



Australian Government
Office of Workplace Services

**IN THE MAGISTRATES' COURT
OF VICTORIA
INDUSTRIAL DIVISION
AT MELBOURNE**

COURT NUMBER W00357367

BETWEEN

**Emma Bradford (a workplace inspector appointed pursuant to section 167(2) of the
Workplace Relations Act 1996 (Cth))**

Plaintiff

and

Bennett and Jouning Pty Ltd (ACN 004 268 795)

Defendant

TRANSCRIPT OF HEARING 31 MAY 2007

Magistrate Kate Hawkins
For the plaintiff: Celia Yuen
For the defendant: Robert Sadler

**DISCLAIMER: THIS IS AN UNEDITED EXCERPT OF THE ABOVE HEARING.
NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.**

- HER HONOUR: 1. I'll now give my reasons for decision in relation to this matter.
2. This is a claim brought under the Workplace Relations Act, the post reform Act or the WorkChoices Act, by a workplace inspector appointed pursuant to section 167 subsection 2 of that Act for the underpayment or the failure to pay minimum entitlements set out in Schedule 1A of the Act and latterly reflected, I think correctly, in the — what's the term of the Standard? The —
- CELIA YUEN: 3. The Fair Pay and Conditions Standard
- HER HONOUR: 4. The Fair Pay and Conditions Standard and seeking, I withdraw that.
5. The employer in these circumstances has made good the underpayment, the failure to pay four weeks annual leave at the termination of employment and the pro rata entitlement prior to the issue of legal proceedings in this matter. Accordingly, by consent, I find proven the breach of the Workplace Relations Act. The defendant has withdrawn its defence and in reliance upon an agreed statement of claim I proceed today solely on the question of penalty.
6. As at April 2006 the defendant, a small regional real estate agency with several sites of operation, engaged approximately 10 employees. Prior to August 2005 it also operated from other sites including a substantial site at Mornington. Those operations were reduced in size prior to the issue being the subject of these proceedings arising.
7. Pursuant to an employment contract or an agreement the defendant agreed to engage an employee, Mr Perrett, and pursuant to that contract he was paid a weekly salary of \$500 gross with the opportunity to earn an additional commission.
8. He didn't take any periods of annual leave during his employment and as such was entitled to be paid a total of 4 weeks or \$2,000 gross for accrued annual leave upon the termination of his employment. Pursuant to the Fair Pay and Conditions Standard he was also entitled to be paid a further amount of \$75 gross for, I presume pro rata, annual leave upon the termination of his employment.
9. Attempts were — once this entitlement was determined attempts were made by the Office of Workplace Services to secure payment for the employee of this outstanding entitlement which had not been made at the time of his termination on 6 April 2006. Various attempts were made both by telephone and by letter seeking compliance.
10. I'm told and accept by counsel representing the defendant at

understood that they were not obliged to pay this entitlement. It appears that that state of knowledge was misfounded and upon receipt of perhaps more accurate legal advice they paid the outstanding amount on the 14 November 2006, less taxation deductions, directly to the employee in question.

11. The Office of Workplace Service were subsequently informed by the employee concerned on 28 November 2006 that the payment had been made. These proceedings were issued on 14 February of this year seeking a penalty. The Defendant filed a Defence and appeared in the matter. At a directions hearing on 28 March, the Defendant withdrew its Defence. The Defendant appears by Counsel in Court today and I accept the explanation for the absence of the Director of the Defendant company. I accept that the Defendant is absent due to personal or serious personal reasons and I accept that that's quite a valid explanation for his non attendance at Court today.
12. In relation to this matter the employee concerned was employed for a period of just over 12 months and the underpayment or non payment concerned related to his 4 weeks of his annual leave which amounted to a sum of just over \$2,000. I note for the record that in relation to a worker employed on a very minimum or lower rate of pay such an amount is substantial in his personal terms.
13. Annual leave is a fundamental term of employee's entitlements and such entitlements are now protected as minimum entitlements in Australian Fair Pay and Condition Standards and were previously protected by the Victorian Workers by Schedule 1A of the previous Workplace Relations Act.
14. This is a relatively small operation running businesses on the Mornington Peninsula. It continues to operate and continues to employ staff. I am told and accept by Counsel that he has given them advice and drafted appropriate employment contracts, although I have no confirmation that they are now in use.
15. There is no evidence before the Court as to the deliberateness or otherwise of this conduct, however I do accept that the Defendant was labouring under an incorrect belief that the employee in question was not entitled to be paid for this entitlement. It is not alleged that the Defendant has previously breached the Workplace Relations Act.
16. The Plaintiff urged the Court to take or consider that the Defendant had lacked co-operation with enforcement authorities and that it would warrant the position of a high penalty. I don't accept that submission in that the Defendant did apparently seek out competent Counsel and once in

receipt of appropriate advice did make good the underpayment. In this situation I think it is not correct to characterise the Defendant's actions as resisting compliance rather than not understanding its proper and lawful obligations.

17. Now, it is a well known maximum of law that lack of knowledge is no legal excuse for such conduct. Every employer is considered to have a full knowledge and required to ensure that it complies with all its lawful obligations including those in relation to the payment of wages and minimum conditions of employment. Its lack of knowledge, for whatever reason, of those obligations cannot be an entire excuse.
18. Senior Management of the Defendant was certainly involved in the later stages of this matter and I find that the Defendant in this case has expressed its remorse by, what might be referred to as a plea of guilty, at an early stage; payment of its obligations prior to its issue of legal proceedings; admission of the breaches and withdrawal of its defence. In this case the aspects of specific deterrence related to this particular employer do not appear to loom large, however issues of general deterrence do.
19. The underpayment of even the most minimal minimum conditions or wages and conditions of employment are rife throughout many industries including this one. The underpayments of workers' entitlements is a matter to be viewed seriously by the Courts and this is reflected by the relatively recent increase by the legislature for penalties in relation to these matters from the sum of \$10,000 to \$33,000 per breach.
20. In conclusion, it is important that a penalty be imposed in this matter regardless of the ultimate compliance by the Defendant to send a clear message to other employers that it is their obligation to take the utmost care to ensure that they are properly paying all wages and conditions of employment and accordingly I will determine penalty on the basis of discounts being applied to the maximum penalty, for most significantly for the payment prior to the issue — or the remedy of the underpayment prior to the issue of proceedings; the remorse being indicated by the Defendant through those actions; its serious — indications of remorse by briefing Counsel to appear in these matters and taking steps to remedy these matters.
21. I think there is some justice in the submission made by the Defendant's Counsel and some logic in terms of both the proportion to maximum penalty but also the reflection of the penalty being a doubling of the underpayment involved in this case.

22. Accordingly, I will impose — having found the breaches proven, I will impose the penalty of \$2,075 upon the Defendant company for the breach of the — for one continuing breach of the Australian Fair Pay and Condition Standard. It's the breach of that Standard that you—?
- CELIA YUEN: 23. Your Honour, I believe the initial period was pre-WorkChoices so it's actually through the regulations that preserve the entitlement to pay out of accrued annual leave.
- HER HONOUR: 24. I am going to impose the penalty for the breach of the Workplace Relations Act, is that sufficient?
- CELIA YUEN: 25. Yes, the Act preserves the right, so it's one course of conduct.
- HER HONOUR: 26. But just to be more succinct, I think we will keep it to that.
27. Is a stay of month sufficient?
- ROBERT SADLER: 28. Well I think, Your Honour — First of all that was too complicated for me, the last bit.
29. But given that I can't give instructions, I wonder if 60 days would be more appropriate as I have a principal who has just gone overseas and I am not sure how long he proposes to stay over there and another one who I don't know when is coming back, so a month might make it difficult.
- HER HONOUR: 30. Is there any opposition to 60 days?
- CELIA YUEN: 31. No, no opposition Your Honour.
- HER HONOUR: 32. Thank you.
33. Which section of the Workplace Relations Act is it that I am imposing the penalty?
- CELIA YUEN: 34. It is still section 719 subsection 1.
- HER HONOUR: 35. Thank you.

Hearing adjourned.