

CHIEF INDUSTRIAL MAGISTRATE'S COURT
SYDNEY

CHIEF INDUSTRIAL MAGISTRATE HART

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THURSDAY 1 MARCH 2007

20389519/06/2 - Office of Workplace Services v PROJECT
AIRCON PTY LIMITED

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EX PARTE

OFFENCE Breach applicable provision

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Ms Polga for the Informant
No appearance for the Accused

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POLGA: I note that the matter might have been set down
for ex parte today. I don't know if the respondent is
here.

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HIS HONOUR: We'll have the matter called outside the
court.

POLGA: Thank you.

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HIS HONOUR: There appears to be no appearance today on
behalf of the defendant.

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POLGA: Your Honour, this went for mention for the first
time on the previous - I haven't got that date in front of
me but--

HIS HONOUR: 8 January.

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POLGA: Yes. Are you at all able to proceed with the ex
parte matter today.

HIS HONOUR: Yes.

POLGA: Would you feel comfortable with that.

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HIS HONOUR: I would assume that it would be a relatively
short matter.

POLGA: It is.

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HIS HONOUR: I propose to deal with that firstly after
I've called through the list.

POLGA: No problem.

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HIS HONOUR: I'll come back and deal with this matter.

POLGA: Thank you, your Honour.

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MATTER STOOD IN LIST

HIS HONOUR: Ms Polga. Now for the record, this is the
 5 matter of the Office of Workplace Services and Project
 Aircon Pty Limited. Thank you, Ms Polga.

POLGA: Thank you, your Honour. I have with me the
 10 inspector who dealt with this matter as well, Inspector
 Darco Prushko.

HIS HONOUR: Thank you.

POLGA: I have here for tender the inspector's statement
 15 and annexures. Those annexures include the breach rates,
 the wage books and copies of the summary of the
 underpayments and the several breach notices.

INSPECTOR'S STATEMENT AND ANNEXURES TENDERED

20 HIS HONOUR: Yes, I've read that material thanks Ms Polga.

POLGA: Your Honour, this is the first occasion that the
 25 Office of Workplace Services has brought matters before
 the Chief Industrial Magistrate since the Workchoices
 legislation.

HIS HONOUR: Yes.

POLGA: I'm just wondering if it might assist if I handed
 30 up an extract and walked through a couple of those
 provisions that I might refer to.

HIS HONOUR: Yes, thank you.

35 POLGA: This is an extract of the Workplace Relations Act
 in relation to the sections that I would be referring to.
 Your Honour an order is sought under subs 719(6) of the
 Workplace Relations Act for payment of outstanding award
 40 entitlements plus interest and it relates to the following
 employees. Gahni in the sum of \$13.28, Tarfik in the sum
 of \$281.28, Aziz in the sum of \$36.10 and Tibenham in the
 sum of \$1,672. If I can just take you through those parts
 of the act that relate.

45 In the definitions section of the act it says applicable
 provisions in relation to a person means a term of one of
 these that applies to the person, in (iii) it says an
 award, and this matters relates to a NAPSA, it is a
 50 Notional Agreement Preserving State Award. In terms of
 the eligible court, the eligible court means in (d) a
 Magistrates Court. I can take you to section 718 of that
 act. It says that certain persons may apply for a penalty
 or other remedy under the division and at item 3 your
 Honour it says determinative award and (e) it says an
 55 inspector has standing.

HIS HONOUR: Yes.

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POLGA: In relation to s 719, your Honour, we also are seeking the imposition of a penalty under s 719(1) of the Workplace Relations Act. That's outlined in that extract that I have there before you at (1), an eligible court may impose the penalty. The penalty provisions are outlined in (4). Sixty penalty units for an individual which is a maximum of \$6,600 and 300 penalty units for a body corporate which is a maximum of \$33,000.

10 In terms of our first order which we'd be seeking under section subs 719(6) for payment of outstanding award entitlements, that's actually outlined in the extract before you, your Honour. Is there anything further you'd like me to go through with respect to--

15 HIS HONOUR: I was just wondering whether you have prepared a schedule which sets out the interest that's claimed in relation to each of the amounts.

20 POLGA: Yes, I do have a schedule. If I might hand those up for the individual employees.

HIS HONOUR: Yes, thank you. Now what are your submissions in relation to the question of penalty.

25 COUNSEL ADDRESSED ON PENALTY

HIS HONOUR: There seems to have been some non-compliance as well. Are there any breaches before the court in relation to non-compliance with the inspection?

POLGA: No, your Honour, there isn't any available.

35 HIS HONOUR: In this matter I am satisfied that the defendant is aware of these proceedings and has elected not to come to court to defend the matter. I am satisfied that the defendant has been notified of the proceedings and of today's hearing of the matter and in those circumstances I propose to deal with these matters on an ex parte basis.

45 I turn firstly to the question of the underpayment of four persons employed by the defendant pursuant to the terms of the Notional Agreement Preserving State Award which is put in place in relation to the Metal Engineering and Associated Industries State Award New South Wales. I am satisfied on the evidence before the court that four employees or former employees of the defendant have not been paid their full entitlements pursuant to the relevant industrial instrument. In those circumstances, I propose to make some orders concerning the payment of the amounts owing to the four individuals together with appropriate interest in relation to each of those underpayments.

55 IN RELATION TO THE EMPLOYEE MARK TIBENHAM, THE DEFENDANT IS ORDERED TO PAY TO MR TIBENHAM THE SUM OF \$1,672 BEING IN RESPECT OF THE UNDERPAYMENT OF ENTITLEMENTS AND IN ADDITION MR TIBENHAM IS TO BE PAID INTEREST IN THE SUM OF

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\$106.34 IN RELATION TO THE YEAR ENDED 31 DECEMBER 2006 AND A FURTHER SUM OF \$26.45 INTEREST UP TO AND INCLUDING 1 MARCH 2007. THE TOTAL PAYABLE TO MR TIBENHAM IS \$1,805.82.

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IN RELATION TO THE SECOND EMPLOYEE MR AZIZ, THE AMOUNT OF THE UNDERPAYMENT UNDER THE INDUSTRIAL INSTRUMENT IS \$36.53 WITH THE ADDITION OF A FURTHER \$2.80 IN INTEREST. HE IS TO BE PAID A TOTAL OF \$39.33.

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IN RELATION TO THE EMPLOYEE MR SARBAST TARFIK, HE IS OWED \$281.28 IN RELATION TO THE UNDERPAYMENT UNDER THE INDUSTRIAL INSTRUMENT AND HE IS TO BE PAID THAT SUM TOGETHER WITH INTEREST AND THE TOTAL PAYABLE TO MR TARFIK IS \$302.83.

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IN RELATION TO THE FOURTH EMPLOYEE MR MOHAMMAD GAHNI, HE IS OWED THE SUM OF \$13.28 IN RELATION TO THE INDUSTRIAL INSTRUMENT WITH A FURTHER SUM OF \$1.02 IN RELATION TO THE INTEREST ON THAT SUM. THE TOTAL PAYABLE TO MR GAHNI IS \$14.30.

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In the State jurisdiction the normal order is that those money would be paid to the former employees or current employees within 28 days. What is the relevant time to pay under this legislation Ms Polga.

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POLGA: Your Honour I don't believe there is any timeframe.

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HIS HONOUR: I note that in some of the decisions that have been handed down by the Federal Magistrates there has been time to pay of 60 days.

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POLGA: Yes.

HIS HONOUR: I am not sure whether that is as the result of any regulation or rule or whether it has simply been a matter of the discretion of the court in the particular matter.

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POLGA: It may be that they've dealt with that by submission, your Honour.

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HIS HONOUR: Yes. Well in all the circumstances I can see no reason to depart from what would be the normal time in this jurisdiction of twenty-eight days so in relation to those four employees the order of the court would be that the defendant pay those sums to the four employees nominated within twenty-eight days of today's date.

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I turn now to the question of an appropriate penalty in relation to the six breaches that are before the court. I note that the prosecutor informs the court that the maximum penalty given that the defendant is incorporated is thirty penalty points or \$33,000 for each offence. It is clear in all the circumstances that the principle of totality has considerable work to do given that the

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breaches all arise out of the same course of conduct which appears to have been a failure on the part of the defendant to have any or any proper regard to the terms of the relevant industrial instrument. I have no evidence before the court to indicate that this particular defendant has ever previously been before a court in relation to breaches of any industrial legislation and in those circumstances I propose to treat the defendant as one entitled to the normal leniency that a court applies where it is dealing with a first offender.

IN THE VIEW OF THE COURT THE APPROPRIATE PENALTY IN EACH OF THE SIX CASES IS \$4,000 MAKING A TOTAL PENALTY OF \$24,000.

HOWEVER, EXERCISING THE DOCTRINE OF TOTALITY I PROPOSE TO REDUCE EACH OF THOSE FINES BY FIFTY PER CENT AND THE CONSEQUENT FINE IN TOTAL WILL BE \$12,000 WHICH WILL BE APPORTIONED EQUALLY BETWEEN THE SIX OFFENCES. THE FINE IS TO BE PAID AT THE REGISTRY OF THE COURT WITHIN TWENTY-EIGHT DAYS.

What is the situation with costs, Ms Polga.

POLGA: There is no issue with the costs, your Honour. We are not seeking costs in the matter.

HIS HONOUR: You have no legislative entitlement to seek costs.

POLGA: No, that's correct.

HIS HONOUR: Is there anything further.

POLGA: There is nothing further, your Honour. Thank you very much.

POLGA: Thank you, Ms Polga.

ADJOURNED

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