

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

No. U02386432

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

BROCHURE FLOW (AUSTRALIA) PTY LTD

Of 1 Millicent Street, Burwood, VIC. 3125

Defendant

ORDERS

1. The Defendant pay to Consolidated Revenue the following penalties for breaches of the *Clerical and Administrative Employees (Victoria) Award 1999* between 6 October 2004 and 30 January 2006:
 - (a) \$16,500 for the breaches of clause 13.5.8 of the Award; and
 - (b) \$16,500 (as an aggregate penalty) for breaches of clauses 27.13.1; 27.6.1; and 27.13.3 of the Award.
2. Payment of the penalties in order 1 to be made within 30 days.

REASONS FOR DECISION

1. The Defendant, Brochure Flow (Australia) Pty Ltd 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**”). From 1 January 2005 it was bound by the *Clerical and Administrative Employees (Victoria) Award 1999* (“**the Award**”).
2. Brochure Flow employed Ms Christine Syrett and Ms Rajmeela Mahara as part time Clerical Officers. Their employment was subject to the Award.
3. The Plaintiff, Ms Kerry 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 Ms Syrett and Ms Mahara in respect of underpayments during their periods of employment with Brochure Flow, and the imposition of pecuniary penalties for breaches of the Award
4. Brochure Flow did not defend this application and consequently Judgement in Default of Defence was entered by this Court on 4 December 2006. The following orders were made:

“1. Defendant to pay Rajmeela Mahara \$3757.05 plus \$347.60 in interest,
2. Defendant to pay Christine Syrett \$1771.60 plus \$222.64 in interest,
3. pursuant to Rule 10.18 of the Magistrates’ Court Civil Procedure Rules, claim for penalties to continue.”
5. At the return date for the hearing of the application for a penalty on 13 December 2006 a director of Brochure Flow, Ms Susan Phillips appeared. She requested an adjournment of the application to obtain legal advice. Ms Phillips did not subsequently appear at the hearing on

14 February 2007. She made no contact with the Plaintiff or the Court, and the outstanding orders in respect of the underpayments had not been complied with. Brochure Flow has taken no step to attempt to set aside the Judgment.

6. The Judgment comprised a total of 6 breaches of the Award as follows:

- (a) **Christine Syrett** – total underpayment \$1,771.60
 - i. Clause 13.5.8 – minimum rates of pay – underpaid \$159.15
 - ii. Clause 27.13.1- accrued and untaken annual leave upon termination – underpaid \$338.34
 - iii. Clause 27.6.1: leave loading on accrued annual leave – underpaid \$338.34
 - iv. Clause 27.13.3: pro rata annual leave upon termination – underpaid \$17.31
- (b) **Rajmeela Mahara** – total underpayment of \$3,757.05
 - i. clause 13.5.8 – minimum rates of pay – underpaid \$2,394.17
 - ii. clause 27.13.3- pro rata annual leave upon termination - \$1,362.88

7. I take the breaches of cl. 13.5.8 and 27.13.3 to each be a single breach of the provision.¹ I am therefore to impose penalty in respect of 4 distinct breaches of the Act. The applicable penalty for each breach is \$33,000, giving a total maximum penalty of \$132,000. Arguably the jurisdictional limit of this Court is \$100,000.

Considerations applicable to penalty

8. 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

¹ See s. 178(2) of the Act

(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... ”

9. 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 part-time workers reliant on the ‘safety-net’ of a minimum rate of pay. I suspect their bargaining position was unlikely to be strong.
10. 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.
11. 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 Brochure Flow are aware of these proceedings, but have not sought to either defend the application, or present any evidence by way of explanation or mitigation. They have failed to abide by Court orders.
12. 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.² Two recent decisions of Mowbray FM nicely set out these relevant considerations.³

Nature and Extent of the Conduct

13. Ms Syrett was underpaid \$159.15 over a 12 month period. Ms Mahara, \$2,394.17 in a 9 month period. For an employee on such a lowly paid position, even if paid pursuant to the Award, such underpayments are

² 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].

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

significant. To be denied their entitlement to accrued annual leave entitlements would have impacted greatly on the employees and their families.

Similar previous conduct

14. No prior contraventions of the Act or other workplace legislation are alleged against the Defendant.

Size of the company, deliberateness of the breaches, involvement of senior management, corporate contrition, corrective action and cooperation with the enforcement authorities

15. There is no material before the Court to indicate the deliberateness of the breaches, or the size and financial viability of the business run by the Defendant. There has been no co-operation with the Plaintiff.

Deterrence

16. Specific deterrence is a major consideration for the Court in this case. The Defendant has blatantly disregarded its Award obligations. It has made no effort to demonstrate any attempt to make itself aware of and comply with its Award obligations. Furthermore it has failed to comply with Orders of this Court to make good its underpayment of these two workers. There is a need to deter other employers from similar disregard for employees' rights.

Discretion and total penalty

16. 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.⁴

⁴ See approach in *CPSU v Telstra (2001) 108 IR 228*

17. Counsel appearing on behalf of the Plaintiff submits that a total penalty in the vicinity of 40% of the maximum, or a sum of (\$52,800) is appropriate. The breaches are serious, blatant and go to the heart of the obligations imposed by the Act. I believe that the just and appropriate aggregate penalty is \$33,000. This may be apportioned as follows:
- \$16,500 in respect of the breaches of clause 13.5.8 of the Award – underpayment of minimum rates of pay
 - \$16,500 in aggregate in respect of the breaches of clauses 27.13.1, 27.6.1 and 27.13.3 of the Award – relating to the obligation to pay various annual leave entitlements.
18. I will order that this pecuniary penalty be paid into Consolidated Revenue.



Kate Hawkins

Magistrate

14 February 2007