

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

No. U02586908

BETWEEN

INSPECTOR ZELJKO KOVACEVIC (a workplace inspector appointed pursuant to section 84(2) of the *Workplace Relations Act 1996* and whose appointment continues in force under item 13 of Schedule 5 of the *Workplace Relations Amendment (Work Choices) Act 2005*)

Plaintiff

AND

KEVIN KINGSLEY (T/AS WOOD & THINGS)

Defendant

ORDERS

1. The Defendant pay to Consolidated Revenue an aggregate penalty of 5,260.00 for breaches of the *Furnishing Industry National Award 2004* between January, 2005 and September, 2005, made up as follows:

- Breach of clause 22.2 (underpayment) \$1,320.00
- Breach of clause 26.3 (non payment) \$2,000.00
- Breach of clause 33.14 (non payment on termination)
\$620.00
- Breach of clause 28.2 (non payment of superannuation)
\$1,320.00

2. Payment of the penalty in order 1 to be made within 30 days.

REASONS FOR DECISION

- 1 The Defendant, Kevin Kingsley trading as Wood & Things (ABN 16 393 859 913) operates a carpentry/cabinet making business in Sunshine. From the time the *Furnishing Industry National Award 2004 (the Award)* was declared a common rule award by the Australian Industrial Relations Commission with effect from 1 January, 2005, Mr Kingsley was bound by the Award.
- 2 In order to meet the needs of the business, Mr Kingsley employed an apprentice, Mr Stephen Fry on 18 October, 2004. From that date, Mr Kingsley was an employer for the purposes of s.178 of the pre-reform *Workplace Relations Act 1996 (Cth) (the Act)*. Mr Fry's employment was subject to the Award. Mr Fry remained an employee of Mr Kingsley's until September, 2005.
- 3 The Plaintiff, Mr Zeljko Kovacevic is an inspector employed by the Commonwealth in the Office of Workplace Services. On 31 October, 2006 he instituted proceedings under the Act in respect of various breaches of the Award seeking payment of amounts owed to Mr Fry and the imposition of pecuniary penalties for breaches of the Award.
- 4 On 24 January, 2007 Mr Kingsley consented to Orders being made by this Court in respect of the alleged underpayments, totalling \$7,461.56 together with interest. A stay of 30 days was granted. To date, the amount owed to Mr Fry has not been paid.
- 5 The Award breaches, which are admitted by Mr Kingsley, comprise:
 - (a) clause 22.2 of the Award – minimum rates of pay (\$1,824.00 underpayment) between the period 3 January, 2005 and 24 June, 2005;
 - (b) clause 26.3 of the Award – non payment of wages (\$3,764.43 non-payment for the period 25 June, 2005 and 19 September, 2005;

- (c) clause 33.14 of the Award – failure to pay all proportionate accrued annual leave on termination (\$606.74 non-payment); and
 - (d) clause 28.2 of the Award – failure to make superannuation contributions of behalf of the employee (\$1,266.39 non payment).
6. On behalf of the Defendant it was submitted that the breaches of the award provisions “arose out of a single course of conduct” by Mr Kingsley, in that the breaches arose from a failure to pay amounts owed to Mr Fry due largely to Mr Kingsley’s difficult financial circumstances. By reason of s178(2) of the Act it was submitted that the breaches could, for the purpose of imposing a penalty, be taken to constitute a single breach of the term.
7. For the reasons set out by Gray J in Gibbs v. The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216 I do not agree. In this case each clause of the award imposes a separate obligation on the employer, even though some of the obligations imposed appear to overlap. I adopt the comments of Gray J, at page 219 where he states:

... I incline to the view that each separate obligation imposed by an award is to be regarded as a “term” for the purposes of s178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others.

8. I am therefore of the view that I am required to determine an appropriate penalty for four distinct breaches of the Award. The applicable maximum penalty for each breach is \$6,600.00, giving a total maximum penalty of \$26,400.00.

Considerations applicable to penalty

9. The Court’s attention was drawn to the principal objects of the Act, as detailed in s. 3 and in particular the objects set out below which clearly

indicate the importance of minimum award standards and the rights and responsibilities set out under the Act to support fair and effective agreement making:

(d) *providing the means:*

...

(ii) *to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and*

(e) *providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement – making and ensures that they abide by awards and agreements applying to them... ”*

10. I accept that it is also relevant to the Court's consideration of penalty, to note that the parliament did, in August, 2004 significantly increase the maximum penalty under s. 178 of the Act from \$1,000 to \$6,600 with respect to individuals. Clearly parliament has indicated that compliance with award obligations are serious obligations and should not be treated lightly.
11. Numerous authorities have set out the range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and the quantum of any penalty to be imposed.¹The Court was referred to the considerations set out by Mowbray FM in particular.²

¹ See for example *TPC v CSR It* [1991] ATPR 52,135 at 52152-52,153; *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285 at 291-29; *CFMEU v Coal & Allied Operations Pty Ltd (No 2)* [1999] FCA 1714 at [7-8]; *TCFUA v Lotus Cove Pty Ltd* [2004] FCA 43 at [46 – 47].

² *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 and *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7.

Nature and Extent of the Conduct

12. Mr Fry was employed by Mr Knight as an apprentice. Although the court was provided with no material regarding Mr Fry's personal circumstances, I have no difficulty accepting that he would not have been in a strong bargaining position having just completed his pre-apprenticeship training and commencing an apprenticeship in his chosen trade. As such, Mr Fry was reliant on the 'safety-net' of an award determined minimum rate of pay. I note that for Mr Fry, this was 55% of the ordinary weekly rate prescribed by the Award.
13. Mr Fry was underpaid over a 9 month period, indeed for a period of two months he was not paid at all. I accept that for Mr Fry, an underpayment of in excess of \$7,000 would have significant impact, particularly noting the impact of being in receipt of no income for a period of two months.
14. On behalf of Mr Kingsley it was submitted that the Court should take into account the steps taken by him to ascertain his obligations to his employee. It is said that Mr Kingsley contacted a government agency, Wageline, for advice and relied on that advice with respect to the rate of pay applicable to Mr Fry and the requirements on employers with respect to superannuation. I accept that reliance on the advice of others is a relevant consideration in determining penalty. However, I also accept the submission of the Plaintiff that there can be no doubt Mr Kingsley was aware of his obligation to pay his employee. I am also not persuaded that Mr Kingsley was unaware of his obligation to make superannuation contributions on behalf of his employee on a regular basis and note that this breach remains unrectified.

Similar previous conduct

15. No previous contraventions of the Act or other workplace legislation are alleged against the Defendant and I have taken this into account in determining penalty.

Demonstration of Contrition

16. On behalf of Mr Kingsley it was submitted that the Court should take into account, by way of a demonstration of contrition, the fact that he appears in court having admitted the breaches and has consented to orders being made against him in favour of the plaintiff.

17. Against that the Court's attention was drawn to the matters set out in detail in the complaint regarding the history of this matter since December, 2005. Attempts at voluntary compliance have been unsuccessful. Meetings scheduled with Mr Kingsley were either not attended or deferred. Mr Kingsley's engagement with the OWS was, at best, sporadic. It was submitted that Mr Kingsley had prevaricated and continues to do so. I am clearly of the view that Mr Kingsley's conduct has not demonstrated an understanding of the seriousness of the matter or indeed, of the need to rectify the underpayment.

18. I accept however that Mr Kingsley did not set out to intentionally underpay Mr Fry, but rather the breaches, particularly those relating to non payment from June, 2005 to September, 2005 were as a direct result of worsening financial situation faced by his business. I have taken size and financial viability of the business into account in determining penalty. In doing so however, I have taken into account the comments of Keely J in Lynch v. Buckley Sawmills Pty Ltd (1984) 3 FCR 503, at p. 508:

In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of an award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no

substantial penalty will be imposed in respect of a breach found by a court to have been committed.

Deterrence

19. There is no doubt that the general deterrence is an important consideration for the court in imposing penalties under the Act. In this case, it was submitted that little could be achieved in the way of specific deterrence as Mr Kingsley is now seeking employment in other areas. However, whilst this may be the case, I am also of the view that specific deterrence has a role to play in circumstances where Mr Kingsley has failed to comply with Court orders to make good its underpayment to Mr Fry and has, to date, made no efforts to do so whether by instalments or otherwise. The need to deter other employers from similar disregard of employee rights is clear.
20. The Court was provided with references provided on behalf of Mr Kingsley. I have no difficulty accepting that Mr Kingsley is otherwise of good character and had a commitment to his trade, perhaps to the detriment of focusing on the other aspects of his business.

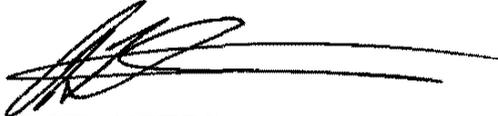
Discretion and Totality

21. As stated earlier, I accept that the obligations imposed by the award provisions overlap in this case. It was submitted by the Plaintiff, and I accept, that an aggregate penalty is appropriate and just in the circumstances. I also accept the submission of Counsel for Mr Kingsley that general sentencing principles, such as totality, apply.
22. Counsel appearing for the Plaintiff sought a penalty in the vicinity of 20-30% of the maximum, or \$6,600.00. Having taken into account all the factors set out above, I consider that a just and appropriate aggregate penalty is \$5,260.00. I accept that the breaches of clause 26.3 and clause 33.14 were connected, and accordingly I have adopted the approach outlined by Gray J in the City of Altona case in imposing a nominal

penalty in respect of clause 33.14 and a more significant penalty with respect to the non-payment of wages. The aggregate penalty is thus made up as follows:

- Breach of clause 22.2 (underpayment) \$1,320.00
- Breach of clause 26.3 (non payment) \$2,000.00
- Breach of clause 33.14 (non payment on termination)
\$620.00
- Breach of clause 28.2 (non payment of superannuation)
\$1,320.00

23. I order that the penalty be paid into Consolidated Revenue.



AJ CHAMBERS

Magistrate

15 March, 2006