchase of a suitcase which he attempted to explain away by saying that it was for one of the students. He was unable to provide any evidence that that was true.

[46] I find that Mr Mitsui treated the credit card as being for his personal use for many of his personal expenses. He disregarded the interests of the company by placing his interests first. There were many examples of food and services being purchased, which could only be for him and his family. There were single instances such as the renewal of his driver’s license, which he charged to the company because, as he said, he “always drives for the company”.

[47] The plaintiff accepts, appropriately, that there may well have been transactions that could be considered to be in the interests of AIIU, such as gifts and client entertainment charges. However, there is no evidence that any of these expenditures were authorised or required. The schedule created by Mr Mitsui is not worthy of

detailed examination. It is entirely a product of his reconstruction, and it is, in the vast majority of instances, unsupported by any documentation.

Bonus

- [48] It is not in contention that AIIU paid Mr Mitsui a “bonus” of \$1,794.40 in 2013. That payment was made at Mr Mitsui’s direction. He admits that he did not obtain Board approval for that payment. He had no right to be paid that amount, and there was no authorisation for that amount to be paid.

Additional Annual Leave

- [49] Mr Mitsui admits that he directed the plaintiff’s bookkeeper to pay his annual leave in June 2015 at the rate of \$66.54 an hour. The rate at which he should have been paid was \$54.39 an hour. The difference was what Mr Mitsui called a “title fee”, the title being his title as Managing Director. There was no authorisation for an extra payment of that nature, and, in cross-examination, he accepted that he had to refund that amount. He knew, at the time, that he was not entitled to that amount, yet he directed an employee to make the payment. This was dishonest conduct on Mr Mitsui’s part.

Mr Mitsui’s duties as a director

- [50] At the hearing of this matter, the plaintiff concentrated on its claim for compensation under the Act. As a director of AIIU, Mr Mitsui owed certain duties under the Act. The following provisions are relevant:

“181 Good faith – civil obligations

Good faith--directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
- (a) in good faith in the best interests of the corporation; and
 - (b) for a proper purpose.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

182 Use of position – civil obligations

Use of position--directors, other officers and employees

- (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
- (a) gain an advantage for themselves or someone else; or
 - (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

- (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: This subsection is a civil penalty provision (see section 1317E).

1317H Compensation orders--corporation/scheme civil penalty provisions

Compensation for damage suffered

- (1) A Court may order a person to compensate a corporation, registered scheme or notified foreign passport fund for damage suffered by the corporation, scheme or fund if:
- (a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation, scheme or fund; and
 - (b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

- (2) In determining the damage suffered by the corporation, scheme or fund for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

...”

Did Mr Mitsui breach his duties?

[51] Yes.

[52] I need not delay long on this consideration. Mr Mitsui was dissatisfied with the way he felt he was being treated and took it upon himself to increase his “remuneration” by authorising extra payments to himself and by purchasing goods for himself on

the company credit card. None of the payments the subject of this action were properly authorised, and Mr Mitsui either knew that or did not care. By requiring other employees to make those payments, he improperly used his position to gain an advantage for himself. Likewise, he improperly used his position by making unauthorised purchases on the credit card. In doing those things, he contravened s 182 of the Act.

Compensation

[53] I have found that the defendant has contravened s 182 of the Act and, so, the plaintiff is entitled to an order under s 1317H that it be compensated for the damage suffered by it. There was no dispute between the parties – apart from the credit card charges – about the calculation of the various amounts under the headings referred to above.

[54] The approach taken by the plaintiff with respect to the credit card transactions was that some of the transactions which were not supported by receipts, et cetera, may have been properly incurred for the benefit of the plaintiff. I accept that that is a relevant matter to take into account. As this is a claim for compensation, I will adopt the approach taken by Tracey J in *Health Services Union v Jackson (No 4)*³ and allow a small discount to account for that possibility. A discount of 10% should be made.

[55] The damage suffered consists of:

- (a) Position Allowance – interest will be allowed at the ordinary rate,
- (b) Director’s Remuneration – \$17,000,
- (c) Travel Cash – \$46,500,
- (d) Credit Card Use – \$122,726.74 (\$136,363.04 less 10%),
- (e) Bonus – \$1,794.40, and
- (f) Additional Annual Leave – \$3,915.82.

Counterclaim

[56] The defendant counterclaimed against the plaintiff under four headings:

- (a) health insurance payments,
- (b) long service leave,
- (c) annual leave, and
- (d) underpayment of salary.

Health insurance payments

[57] Mr Mitsui claims that he is entitled to a payment of \$35,319.31 in respect of health insurance costs incurred by him between April 2005 and December 2015. He says that this liability arises in the plaintiff pursuant to an oral agreement between him

³ (2015) 108 ACSR 156.

and Mr Kurahashi in 2005. He says that this agreement was negotiated when he was employed by ASI and that it continued to his employment with AIIU. No mention of health insurance payments is made in the contract of employment or, for that matter, in an earlier contract that was in evidence.

[58] Mr Mitsui also relies upon his translation into English of a memorandum written in Japanese and which appears to bear the signature of Mr Kurahashi. In his evidence, Mr Kurahashi accepted that the signature appeared to be his, but he did not recall ever seeing or signing that document. He went on to say that payment of an employee's health insurance costs would be a highly irregular arrangement for AIIU and that he would be likely to recall it if an exception had been made to that general rule.

[59] Mr Mitsui's evidence of the original agreement and its reduction to a memorandum in Japanese and then his English version of it was replete with uncertainties and inconsistencies. Notwithstanding that there appears to be the signature of Mr Kurahashi on the document, I prefer his evidence that, because of its unusual nature, had there been such an agreement, he would have remembered it. In the light of what I have found to have been Mr Mitsui's lack of honesty in other matters, I do not accept that there was such an agreement.

Long service leave

[60] The plaintiff accepts that it owes Mr Mitsui an amount for long service leave. Mr Mitsui claims \$21,333. The plaintiff acknowledges that it owes \$15,339.98. When cross-examined on this and presented with payroll records, Mr Mitsui accepted that he may have taken periods of long service leave, which he now cannot recall. I prefer to rely on the business records of AIIU rather than Mr Mitsui's faulty memory. The amount of \$15,339.98 will be set off against the compensation ordered to be paid.

Annual leave

[61] The defendant claims that he was not paid his accumulated annual leave on termination. He pleads that he was owed a total of \$14,082.79, that he was paid on termination \$8,668.68, and is therefore owed \$5,414.11. AIIU pleads that it paid him the amount owing at that time – \$8,605.04. Mr Corney contradicts that pleading in his First Affidavit. He says:

“63. Ms Devlin [AIIU's internal bookkeeper] informed me, and I verily believe, that Mr Mitsui had the following accrued entitlements when his employment was terminated:

- a. Long service leave of approximately 283.14 hours at the rate of \$54.39 per hour, in the amount of \$15,399.98;
- b. Annual leave of approximately 158.21 hours at the rate of \$54.39 per hour, in the amount of \$8605.04.

64. These amounts were withheld by AIIU rather than being paid to Mr Mitsui on the termination of his employment.

65. I instructed AIIU staff not to pay these entitlements to Mr Mitsui in his final pay. I gave that instruction because by that

time, this matter had been referred to Queensland Police and I was aware that Mr Mitsui owed large amounts of money to AIIU which may also be subject to a civil claim. It was therefore my intention to see how those proceedings played out before adjusting those entitlements appropriately.”

- [62] This part of the counterclaim did not receive attention during the trial. There is, though, evidence from the books of account of AIIU, which I accept as more reliable than either Mr Mitsui’s statements or Mr Corney’s recollection. In Ms Spencer’s First Affidavit, she exhibits copies of Mr Mitsui’s payroll records. They include the payroll advice for his termination payment. It shows that he was paid a total of \$14,042.41 which included his accumulated unpaid annual leave to that time. I am satisfied that Mr Mitsui received what was owing to him at that time.

Underpayment of salary

- [63] In January 2015, Mr Mitsui and Mr Kurahashi had a meeting in which Mr Kurahashi proposed, in terms that would brook no dissent, that Mr Mitsui’s position change from Managing Director to General Manager and that his salary be reduced from \$59.83 an hour to \$54.39 an hour. Mr Mitsui opposed this reduction, but he was effectively given no choice. I infer from Mr Kurahashi’s evidence that this type of alteration occurs in Japan in certain circumstances and is, apparently, acceptable. Mr Mitsui’s contract is, of course, governed by Australian law. For one party to unilaterally change the payment of an employee is a breach of contract. It was argued on behalf of the plaintiff that Mr Mitsui accepted the variation as, had he not, he could have resigned. Further, it was argued that, by his conduct, he affirmed the change in the terms of the contract.

- [64] I accept that Mr Mitsui was put in a very difficult position. If he refused to accept the reduction in pay, he would have been dismissed. He took the practical approach – he kept his job – because he had no choice. Mr Mitsui did not have the benefit of representation at trial, and there are arguments he might have advanced, which would have resulted in him being successful on this part of his counterclaim.

- [65] This set of events received limited attention in submissions. However, I take the view that the effect of the conversation could have been characterised, not as varying the contract, but as terminating it and replacing it with a new contract. But AIIU did not argue that point and contended that:

- (a) there had been a variation,
- (b) Mr Mitsui had elected not to terminate the contract, and
- (c) he had conducted himself in a way that demonstrated that he had accepted the change.

- [66] In the absence of any pleading or argument about duress or other similar matters, I find that Mr Mitsui accepted the variation and is not entitled to the sum claimed.

Calculation of compensation

- [67] On the findings I have made, the plaintiff has suffered damage as a result of the contraventions of s 182 of the Act. The plaintiff claims interest on the sums which

have accumulated over time and uses the rates allowed in this Court for interest under s 58 of the *Civil Proceedings Act* 2011. I will adopt those rates as being reasonable in these circumstances.

[68] I assess the damage suffered at \$211,061.48 consisting of:

- (a) Director's Remuneration – \$17,000,
- (b) Travel Cash – \$46,500,
- (c) Credit Card Use – \$122,726.74,
- (d) Bonus – \$1,794.40,
- (e) Additional Annual Leave – \$3,915.82, and
- (f) Interest on the above amounts – \$19,124.52 (including interest on the Position Allowance).

[69] I deduct from that amount the sum of \$15,339.98 for unpaid long service leave. Interest was not sought on that amount. The counterclaim is otherwise dismissed.

[70] I order that there be judgment for the plaintiff in the sum of \$195,721.50.

[71] I will hear the parties on costs.

(Correction: These reasons were amended to include “The counterclaim is otherwise dismissed” on 17 December 2021.)