FEDERAL MAGISTRATES COURT OF AUSTRALIA

MARTIN v W & K CRUST PTY LTD *[2007] FMCA 992*

INDUSTRIAL LAW – Prosecution of civil penalty – breach of award.

Workplace Relations Act 1996 (Cth), ss.717, 718, 719, 841, Schedule 8

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

Applicant:	SHELBY MARTIN
Respondent:	W & K CRUST PTY LTD (ACN 069 720 181)
File Number:	BRG 198 of 2007
Judgment of:	Jarrett FM
Hearing date:	25 June 2007
Date of Last Submission:	25 June 2007
Delivered at:	Brisbane
Delivered on:	26 June 2007

REPRESENTATION

Counsel for the Applicant:	Mr Horneman-Wren
Solicitors for the Applicant:	Corrs Chambers Westgarth
Solicitors for the Respondent:	No appearance

ORDERS

(1) That the respondent pay the Commonwealth $8,250 for the breach of an applicable provision of the notional agreement preserving a State award between the respondent and Mr Ross Greer relating to the provision of notice of termination or payment in lieu of notice of termination;

(2) That the respondent pay the Commonwealth $8,250 for the breach of an applicable provision of the notional agreement preserving a State award between the respondent and Mr Ross Greer and breach of the Australian Fair Pay and Conditions Standard relating to annual leave entitlements;

(3) That the respondent pay the penalties set out in orders 1 and 2 hereof within 60 days of the date of these orders;

(4) That within 60 days of the date of these orders the respondent pay to Mr Ross Greer his outstanding entitlements totalling $6,725.46;

(5) That within 60 days of the date of these orders the respondent pay to Mr Ross Greer interest upon his outstanding entitlements at the rate of 6.5% per annum from 19 May, 2006 to the date of these orders, such interest totalling $482.66.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 198 of 2007

SHELBY MARTIN
Applicant

And

W & K CRUST PTY LTD (ACN 069 720 181)
Respondent

REASONS FOR JUDGMENT

1. This is an application for:

   a) an order for the imposition of a penalty on the respondent pursuant to s.719(1) of the *Workplace Relations Act 1996* ("the Act") in respect of a breach of an "applicable provision" in a Notional Agreement Preserving a State Award (NAPSA) relating to the provision of notice of termination or payment in lieu of notice of termination;

   b) an order pursuant to s.719(6) of the Act for the respondent to pay to its former employee, Mr Ross Greer, $3,544.00 being the amount that the respondent has underpaid Mr Greer as a consequence of the respondent's breach;

   c) an order for the imposition of a penalty on the respondent pursuant to s.719(1) of the Act in respect of a breach of an "applicable provision" relating to annual leave pursuant to either:

      i) the relevant NAPSA; or alternatively; or

      ii) the relevant NAPSA and s.235(2) of the Act;

d) an order pursuant to s.719(6) of the Act for the respondent to pay to Mr Greer the full amount of the underpayment with respect to annual leave;

e) an order pursuant to s.722 of the Act for the respondent to pay to Mr Greer interest on the respective underpayments;

f) an order pursuant to s.841 of the Act that any penalty imposed be paid to the Commonwealth.

The facts

2. The applicant is a workplace inspector, employed by the Office of Workplace Services and is, I accept, duly appointed under s.167 of the Act.

3. The respondent is an Australian proprietary corporation limited by shares. Warren William Crust is the sole director of the respondent. The respondent was formerly known as Crust Smash Repairs Pty Ltd and prior to that as Newmarket Auto Care Pty Ltd. Between 19 February, 2007 and 9 June, 2007 the respondent was in the care of a receiver and manager. On 9 June, 2007 a different receiver and manager was appointed to the company pursuant to a registered mortgage debenture over all of the assets of the respondent. It was not suggested that the receivership impacted upon this application in anyway.

4. The respondent carried on the business of a panel beating/automotive repair workshop trading for profit at Newmarket in Brisbane. The respondent is, I find, a *constitutional corporation* within the meaning of that term as used in the Act[1].

5. Mr Greer is a trade qualified panel beater. He has worked for the respondent's business since that business began in March, 2003. At that time the business was conducted by a partnership between the respondent and another natural person. In about May, 2003 and shortly after Mr Greer commenced employment in the business the partnership between the proprietors ended. The respondent continued the business

[1] see s.4 of the Act

on its own account and Mr Greer continued to be employed as a panel beater by the respondent. There was no written employment agreement between Mr Greer and the respondent.

6. I accept that Mr Greer's employment was subject to the applicable industrial instrument. That was the common rule award *The Engineering Award State – 2002* ("the State Award") made pursuant to the *Industrial Relations Act 1999* (Qld) ("the Qld Act").

7. Relevantly, the application clause of the State Award provides as follows:

> ***1.4 Parties bound***
>
> *This Award is legally binding upon the employees as prescribed by clause 1.5 and their employers ...*
>
> ***1.5 Award coverage***
>
> *1.5.1 Subject to the exemptions listed in clauses 1.5.2 and 1.5.3, this Award shall apply throughout the State of Queensland to employees and employers of such employees engaged in the industries and occupations of engineering, metal working, electrical/electronic, fabricating and vehicle building and to all their branches and all allied industries who were previously covered by one of the following Awards:*
>
> *(a) Coach and Motor Body Building Industry and Farriers' Award - State;*
>
> *(b) Electrical Engineering Award - State;*
>
> *(c) Electroplaters' Award - State;*
>
> *(d) Engine Drivers' Award - State (in regard to classifications transferred from that Award and appearing in Schedule 16);*
>
> *(e) Mechanical Engineering Award - State;*
>
> *(f) Sheet Metal Workers' Award - State; and*
>
> *(g) Typewriter, Adding, Cash Register and other similar Machines Mechanics' Award - State.*
>
> *or who would have been covered by these awards had they not been rescinded; employees and employers of such employees in*

those industries and occupations above for whom classifications and wage rates are prescribed by this Award.

8. Mr Greer was employed as a trade-qualified panel beater. I accept that until 1990 the employment of panel beaters was subject to the *Coach and Motor Body Building Industry and Farriers' Award – State*. From 11 June 1990, however, that award was rescinded and amalgamated into the State Award referred to above. I accept that Mr Greer's correct wage classification under the State Award is Wage Group Cl0.

9. The State Award provided for a number of entitlements. Relevantly, the State award provided for termination of employment in the following way:

4.7.2 Termination by employer

(a) An employer may dismiss an employee only if the employee has been given the following notice:

Period of Continuous Service	*Period of Notice*
Not more than 1 year	*1 week*
More than 1 year but not more than 3 years	*2 weeks*
More than 3 years but not more than 5 years	*3 weeks*
More than 5 years	*4 weeks*

(b) In addition to the notice in (a) above, employees 45 years old or over and who have completed at least two years' continuous service with the employer shall be entitled to an additional week's notice.

(c) Payment in lieu of notice shall be made if the appropriate notice is not given:

Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the minimum compensation payable to an employee will be at least the total of the amounts the employer would have been liable to pay the employee if the employee's employment had continued until the end of the required notice period. The total must be worked out on the basis of:

(i) the ordinary working hours to be worked by the employee; and

(ii) the amounts payable to the employee for the hours including for example allowances, loadings and penalties; and

(iii) any other amounts payable under the employee's employment contract.

(e) The period of notice in this clause shall not apply in the case of dismissal for misconduct or other grounds that justify instant dismissal, or in the case of a casual employee, or an employee engaged by the hour or day, or an employee engaged for a specific period or tasks.

10. It also provided for annual leave and annual leave pay in the following way:

7.1 Annual Leave

7.1.1 Every employee (other than a casual employee) covered by this Award shall at the end of each year of employment be entitled to annual leave on full pay as follows:

(a) not less than 5 weeks if employed on shift work where 3 shifts per day are worked over a period of 7 days per week;

(b) not less than 4 weeks in any other case;

7.1.2 Such annual leave shall be exclusive of any public holiday which may occur during the period of that annual leave and (subject to clause 7.1.8) shall be paid for by the employer in advance:

(a) in the case of any and every employee in receipt immediately prior to that leave of ordinary pay at a rate in excess of the ordinary rate payable under this Award at that excess rate; and

(b) in every other case, at the ordinary rate payable to the employee concerned immediately prior to that leave under this Award.

…

7.1.8 Calculation of annual leave pay - In respect to annual leave entitlement to which clause 7.1.8 applies, annual leave pay (including any proportionate payments) shall be calculated as follows:

(a) Shift workers - Subject to clause 7.1.8(c), the rate of wage to be paid to a shift worker shall be the rate payable for work in ordinary time according to the employees roster or projected roster, including Saturday, Sunday or holiday shifts;

(b) Leading hands, etc. - Subject to clause 7.1.8(c), leading hand allowances and amounts of a like nature otherwise payable for ordinary time worked shall be included in the wages to be paid to employees during annual leave;

(c) All employees - Subject to clause 7.1.8(d), in no case shall the payment by an employer to an employee be less than the sum of the following amounts:

(i) the employee's ordinary wage rate as prescribed by this Award for the period of the annual leave (excluding shift premiums and week-end penalty rates);

(ii) leading hand allowance or amounts of a like nature;

(iii) a further amount calculated at the rate of 171/2 percent of the amounts referred to in clauses clause 7.1.8(c)(i) and (ii);

(d) Clause 7.1.8(c) shall not apply to the following:

(i) Any period or periods of annual leave exceeding 5 weeks in the case of employees concerned in a calling where 3 shifts per day are worked over a period of 7 days per week; or 4 weeks in any other case;

(ii) Employers (and their employees) who are already paying (or receiving) an annual leave bonus, loading or other annual leave payment which is not less favourable to employees.

11. I highlight that the above clauses of the State award deal with two separate, although connected subject matters, namely the quantum of time that accrues in employment on the one hand (cl.7.1.1) and how that time is to be paid on the other (cl.7.1.2 and 7.1.8).

12. Typically Mr Greer worked 42 hours per week and earned $886.00 gross per week. That was in excess of the ordinary rate prescribed for a worker of his classification - $578.20 per week.

13. The payroll book for the business suggests that Mr Greer ceased employment in the week ending 13 February, 2004, but was subsequently re-employed in the week ending 12 March, 2004. Mr Greer's evidence is that he took a three week holiday over this period (some of which was unpaid leave), but he did not resign his employment. The length of Mr Greer's continuous service is relevant to some calculations that appear later in these reasons, but it is not necessary to make a finding about this conflict in the evidence.

14. I accept the applicant's submission that under the law as it applied to Mr Greer's employment at the time, for the purposes of working out an employee's rights and entitlements under an industrial instrument, an employee's continuity of service with an employer was deemed not be broken if:

    a) the employee's employment was terminated by the employer or employee; and

    b) the employer re-employed the employee within 3 months after the termination[2].

15. Mr Greer's employment in the business was continuous until he was dismissed on Friday 19 May, 2006. Leading up to that date, Mr Greer became aware that the respondent was attempting to sell the business. He was assured by the respondent's director that the business would be sold and that his job was safe.

16. At around midday on 19 May, 2006 however, Mr Greer telephoned Mr Crust from the office at the business. During that conversation Mr Crust told Mr Greer that the business was to be closed that day and that

[2] see s.71(5) of the *Industrial Relations Act* 1999 (Qld)

he should take his tools home and he would pay Mr Greer what was owing to him.

17. I find that on the termination of Mr Greer's employment the respondent did not provide Mr Greer with:

    a) any payment for untaken annual leave that he accrued during the time he worked for the respondent; or

    b) any pay in lieu of notice.

The statutory framework

18. I accept the applicant's submission that prior to the commencement of *Workplace Relations Amendment (Work Choices) Act 2005* (Qld), the State award and any applicable industrial instrument made pursuant to the Qld Act applied to the employment relationship between the respondent and Mr Greer.

19. From 27 March, 2006 the Act:

    a) applies to all *constitutional corporations* and their employees; and

    b) with respect to those persons to which it applies, operates so to exclude most State industrial relations legislation such as the Qld Act.

20. The Act contains transitional provisions set out in schedule 8 thereto, the objects of which are[3]:

> *(a) to preserve for a time the terms and conditions of employment, as they were immediately before the reform commencement, for those employees:*
>
> *(I) who, but for the reforms commenced at that time, would be bound by a State employment agreement, a State award or a State or Territory industrial law; or*
>
> *(ii) whose employment, but for the reforms commenced at that time, would be subject to a State employment*

[3] see cl.2 schedule 8 to the Act

agreement, a State award or a State or Territory industrial law; and

(b) to encourage employees and employers for whom those terms and conditions have been preserved to enter into workplace agreements during that time.

21. From 27 March, 2006 the State award ceased to apply to Mr Greer and the respondent as an industrial instrument enforceable under the laws of Queensland. However, according to clause 31 schedule 8 to the Act a *notional agreement preserving State awards* ("NAPSA") is taken to come into operation from 27 March, 2006 in respect of the respondent and Mr Greer. The NAPSA binds both Mr Greer and the respondent[4].

22. By operation of cl.34(1) and 34(2) of schedule 8 to the Act, the terms of the NAPSA between the respondent and Mr Greer include the terms of the State award and any relevant State industrial law that determines, in whole or in part, *a preserved entitlement. Preserved entitlement* means[5] an entitlement to:

a) annual leave and annual leave loadings; or

b) parental leave, including maternity leave and adoption leave; or

c) personal/carer's leave; or

d) leave relating to bereavement; or

e) ceremonial leave; or

f) notice of termination; or

g) redundancy pay; or

h) loadings for working overtime or shift work; or

i) penalty rates, including the rate of payment for work on a public holiday; or

j) rest breaks; or

k) another prescribed entitlement.

[4] see cl.32 and 33 schedule 8 of the Act
[5] see cl.35 schedule 8 of the Act

23. Except as provided in Part 3 of schedule 8 of the Act, a NAPSA has effect according to its terms[6], although the NAPSA is not enforceable under the law of a State or a territory[7]. The NAPSA ceases to be in operation at the end of a period of 3 years beginning on 26 March, 2006, if a workplace agreement comes into operation in relation to the employee, or if the employee becomes bound by an award[8].

24. Divisions 4 and 5 of Part 3 of Schedule 8 of the Act set out circumstances in which a term of a NAPSA is unenforceable because the Australian Fair Pay and Conditions Standard[9] ("the Standard") also deals with that matter. Specifically if the Standard makes provision for a matter, then a term of the NAPSA (other than a *preserved notional term*) that also deals with that matter is unenforceable[10].

25. According to cl.45(1) of schedule 8 to the Act:

> *(1) A **preserved notional term** is a term, or more than one term, of a notional agreement preserving State awards that is about any or all of the following matters:*
>
> *(a) annual leave;*
>
> *(b) personal/carer's leave;*
>
> *(c) parental leave, including maternity and adoption leave;*
>
> *(d) long service leave;*
>
> *(e) notice of termination;*
>
> *(f) jury service;*
>
> *(g) superannuation.*

26. If a NAPSA includes a *preserved notional term* and the employee has an entitlement (*preserved notional entitlement*[11]) in relation to that matter under the *preserved notional term*, then if the preserved notional term is about annual leave, personal/carer's leave (including sick leave) or parental leave and the employee's preserved notional entitlement is

[6] see cl.38(1) schedule 8 of the Act
[7] see cl.38(3) schedule 8 of the Act
[8] see cl.38A(1), 38A(2) and 38A(3) schedule 8 of the Act
[9] see Part 7 of the Act
[10] see cl.44 schedule 8 of the Act
[11] see cl.46(1)(b) schedule 8 of the Act

more generous than the equivalent entitlement under the Standard, the employee's entitlement under the Standard is excluded and the employee's preserved notional entitlement under the NAPSA has effect in accordance with its terms. Otherwise the employee's entitlement under the Standard has effect[12].

27. The meaning of the term *more generous* is defined in cl.47 Schedule 8 of the Act as follows:

> *(1) Whether an employee's entitlement under a preserved notional term in relation to a matter is* more generous *than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:*
>
> > *(a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or*
> >
> > *(b) to the extent that regulations made under paragraph (a) do not so specify–is to be ascertained in accordance with the ordinary meaning of the term* more generous.
>
> *(2) If a matter to which an entitlement under a preserved notional term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Division.*

28. The *Workplace Relations Regulations 2006* has specified a definition for the phrase *more generous* in Chapter 5 thereof as follows:

> ***3.2 Meaning of more generous***
>
> *(1) For paragraph 47 (1) (a) of Schedule 8 to the Act, this regulation explains how to determine whether an employee's entitlement under a preserved notional term in relation to:*
>
> > *(a) annual leave; or*
> >
> > *(b) personal/carer's leave; or*
> >
> > *(c) parental leave, including maternity and adoption leave;*

[12] see cl.46(2) schedule 8 of the Act

is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard.

(2) The entitlements are to be compared on the basis of their effect on the employee alone, rather than on the basis of their effect on employees generally.

(3) However:

(a) if the total annual quantum of a kind of leave permitted under the preserved notional term is greater than the total annual quantum of that kind of leave permitted under the Australian Fair Pay and Conditions Standard, the entitlement specified under the preserved notional term is taken to be more generous; and

(b) if the total annual quantum of a kind of leave permitted under the preserved notional term is less than or equal to the total annual quantum of that kind of leave permitted under the Australian Fair Pay and Conditions Standard, the entitlement under the Australian Fair Pay and Conditions Standard has effect.

Mr Greer's employment

29. The practical effect of the above for Mr Greer is that:

a) the provisions of his NAPSA with the respondent included:

i) the provision of the State award with respect to notice of termination – that is, it was a *preserved notional term* of the NAPSA;

ii) the provisions of the State award dealing with payment of annual leave;

iii) the provisions of the State award dealing with payment of annual leave loading on termination of employment;

b) Mr Greer was entitled to the benefits of each of those terms when he was terminated (that is, they were preserved notional entitlements);

c) the entitlement under the Standard with respect to those matters (if any) will prevail over the terms of the NAPSA unless Mr Greer's preserved notional entitlement (in each respect) is *more generous* than the Standard.

30. There are no provisions in the Australian Fair Pay and Conditions Standard that deal with termination of employment. The terms of the NAPSA will determine Mr Greer's entitlements in that regard.

31. The Standard does, however deal with annual leave and how annual leave is to be paid. The Act provides:

> ***232 The guarantee***
>
> *(1) For the purposes of this Division,* ***annual leave*** *means leave to which an employee is entitled under this Subdivision.*
>
> All employees to whom this Division applies
>
> *(2) An employee is entitled to accrue an amount of paid annual leave, for each completed 4 week period of continuous service with an employer, of 1/13 of the number of nominal hours worked by the employee for the employer during that 4 week period.*

32. In respect of payment for annual leave, the Act provides the following:

> ***235 Annual leave–payment rules***
>
> *(1) If an employee takes annual leave during a period, the annual leave must be paid at a rate that is no less than the employee's basic periodic rate of pay immediately before the period begins.*
>
> *(2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee's untaken accrued annual leave must be paid at a rate that is no less than the employee's basic periodic rate of pay at that time.*

Which entitlement to annual leave is more generous?

33. The provisions of the Standard apply from 27 March, 2006. Until that time, Mr Greer had accrued annual leave entitlements according to the terms of the State award. It seems to me that those entitlements constitute a *preserved notional entitlement* for the purposes of

cl.46(1)(b) of schedule 8 of the Act. He also had a separate entitlement to be paid for that leave in a particular way that had also accrued under the State award. Both entitlements need to be separately considered against the concomitant provision of the Standard to discern whether those preserved notional entitlements are more generous that the entitlements under the Standard.

34. Turning to the first issue, it is necessary to determine Mr Greer's total annual quantum of leave under both the Standard and the NAPSA[13]. At the relevant time, under the Standard employees were entitled to annual leave of 1/13 of *nominal hours worked* during each completed four weeks of continuous service[14]. Mr Greer was a full-time day worker, who worked 42 hours a week. The Standard provided that, if an employee is employed by an employer to work a specified number of hours per week, the number of nominal hours worked by the employee during a week is to be worked out by starting with the specified hours and deducting time absent from work on leave that does not count as service and time for which payment cannot be made because of industrial action[15]. On this basis, his total annual quantum of annual leave under the Standard for a year of employment was 168 hours (four weeks at 42 hours per week).

35. Under the NAPSA Mr Greer is entitled to annual leave of "not less than four weeks" for each year of employment. The applicant highlights that the entitlement could be four weeks at 42 hours per week, or four weeks at 38 hours per week. It is unnecessary to decide which interpretation prevails because on either view, the entitlement is not greater than (that is, it is equal to) the total annual quantum of the equivalent kind of leave provided for in the Standard.

36. The standard therefore governs the quantum of annual leave to which Mr Greer was entitled at the time of his employment. I do not think that the fact that the Standard did not commence operation until 26 March, 2006 means that his entitlements under the Standard only commence from that point. If that were the case, cl.46(2) of Schedule

[13] see cl.3.2 Chapter 5 of the *Workplace Relations Regulations* 2006
[14] At the time of the termination of Mr Greer's employment, the Act had not been amended by the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (Cth) (Amending Act). This is important because the Amending Act substantially changed the way that "nominal hours" are calculated
[15] see s.229 of the Act

8 to the Act would have no operation. That clause is clearly designed to permit of the type of comparison I have just performed and to provide the employee with the benefit of the Standard (if appropriate) over the period to which the comparison relates.

37. In my view, Mr Greer has an entitlement under the Standard to four weeks annual leave per annum. Having regard to the evidence, I accept the applicant's submissions that as at the date of his termination Mr Greer had accrued 15.28 days of annual leave. He is entitled to be paid for that accrued leave.

38. That leads to the second issue which relates to payment for annual leave. Both the NAPSA and the Standard make provision for payment of annual leave. The method prescribed for determining which provision is more generous in cl.3.2 Chapter 5 of the Regulations does not apply because that section only applies to working out the quantum of particular kinds of leave entitlements. It does not deal with how that leave is to be paid.

39. The NAPSA provisions would lead to Mr Greer being paid 15.28 days at his daily rate of $177.20 – a total of $2,707.62. I should add that I consider that the appropriate rate at which to calculate the entitlement is the rate at which Mr Greer was ordinarily paid, rather than the (much lower) rate prescribed by the State award for employees of Mr Greer's classification. I am of that view because it pays attention to the provisions of clause 7.1.2 (a) of the State award, which fit comfortably with clause 7.1.8(c) thereof.

40. In addition to his daily rate, Mr Greer is entitled under the NAPSA to annual leave loading of 17.5%[16] – a further $473.84. His total remuneration entitlement for his annual leave therefore is $3,181.46.

41. His entitlement under the Standard does not include any form of leave loading. Thus, at best for Mr Greer, under the Standard his entitlement would be $2,707.62. The entitlement arising under the NAPSA is, according to the ordinary understanding of the phrase *more generous*,

[16] cl.7.1.8(c)(iii) of the State award

more generous to Mr Greer than the entitlements under the Standard. The entitlements under the NAPSA have effect[17].

The prosecution

42. Section 719(1) of the Act relevantly states:

> *(1) An eligible court may impose a penalty in accordance with this Division on a person if:*
>
> *(a) the person is bound by an applicable provision; and*
>
> *(b) the person breaches the provision.*

43. *Applicable provision* is defined in s. 717 as follows:

> ***applicable provision**, in relation to a person, means:*
>
> *(a) a term of one of these that applies to the person:*
>
> *(i) an AWA;*
>
> *(ii) the Australian Fair Pay and Conditions Standard;*
>
> *(iii) an award;*
>
> *(iv) a collective agreement;*
>
> *(v) an order of the Commission (except one made under Division 4 of Part 9); and*
>
> *(b) section 607 (meal breaks); and*
>
> *(c) section 612 (public holidays); and*
>
> *(d) section 689 (extended entitlement to parental leave).*

44. Although a NAPSA is not included in the definition of *applicable provision*, cl. 43 of Schedule 8 provides that:

> *43 Enforcing the notional agreement*
>
> *(1) A notional agreement preserving State awards may be enforced as if it were a collective agreement.*

[17] cl.46 of Schedule 8 of the Act.

(2) A workplace inspector has the same functions and powers in relation to a notional agreement preserving State awards as he or she has in relation to a collective agreement.

45. I accept the applicant's submission that the effect of this provision is that a penalty may be imposed under s.719 of the Act for a breach of a term of a NAPSA as if it was a term of a collective agreement and therefore an *applicable provision*. I acknowledge that to the extent that the respondent is bound to apply the annual leave provisions of the Standard, these provisions are also an *applicable provision*.

Breaches

46. Mr Greer was, pursuant to the NAPSA, entitled to three week's notice of termination plus an additional one week's notice (as he was 45 years old or over and had completed at least two years continuous service)[18]. Payment in lieu of notice could have been made if the appropriate notice was not given. Mr Greer received neither. This breach is made out.

47. Mr Greer was entitled to be paid four weeks notice at his ordinary rate of $886.00 per week. That is a total of $3,544.00.

48. At the date of termination Mr Greer also had an entitlement to annual leave and upon termination was entitled to have that paid out to him. The amount to which he was entitled was $3,181.46. It was not paid. This breach is made out.

Voluntary compliance

49. On 13 June, 2006 the Office of Workplace Services (OWS) received a Wages and Conditions Claim Form from Mr Greer. The OWS attempted to have the respondent voluntarily comply with its obligations under the relevant applicable provisions and, to this end, the Applicant, Inspector Martin:

    a) on 12 July, 2006 sent a letter to the respondent outlining that a claim had been made, encouraging the respondent to resolve the

[18] cl.4.7.2 of the State award

matter directly with Mr Greer, and providing the respondent 14 days in which to do so;

b) on 21 July, 2006 rang Mr Crust and when Mr Crust alleged that he not received the letter, re-sent the letter to Mr Crust at the alternative address given by Mr Crust;

c) on 8 August, 2006 sent a letter to the respondent/Mr Crust indicating that the OWS' investigations had resulted in a finding that there had been a breach with respect to non-payment of annual leave and payment in lieu of notice and which sought for the respondent to:

   i) take immediate action to meet its obligations to Mr Greer; and

   ii) advise the OWS in writing by 22 August, 2006 of the action taken to comply with these obligations;

d) on 28 August, 2006 sent a letter entitled "Final Notice" to the respondent indicating that the matter would be referred to litigation unless the respondent advised in writing by 4 September, 2006 what steps it had taken to rectify its breach;

e) on 25 September, 2006 sent a further letter (after receiving the payroll records of the respondent pursuant to a "Notice to Produce" under section 1 69(2)(c) of the Act) that contained a re-calculation of the amount owing and which again sought for the respondent to:

   i) take immediate action to meet its obligations to Mr Greer; and

   ii) advise the OWS by 10 October, 2006 of the action taken to comply with these obligations;

f) on 12 October, 2006 sent a letter entitled "Final Notice" to the respondent indicating that the matter would be referred to litigation unless the respondent advised in writing by 20 October, 2006 what steps it had taken to rectify its breach;

g) on 3 November, 2006 sent a letter to the respondent notifying that, as attempts to resolve the matter by voluntary compliance had been unsuccessful, the matter had been referred to the Queensland Litigation Team of the OWS.

50. After the matter was referred to the OWS Queensland Litigation Team, Inspector Gai Buchanan:

a) on 29 November, 2006 sent a letter to the respondent outlining the alleged breach and indicating that, unless the breach was rectified by 13 December, 2006 the matter would proceed to litigation. This letter confirmed that, if the matter did proceed to litigation, the OWS would be seeking:

i) interest on the sum owed to Mr Greer; and

ii) the imposition of a penalty.

The letter also indicated that the Act allows for penalties (for these types of breaches) of up to $33,000.00;

b) on 2 January, 2007 left a voice message on Mr Crust's mobile asking for Mr Crust to contact her.

51. I accept that with the exception of a "without prejudice" letter dated 20 October, 2006 from solicitors acting for the respondent (which was in response to Inspector Martin's letter of 2 October, 2006) no written response was received to any of the above letters.

52. I accept that Inspector Martin spoke to Mr Crust via telephone on two occasions. On the first occasion (on 25 July, 2006) Mr Crust indicated that he had spoken to Mr Greer and that Mr Greer had indicated that he would "drop it". Inspector Martin then spoke to Mr Greer who indicated that he did not say any such thing. The other telephone conversation related to the OWS' notice to produce the Payroll Book. In addition, there were two "without prejudice" telephone calls from a person who identified themself as a lawyer with Holding Redlich and acting on behalf of the respondent on 11 October, 2006 and 27 October, 2006.

Penalties

53. The Court has the power to impose a penalty on the respondent pursuant to s.719(1) of the Act with respect to each breach of an applicable provision. Whilst s.719(2) of the Act requires the Court to consider two or more breaches of an applicable provision that arise out of a "course of conduct" to be taken to constitute one single breach of the applicable provision, I accept the applicant's submissions that this section has no application here as:

    a) the provisions of the NAPSA with respect to payment in lieu of notice and with respect to annual leave are separate and distinct provisions that impose separate obligations on the respondent; and

    b) the relevant breaches do not constitute a *course of conduct*.

54. In my view it is appropriate to determine an appropriate penalty for each distinct breach. The applicable maximum penalty for each breach is $33,000.00 – a total maximum penalty of $66,000.00.

55. A number of 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 the penalty imposed. Those authorities are usefully collected, with respect, by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 and *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9. I will not repeat what his Honour there set out.

56. I accept the applicant's submission that this is an appropriate case to impose a significant penalty for each breach for the following reasons:

    a) The principal objects of the Act emphasis the importance of minimum standards and the importance for the enforcement of those standards. Australian workers rely on these minimum standards;

    b) The contraventions in this case reveal a deliberate disregard for the respondent's statutory obligations;

c) Despite being given a significant opportunity to comply voluntarily with its obligations to Mr Greer, the respondent has chosen not to do so;

d) Legal proceedings were initiated as a last resort;

e) The respondent has demonstrated a failure to co-operate with the OWS. It failed to meaningfully respond to written correspondence;

f) There is a need to deter other employers from similar conduct. If a significant penalty is not imposed there is a risk that some employers will not comply with their obligations to provide employees with their minimum entitlements in the expectation that the low penalty for "getting caught" makes taking the risk of underpaying employees financially attractive.

57. I accept the applicant's submissions that the range of penalty appropriate for each breach is between $5,000 - $10,000.

58. I fix the penalty in each case at $8,250.00 – a total of $16,500. There is nothing to my mind to suggest that either breach is more serious than the other. Each is equally serious and should attract a similar penalty.

59. The penalty should be paid to the Commonwealth[19] and I will so order.

60. Sections 719(6) and 722 authorise an order that Mr Greer's outstanding entitlements be paid to him. I will so order. He is also entitled to interest of the outstanding entitlements. The applicant submitted that 6.5% is appropriate. I agree and the outstanding entitlements will carry interest at 6.5% per annum.

61. For the foregoing reasons I make the orders set out at the commencement hereof.

I certify that the preceding sixty-one (61) paragraphs are a true copy of the reasons for judgment of Jarrett FM

Associate: S. Haysom

Date: 26 June 2007

[19] see s.841 of the Act