



Australian Government
Office of Workplace Services

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

Court number U02986123

BETWEEN

**Zeljko Kovacevic (A Workplace Inspector appointed pursuant to s167(2) of the
Workplace Relations Act 1996)** **Plaintiff**

and

Big Chip Pty Ltd (ACN 109 813 390) **Defendant**

EX TEMPORE JUDGMENT (18 APRIL 2007)

Magistrate: Her Honour Magistrate Hawkins
For the plaintiff: Paul Barker (Australian Government Solicitor)
For the defendant: Jonathan & Conny Stewart

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

- HER HONOUR:
1. This is an application brought by an inspector under the *Workplace Relations Act* on behalf of the Office of Workplace Services. In this application the Office seeks the imposition upon the Defendant of penalties under subsection 719(1) of the *Workplace Relations Act* and/or section 178(1) of the *Pre-Reform Act* for breaching various clauses of the relevant common rule awards and alternatively, the awards. In this case the relevant award was the *National Building and Construction Industry Award 2005* and the common rule award was the *National Building and Construction Industry Victorian Common Rule Declaration 2005*. The breaches of those awards relate to five areas in relation to travel allowance, industry allowance, tool allowance, the failure to pay proportional annual leave payments upon the termination of employment and the failure to pay annual leave loading in respect of annual leave payments.
 2. The Defendant at all relevant times was a body corporate incorporated under the *Corporations Act* and is sued in its corporate name. The Defendant is a family business operating in the building and construction business building homes. The employee concerned in relation to these underpayments is Mr Nathan Grech. He commenced an apprenticeship with George and Christine Spitteri on the 7th of February 2005 in carpentry. That apprenticeship was terminated on, it says in the fax the 24th of June 2005, so the apprenticeship only ran for a short time, did it?

[Paul Barker - That's prior to the employee being employed by the Defendants.

Magistrate Hawkins - Alright, just confirming that was correct]
 3. He then commenced employment on the 26th of June 2005 and concluded that employment on the 13th March 2006. He was employed full time and he commenced a further apprenticeship on the 27th of June 2005 and that was terminated on the 12th of March 2006. He was an apprentice for the purpose of a common rule award and alternatively the award during his employment and he performed carpentry work for the Defendant during his employment.
 4. The Defendant is a carpentry and design based business which was established in July 2004. Mrs Stewart was employed by the company since the business commenced as accounts administrator. She managed the company, together with her husband, Jonathan Stewart who is the director of the company. Apart from themselves they have two other employees who are primarily employed as apprentice carpenters. It is a fairly small business and the income generated from the business is the only source of income for the Stewart family. The business appears to have had a rocky financial road during its early years and made significant losses in the 05/06 financial year. The Stewarts have told me that they were in

significant financial strife during the period of employment of Mr Grech and found it difficult to pay their various debts in full and that included the debt to Mr Grech in relation to underpayments once they became aware of those. They were unaware of the correct wages and entitlements to be paid to Mr Grech until they were notified by the Office of Workplace Services after his termination. They were not members of the relevant industry organisations and were new small business owners and employers. They took certain steps to try and find out about their obligations including contacting Wageline and the like but were confused and not entirely correctly informed about those obligations. However once contacted by Office of Workplace Service and after discussion about their obligations, they did acknowledge that they had underpaid Mr Grech.

5. There were subsequent communications between the Office of Workplace Service about that debt and an instalment payment plan was ultimately agreed after a period of time. Ms Stewart deposes that as the company was not generating any income and contractors were not making payments for work done and other debts were owed, they were unable to maintain the payment plan and fell behind with their payments. It appears that Big Chip gave priority to repaying debts to other debtors rather than ensuring that obligations to former employees were met. Ultimately, the repayment of the underpayments were made direct to the former employee but were not completed prior to the issue of Court proceedings. The total amount of the underpayment was in the order \$3,448.52. The various warnings were given by the Office to the Defendants prior to the issue of proceedings and ultimately the final repayment of the debt was made on the 20th of February 2007. I note that proceedings were issued in this matter on the 18th of December 2006.
6. The Defendant has largely cooperated with the Office and has agreed to pay a sum of interest of \$259.06 to Mr Grech. They also assisted the conduct of these proceedings by agreeing a Statement of Facts. I place significant weight on remorse shown by the Defendants through their attendance at Court today and their cooperation with authorities and their ultimate repayment of all amounts owed to Mr Grech. I take into account in determining appropriate penalty and have regard to various relevant authorities in this area primarily from the Federal Court and the Federal Magistrates' Court, particularly well enunciated in cases such as the *TCFUA* and *Lotus Cove Pty Ltd*, a decision of Justice Merkel in 2004 and various other authorities to which I have been taken on this occasion and previously.
7. The maximum applicable penalty in this case is five breaches at 300 penalty units or \$33,000.00 per breach, leading to a maximum penalty of \$165,000.00. I have given consideration to the totality principal in relation to these breaches and give consideration to the overall conduct of the Defendant rather than to focus on the specific number of breaches in determining what is applicable. The scheme

of the *Workplace Relations Act* is of most importance in determining this case. High regard needs to be placed on the obligations of employers in meeting minimum standards including wages and conditions and the enforcement of those standards.

8. The breaches involved here are broad ranging and would have undoubtedly continued had the matter not been brought to the attention of the Defendant. These are not trifling matters as I have explained to the Defendants more fully earlier. The underpayment of \$3,448.00 is large and highly significant in terms of the overall wages paid to this lowly paid apprentice employee. I accept that these breaches, whilst probably distinct, arose out of the same course of conduct of employment of this single employee. Clearly, the breaches were not wilful or deliberate.
9. In summary, as I have already said, I do not consider that specific deterrence is necessary in this regard. I am satisfied that this employer, now aware of its obligations will ensure compliance in the future. There is no history of prior breaches of this type or of any other workplace relations or other law. However the need for general deterrence is high in this and many other industries where lowly paid workers are engaged. The minimum safety net must be adhered to and the penalty imposed today by the Court needs to be sufficiently high such that other employers when deciding whether or not to pay those minimum standards, think twice and make sure that they do comply.
10. In taking into account all of the factors that I have had regard to and the financial circumstances of this particular Defendant, I consider that the appropriate penalty to be imposed is \$500.00 per breach, or a total amount of \$2,500.00. I order that the Defendant pay to consolidated revenue the sum of \$2,500.00 together with, and pay directly to Mr Grech the outstanding amount of interest, which has been agreed at \$259.06. Now those amounts are to be paid within 1 month. You will have to, if you can't make that payment, negotiate an instalment payment, with you Mr Barker or the Office?

Paul Barker 11. Probably best directly with the Office.

HER HONOUR 12. Alright, but I do order that Mr Grech be paid first. Thank you. Is there anything further?

Paul Barker : 13. No your Honour, if your Honour pleases.