Australian Government
Workplace Ombudsman

IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION

COURT NUMBER WO2577664

BETWEEN

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

Plaintiff

and

XIDIS PTY LTD trading as Effective Supermarket Services (A.C.N. 097 227 659)

First Defendant

and

Nick Iksidis of [address removed]

Second Defendant

TRANSCRIPT OF HEARING 20 DECEMBER 2007

Magistrate Kate Hawkins
For the plaintiff: John Snaden
For the defendant: Tim Sharard

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

HER HONOUR: 1. Yes good afternoon gentlemen.

JOHN SNADEN: 2. Good afternoon Your Honour.

HER HONOUR: 3. Is there anything to be said prior to me giving my decision in this matter?

TIM SHARARD 4. Not on our side Your Honour.

HER HONOUR: 5. Alright, thank you. I will be imposing a penalty on the Defendants in relation to this matter and I'll go through my reasons for decision in relation to that in a moment. I would like to be addressed however in relation to the question of apportionment of that penalty as between the first and second Defendants. I've been contemplating how that ought to be divided given that the second Defendant… given that it's really a one man operation so to speak, and what might be the appropriate way to apportion that penalty. So I'll leave you to think about that while I give my reasons for decision.

6. I direct that these proceedings are being recorded aren't they? Yes. I direct that copies be made of the recording of this matter and given to each of… or provided to each of the parties free of cost.

7. This matter concerns a prosecution brought by an inspector engaged by the office… by the Workplace Ombudsman. The first and second Defendants to this action admit breaches which cover arise from Sections 182 subsection 1 and Section 235 of the *Workplace Relations Act* and clauses 5.1 of the Minimum Wage Order and Section 505 subsection one of the Pre-Reform Workplace Relations Act in respect of underpayments concerning three employees.

8. By way of background the first Defendant, Seedis (Xidis), is that how it's pronounced?

JOHN SNADEN: 9. Exedeese (Xidis)

HER HONOUR: 10. Xidis Pty Ltd is a registered company limited by shares which has been in operation since mid 2001. Nick Xidis is the second Defendant and he is the Sole Director, Company Secretary and Sole Shareholder of the first Defendant.

11. The company trades as Effective Supermarket Services. It provides trolley collection staff, management services to supermarkets and large retailers in Victoria and New South Wales. At all material times the second Defendant was a Director of the first Defendant company and was responsible for ensuring that it complied with its legal obligations.

12. The first Defendant employed numerous employees but three of those employees have made complaints in relation to

underpayments. David Popov, Michael Tucker and Shannon Drury. They were engaged by the first Defendant as trolley collectors. They performed work involved in collecting trolleys at shopping centre car parks and returning them to designated trolley bays within the stores.

13. At all material times up to and including the 26th of March 2006 the first Defendant was bound by a minimum wage order under the Pre-Reform Workplace Relations Act known as the *Property and Business Services Industry Sector Minimum Wage Order (Victoria)*. After that time it is and was bound by the Australian Fair Pay and Conditions Standards set out pursuant to the *Workplace Relations Act*.

14. The admitted contraventions in this case arose from the underpayment of minimum hourly pay rates in respect of each of the three employees and the deduction of a vehicle bond from Mr Popov's wages and also arising from the failure to pay Messrs Popov and Tucker for untaken accrued annual leave upon the termination of their employment.

15. Mr Popov was employed by the first Defendant between the 02nd of March 2006 and the 12th of January 2007 as a full time employee pursuant to a written contract. He performed trolley collection services at The Glen shopping centre in Glen Waverley and at the Vermont South shopping centre. His employment was terminated from the 13th of January of 2007.

16. At all material times his minimum hourly rate of pay was regulated by the Minimum Wage Order. He worked under limited supervision and it's been agreed ultimately that his duties fell within the scope of classification level five under that Order.

17. At all materials times his minimum hourly rate of pay and employment entitlements was regulated by the Standard. He was paid by the first Defendant the sum of $13.75 per hour during his employment. That was the level four hourly wage rate under the Minimum Wage Order up until the 01st of December 2006.

18. The basic periodic rates of pay increased from $13.39 per hour to $14.11 per hour with effect from the 01st of December 2006. This underpayment on the hourly rate arises from the failure by the Defendant to pay the minimum hourly rate applicable to him under the Standard from the 01st of December 2006 to the 12th of January 2007.

19. Furthermore in September 2006 the first Defendant deducted $281.87 pay from Mr Popov's wages as a bond, as they described it, for a vehicle used by Mr Popov to perform his duties. I understand this to be a vehicle owned by the Defendant company.

20. At the time the deduction was made Mr Popov was entitled to a minimum hourly rate of $13.39 in accordance with the Standard. As

a consequence of the deduction the first Defendant failed to pay the minimum hourly rate for the pay period 11 September to the 24th of September 2006.

21. In an email dated the 29th of September 2006 to Mrs Popov the second Defendant stated *'the bond is fully refundable to David in the event he wishes to leave ESS'*. The first Defendant failed to repay to Mr Popov the deduction amount of $281.87 pay, representing the vehicle bond upon the termination of his employment.

22. Furthermore the first Defendant did not pay Mr Popov for his untaken accrued annual leave upon the termination of his employment.

23. The second employee concerned was Mr Michael Tucker. He was employed by the first Defendant between the 28th of November 2006 and the 31st of December 2006 pursuant to a written contract. Again he was engaged in similar duties to that of Mr Popov. Those duties fell within the scope of classification level five, instead he was paid in accordance with level four and did not receive the pay increase when it was due; nor did he receive his payment for his untaken accrued annual leave upon the termination of his employment.

24. Mr Drury, the third employee concerned was employed between the 12th of October 2005 and the 19th of November 2006 pursuant to a written contract. He did similar duties to the first two employees but at shopping centres in Greensborough, Epping and Ivanhoe. His employment was terminated from the 20th of November 2006. Again he was paid pursuant to classification level four rather than five.

25. The total combined amount of the underpayments to these three employees is $3,523.98. Initially the Plaintiff claimed that the employees were entitled to the benefit of the *Transport Workers Award*. This was disputed by the Defendants. Ultimately the parties reached an agreed position on the 16th of November 2007 that the Plaintiff would not pursue its alternate claim under the *Transport Workers Award* 1998 and that the first Defendant would make payment to the employees of the underpayments outlined earlier.

26. The parties also agreed that the matter would proceed by way of an agreed statement of facts to be tendered to the Court and this has been of great assistance to the Court and greatly shortened the amount of time and the resources required to deal with this matter.

27. The question, having filed that statement of agreed facts I do find the breaches alleged proven. The question that remains for the Court to determine is what penalty ought be imposed for the breaches which have been outlined.

28. Seven contraventions are alleged however due to their nature and principles of totality I shall treat these as a total of three breaches with a maximum for the first Defendant of $33,000.00 by way of penalty per breach. The maximum for the second Defendant being

an individual is $6,600.00 per breach.

29. In determining the question of penalty the Court must have regard to the objects and principles of the *Workplace Relations Act* and the entire regulation of this area within Australian history. I note that this is clearly a feature set out in Section three of the current Act, the need to set minimum wages and conditions for employees and to provide an enforcement mechanism.

30. There has been talk over the last 24 hours in the news of the *Workplace Relations Act* or the potential future of the *Workplace Relations Act*, however I note that this objective whilst not in identical terms has been a feature historically in all industrial legislation.

31. The former parliament saw fit to significantly increase the penalties for breaches of the *Workplace Relations Act* from $10,000.00 per breach to $33,000.00 per breach several years ago. This reflects the importance and the need to protect the minimum rates of pay for workers in the Australian system.

32. In determining what the penalty ought to be in any particular case, the Courts have set down a clear range of matters to which the Court must give consideration. I will now turn to those. Firstly the nature and extent of the conduct must be considered.

33. The Defendant company and the trolley collecting industry generally employs what is clearly often employees in a vulnerable position, unable to flex bargaining muscle in respect of their terms and conditions of employment.

34. One of the workers the subject of complaint in this matter was said to suffer some form of intellectual disability and was not able to read and write. Clearly that employee had support to assist his advocacy in relation to this matter but I accept that it's common practice in the industry and for this Defendant to recruit workers from organisations which specialise in finding employment for workers such as the long term unemployed and also who may suffer from mild forms of intellectual or physical disability. Education levels of employees in this industry are generally low and clearly it's an important function of the *Workplace Relations Act* and the organisations set up under it to apply the law and enforce that law to protect workers such as these.

35. The employees concerned in each case were purportedly engaged pursuant to exhaustive comprehensive written contracts of employment. One of these documents was described as an AWA although it was never registered as an Australian Workplace Agreement.

36. The contracts have the appearance of documents drafted with legal assistance, they have provision to protect the company in relation to a broad ranging number of interests including such curiosities in this particular circumstance as inventions, copyrights, designs and know

how. It also includes non solicitation clauses, performance reviews and the like. Given that the workers are just collecting trolleys at supermarkets it's perhaps hard to understand the applicability of some of these provisions.

37. The employees were paid at the minimum rate for an employee engaged at level four classification. I find and accept that the Defendant was under a genuine but mistaken belief that it was entitled to pay its workers at this rate. It is subsequently admitted that level five payments are appropriate, however this was a matter of genuine dispute until shortly before this matter has been determined by the Court. That is a factor I do take into account in assessing the Defendant's conduct.

38. However, what is of great concern to the Court is the extent to which the employment contracts go to purport to degrade minimum standards and conditions of employment within those agreements. For example the contracts purport to include provisions that wrongly purport to commit the first Defendant to withhold payments due to employees and or to deduct payment from monies owing to the employees in breach of the employees' minimum entitlements under the safety net. It also purports to give the first Defendant the right to withhold accrued entitlements in circumstances for termination for cause. It also in some instances understates the employees' entitlement under the safety net, for example in relation to taking sick leave during probation periods.

39. I do say in the context of having considerable experience in dealing with employment contracts over many years it does contain some of the most remarkable provisions I have seen. Clearly considerable effort has been taken by the Defendant to draft these contracts and I conclude that the Defendant in doing so has demonstrated a systematic approach to disregarding the obligations… or disregarding their obligations to provide employees with their minimum pay entitlements under the safety net.

40. Whilst I accept the Defendant's submission that there was genuine confusion about the applicability of industrial instruments and classifications with regard to wage rates, the basic obligations of employers to do such thing as make payments for untaken annual leave upon termination are notorious obligations. I conclude that the failure by the Defendant to do these things was a deliberate act.

41. Turning to the issues giving rise to these proceedings I note that prior to lodging complaints with the Workplace Ombudsman, Mr Popov and Mr Drury attempted to resolve their underpayment claims directly with the first and second Defendants. Mr Popov wrote to the second Defendant in early 2007 claiming he was entitled to a higher hourly pay rate than had been paid to him on the basis that he was subject to the benefits of wage rates pursuant to the *Transport Workers Award* 1999, and that he sought reimbursement of the vehicle bond

and payment for his untaken accrued annual leave.

42. The second Defendant responded to Mr Popov shortly thereafter. This correspondence threatens that the employee may be held personally liable for an accident. This correspondence refutes the claims by Mr Popov and goes on to threaten that the employee may be held personally liable for an accident between the work vehicle he was driving during his employment and another vehicle, for the cost of uniforms not returned and also refers to unspecified breaches of his contract of employment. It further threatens the employee with defamation proceedings should he discuss his claims with other employees.

43. Mr Drury wrote to the second Defendant in December 2006 claiming again that he was entitled to a higher hour rate of pay than which he had received, he also sought payment for untaken accrued annual leave. No response was received by him.

44. The three employees subsequently made complaints of underpayment to the Workplace Ombudsman in early 2007. Attempts to secure a voluntary compliance were unsuccessful. I do accept that this is partially due to the genuine dispute concerning the applicability of the federal award.

45. Subsequently this complaint was filed on the 14th of September 2007. As a consequence of negotiations between the respective parties' solicitors, it was agreed that the Defendants would not file defences, instead they agreed to make good the underpayment claims based on the alternative pleadings in the complaint pursuant to the Minimum Wage Order.

46. In return the Workplace Ombudsman agreed not to pursue the claim under the *Transport Workers Award* and the parties agreed to expedite the matter by signing consent orders and having those filed and made within the Court. These are significant expressions by the Defendants of their acknowledgment of the contraventions of the law in respect to these matters and for which they will receive a significant benefit in relation to the calculation of overall penalty.

47. The Court is also required to consider the nature and extent of the loss and damage. Whilst these amounts may be relatively small, in the context of the amounts of wages these individual employees were receiving they are quite large. It's also of note that they were not made good until nearly 12 months after the termination of employment. There is no prior conduct of this nature alleged against the first or second Defendant. I've already outlined that I will treat the number of contraventions as a total of three breaches.

48. The company is relatively new, I'm told that it started as a one man operation and has rapidly expanded. It now employs approximately 80 employees over about 32 sites in Victoria and New South Wales. It also operates a number of subcontractors at these sites. I also

note that it is influential in the employment practices of its subcontractors and one of the results of these proceedings is that the Defendants have undertaken to ensure that any subcontractors they are dealing with are informed about appropriate and lawful wages and conditions to be paid to employees in the industry.

49. Until recently the company ran at a loss; it now returns a profit. It runs from a small, central office and despite the number of employees it is said and I accept it to be a relatively small operation.

50. Mr Xidis is centrally involved in the employment practices of the company. He has been the driving force behind the growth of the operation and he has been centrally involved in the employment of the employees concerned. He has signed correspondence with them and communicated directly about employment matters.

51. I have concluded that these contraventions alleged and proven have not arisen through mere inadvertence. The Defendant has displayed a reckless disregard for the minimum standards required. He demonstrates a high level of sophistication in his communications and documentation and within those correspondence displays a knowledge of relevant laws and government bodies charged with their administration in relation to workplace matters. From this the Court infers that he has made a considered choice not to pay certain entitlements.

52. I've accepted the genuine dispute about the pay rates however the remaining breaches were not of a similar vein. It was open to the Defendant to rectify these matters early in the piece but he has chosen not to do so until shortly before the hearing. Ultimately however the Defendants have cooperated with the Plaintiff prior to trial and have rectified the underpayments. As I said, they have informed subcontractors of their legal obligations and have made arrangements with their solicitors to ensure that the Defendant is kept up to date with information about pay increases and its legal obligations.

53. I note that the Defendant company prides itself as a professional operation and seeks to distance itself from what I'll refer to as bad players within the industry. It has to its credit provided pay slips and doesn't seek to pay employees in cash or the like.

54. A major factor which must be considered in relation to the question of penalty is that of deterrence, that is a matter of both general and specific deterrence. Specific deterrence is the need to deter this or Defendants specifically from breaching the law again in the future. I accept that by being brought to Court and engaged in these proceedings to a large extent that deterrent aspect has been achieved. However that's not the end of it. The Defendant company does employ a significant number of employees and will continue to employ a significant number of employees one would presume, if the operation continues. However general deterrence is a factor that

looms very large in this industry. I have before the Court, evidence about the notorious nature of this industry including companies other than the Defendant.

55. I accept the submission by Defendants counsel not to visit the sins of others upon this Defendant however this is a legitimate aspect of determining penalty that the Court must have regard to. Given the nature of the industry generally and of particularly the vulnerability of the workers often engaged within it, and their reliance upon minimum wages and the conduct of the Defendant in this case, these are major considerations.

56. I now turn to the quantum of penalty. What I said earlier is that clearly it's open to the Court to impose a penalty on both the Defendant company and the Defendant Director. However, it's important that there isn't a double penalty imposed if you like. It's also submitted that perhaps I should deal with it as treating both Defendants jointly and severably liable; however I'm not sure that that's the appropriate way to proceed given that the total maximum penalty for the corporate Defendant is $99,000.00 whereas the total penalty for the individual is something like $19,800.00. I'm not sure that that's entirely appropriate either. Are you able to make submissions as to the appropriate way of dealing with these matters? I'm not sure that that's what Section 728 of the Workplace Relations Act import is either.?

[Submissions were then made by the parties of the issue of apportionment before Her Honour returned to her decision.]

HER HONOUR: 57. In respect of the breaches alleged I will impose a total penalty of $25,000.00 upon the Defendants, I propose to order that half of that be paid by each Defendant. So the first Defendant is to pay the sum of $12,500.00 and the second Defendant also the sum of $12,500.00. I direct that those penalties be paid into consolidated revenue, the usual stay is 30 days.