

IN THE MAGISTRATES' COURT OF VICTORIA  
AT MELBOURNE  
INDUSTRIAL DIVISION

No. U02386625

BETWEEN

**INSPECTOR KERRY SHACKLOCK (a workplace inspector  
appointed pursuant to section 167(2) of the *Workplace Relations Act  
1996)***

**Of Level 6, Customs House, 414 Latrobe Street, Vic. 3000**

Plaintiff

AND

**ARTISTCARE (VIC) PTY LTD**

(ACN 072 503 489)

Defendant

### **ORDERS**

1. The Defendant pay to Consolidated Revenue the following penalties for breaches of the *Victorian Shops Interim Award 2000* and the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping-In) Award 2003*;
  - (a) An aggregate amount of \$16,500 for breaches of clauses 18.1.1 of the Award and 6(g) and 6(i)(iv) of the roping in Award; and
  - (b) An aggregate amount of \$16,500 for breaches of clauses 32.4.13(b); 32.4.12(b)(ii) and 23.6.1 of The Award.
2. Payment of the penalties in order 1 to be made within 30 days.

3. ~~To Consolidated Revenue~~ *Revenue*

## REASONS FOR DECISION

1. The Defendant is a body corporate for the purposes of the *Corporations Act 2001 (Cth)*. It is and was an employer for the purposes of s. 178 of the *Workplace Relations Act 1996 (Cth)* (“**the Act**”). It trades as ‘Artistcare’ in Brunswick and South Melbourne.
2. From 23 September 2004 until 28 October 2005 the Defendant employed Melissa Moore as a Retail Store Manager in South Melbourne. From 11 July 2005 until 26 October 2005 it employed Corine Auzou as a Sales Assistant, also in South Melbourne. Their employment was subject to the *Victorian Shops Interim Award 2000* and the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping-In) Award 2003*.
3. The Plaintiff, Ms Kerryn Shacklock is employed by the Commonwealth in the Office of Workplace Services. She was responsible for investigations into the Defendant as an inspector under the Act. She instituted these proceedings seeking payment to each of the employees in respect of total underpayments of \$1227.02 for Mrs Auzou and \$2,384.53 for Ms Moore and for the imposition of pecuniary penalties for breaches of the Award. The alleged breaches relate to:
  - Failure to pay the correct rate for work on weekdays between 6pm and 9pm
  - Failure to pay the correct rate for work on Saturdays;
  - Failure to pay the correct rate for work on Sundays;
  - Failure to pay pro rate annual leave upon termination;
  - Failure to pay accrued and untaken annual leave upon termination; and
  - Failure to pay leave loading on accrued annual leave.

4. The Defendant did not defend this application and the Plaintiff sought an interlocutory order seeking:
- The imposition on the defendant of a penalty or penalties under s.178(1) of the Workplace Relations Act 1996, as in force immediately prior to 27 March 2006, for breaches of clauses 18.1.1 and 23.4.13(b) of the *Shop Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* and clauses 6(g) and 6(i)(iv) of the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping-In) Award 2003* as it applied to Ms Auzou;
  - The imposition on the defendant of a penalty or penalties under s.178(1) of the Workplace Relations Act 1996, as in force immediately prior to 27 March 2006, for breaches of clauses 32.4.12(b)(ii), 32.6.1 and 32.4.13(b) of the *Shop Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* as it applied to Ms Moore.
5. The Defendant apparently accepted liability for the underpayment in correspondence with the Plaintiff and ultimately forwarded a cheque for the amounts above 2 days prior to the hearing of this application.
6. I am informed that the Defendant refused to agree to provide the Court with a statement of agreed facts, and sent a letter 1 day prior to the hearing seeking an adjournment due to a virus infection. The Defendant did not appear, and the Court contacted his office to obtain a medical certificate. As no certificate was received by 12 noon the application commenced ex parte.
7. After receiving sworn evidence I am find<sup>1</sup> the alleged award breaches proven. A total of seven breaches are alleged, but given the provisions of s.178 (2) of the Act I will treat the breaches of c. 32.4.13(b) as one course of conduct, thereby constituting one breach. Accordingly I find that 6 breaches have occurred.

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<sup>1</sup> On the standard of proof applicable to these cases

8. The total maximum penalty available to this court is  $6 \times \$33,000 = \$198,000$ , limited by the Court's jurisdictional limit of \$100,000.

**Considerations applicable to penalty**

9. Listed under the principal objects described in s. 3 of the Act includes:
- "... (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. This statement emphasises the importance of minimum standards, and the enforcement of those standards. Whilst little material in respect of the personal circumstances of the two employees involved in this case is before the Court, I note that they are workers reliant on the 'safety-net' of a minimum rate of pay. I suspect their bargaining position was unlikely to be strong.
11. It is also relevant to note that the maximum penalty was increased in August 2004 from \$10,000 to \$33,000 per breach. Failure to pay Award rates of pay, and conditions such as annual leave are not trifling matters.
12. For this matter to reach the point of judgement in a Court, it has a long history. Attempts at voluntary compliance have been unsuccessful. Legal proceedings are a last resort. I am satisfied that the Defendant was aware of these proceedings, but have not sought to either defend the application, or present any evidence by way of explanation or mitigation.
13. The Federal Court has in a number of decisions set out a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a

penalty, and if it does the amount of that penalty.<sup>2</sup> Two recent decisions of Mowbray FM nicely set out these relevant considerations.<sup>3</sup>

#### **Nature and Extent of the Conduct**

14. The underpayments are large given the relatively short period of employment involved. For an employee in such a lowly paid position, even if paid pursuant to the Award, such underpayments are significant.

#### **Corporate contrition, corrective action and cooperation with the enforcement authorities**

15. Payments of the outstanding amounts were not made until the 11<sup>th</sup> hour, and did not include a component for interest.
16. The Defendant whilst acknowledging the debt well prior to the issue of legal proceedings failed to make good the underpayment.
17. The Defendant chose not to appear at Court to offer any explanation by way of mitigation.
18. Ultimately however the outstanding amount has been paid and the Defendant will receive a discount on the penalty as a result.

#### **Involvement of senior management,**

19. A director of the Defendant Company has been involved in the breach.

#### **Size of the company**

20. The Defendant is still operating two retail stores.

#### **Similar previous conduct**

21. No prior findings of guilt under this Act or other workplace legislation are alleged; however the Office of Workplace Services and its

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<sup>2</sup> See for example *TPC v. CSR lt* [1991]ATPR52,135 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].

<sup>3</sup> *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 and *Mason v Harrington Corporation Pty Ltd* [2007]FMCA 7.

predecessor have intervened in relation to underpayments by this Defendant on 13 prior occasions. Many of these relate to amounts outstanding for in excess of 12 months.

#### **Deliberateness of the breaches**

21. It is readily apparent that these breaches are wilful and deliberate.

#### **Deterrence**

16. Specific deterrence is a major consideration for the Court in this case. The Defendant has blatantly disregarded its' Award obligations and has made no effort to remedy the breach until the matter has reached Court. There is a need to deter other employers from similar exploitation of lowly paid workers.

#### **Discretion and total penalty**

22. At the time of termination the employees were not paid their accrued annual leave and leave loading entitlements. Whilst the breaches relating to these leave entitlements are properly distinct Award entitlements, the obligations imposed by the relevant clauses largely overlap. I consider it just and appropriate to aggregate the penalty in respect of these breaches to reflect this.<sup>4</sup> Similarly the breaches relating to the failure to pay the applicable minimum rates of pay are also distinct I take a similar approach.

23. Counsel appearing on behalf of the Plaintiff submits that a total penalty in the vicinity of 60% of the maximum, (a sum in excess of the jurisdiction of this Court) is appropriate. The breaches are serious, blatant and go to the heart of the obligations imposed by the Act. However the Defendant must be given due recognition of its acknowledgement of the breaches, and payment of the underpayments.

24. I believe that the just and appropriate aggregate penalty is \$33,000. This may be apportioned as follows:

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<sup>4</sup> See *approach in CPSU v Telstra (2001) 108 IR 228*

- \$16,500 in respect of the breaches of the clauses relating to the minimum rates of pay; and
- \$16,500 in aggregate in respect of the breaches of clauses relating to the obligation to pay various annual leave entitlements.

25. I will order that this pecuniary penalty be paid into Consolidated Revenue.

**Kate Hawkins**

**Magistrate**

**21 February 2007**