

**Transcript - Melbourne Magistrates' Court - 14 December 2006****Matter No: U02386975****Inspector Kerryn Shacklock (OWS) v Snowline Management Pty Ltd**

MC = Magistrate Chambers.

JS = John Snaden of Counsel for Kerryn Shacklock (OWS).

CS = Cassie Serpell of Counsel for Snowline Management Pty Ltd.

**COURT CLERK** The Melbourne Magistrates' Court is now open, please be seated.**MC** Yes, good morning.**CS** Good morning Your Honour.**JS** Good morning Your Honour.**MC** Now this matter's ready to proceed as a penalty hearing only.**CS** Yes.**JS** Correct your Honour. Before I start, I would say that we don't envisage this will go for much longer than half an hour.**MC** Yes, yes.**JS** Certainly my submissions will only be very brief. As you said Your Honour this is a hearing to decide the quantum of penalty that should flow from the underpayment by the defendant of one of its food and beverage attendants between January 2004 and August 2005. You understand the defendant is a, owns and operates a hotel in Harrierville.**MC** Yes, is it August or is it September? I had the employment ending on 6 September 2005 in that complaint.**JS** It may be that the employment ended then. I'll check that your Honour.**CS** The 6<sup>th</sup> of September is certainly what I understood Your Honour.**MC** Oh I see but the breaches, the work was performed between the 17<sup>th</sup> January and the 8<sup>th</sup> August, is that right? Okay.**JS** I don't think a lot turns on that your Honour.**MC** Yes, yes, yes, okay.**JS** Perhaps that's a better way of putting it that the breaches themselves occur over that period and over that period your Honour the defendant paid the employee in question Ms Lisa Collins \$3,375.61 less than it was obliged to pay her under the terms of the prevailing Award which was the Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award of 1998. That is an Award of the Australian Industrial Relations Commission that was made pursuant to what most practitioners refer to as the pre-reform Workplace Relations Act of 1996.

Your Honour there were 6 types of breach of the Award that this case relates to. They were firstly breaches of the minimum hourly rate of pay. Secondly, breaches of the rates

prescribed for working on Saturdays. Thirdly, breaches of Sunday rates, what I loosely refer to as Sunday rates. Fourthly, breaches of public holiday rates. Fifthly, breaches of afternoon shift penalty rates and finally breaches of night shift penalty rates. I don't propose unless Your Honour really wants me to to go through the provisions of the Award.

**MC** No.

**JS** They're all set out in the ...

**MC** No that's fine.

**JS** .....in the Complaint. The breaches all took place before the advent of the so-called Workchoices legislation so we are.....

**MC** Operating under the pre-reform Act.

**JS** Correct and specifically section 178 of the pre-reform Act. Your Honour, notwithstanding that the breaches took place over a considerable length of time, we concede that in each case...

**MC** Course of conduct.

**JS** .....it's a single course of conduct.

**MC** Yes, yes.

**JS** Now I should clarify that. There was, as we say, 6 types of breach. Each, there are still 6 breaches, but each is in and of itself constitutes a single course of conduct.

**MC** Single course of conduct, yes.

**JS** I should also note, Your Honour another of the complicating factors in this case is that the maximum penalty for breach actually changed part way through the period that we're talking about. At the start of the period it was \$10,000 for a body corporate and in August of 2004 it was increased to 300 penalty units or \$33,000. Your Honour the principles.....

**MC** In August 04, and her employment started in January 2004 and then we go through to January 05, yes.

**JS** So we've got 7 or something months under the old, what I refer to as the old penalty and about a year under the \$33,000 penalty. Your Honour the principles to be applied with respect to determining penalties are fairly well known and I don't propose to go through them in any great detail. The most important in my submission is deterrence. The need to deter not only this employer, but also others from engaging in this sort of conduct. Your Honour's no doubt familiar with the, the decisions on this point, deterrence is generally regarded as one of the most, if not the most, important factor in determining penalties.

**MC** What do you say in relation to specific deterrence for Snowline Management Pty Ltd? Have you got any measures alleged against them?

**JS** No.

**MC** No.

**JS** This is the only matter that's alleged against them and they have, to use the criminal vernacular, no priors.

**MC** Yes.

- JS** But as I say, Your Honour likely refers to that as the concept of specific deterrence. There's also the concept of general deterrence.
- MC** General deterrence, yes I understand.
- JS** Likewise, Your Honour, we say that the court should take into account the seriousness of the breach and I anticipate that my learned friend will say well we're not dealing with tens of thousands of dollars in this case and on that basis it's not as serious a breach as some others that come before this Court, but when you take into account the fact that this employee only earned about \$18,000 over this particular period, the underpayment's actually quite a significant amount. It's in the order of 15 plus per cent and you can imagine Your Honour that \$3,500 for somebody who works as a casual food and beverage attendant, who was paid as little as Ms Collins was over that period is actually quite a significant amount of money, so certainly not in the most egregious of categories...
- MC** At the higher end of the scale, no.
- JS** Not by any means, but it's more than just a nominal or...
- MC** Technical breach.
- JS** Correct. Yes, it is, it is a serious breach. Your Honour there's one final matter I want to highlight and that's the lack, or relative lack of cooperation that the defendant has shown throughout the course of this matter. As you might imagine, this isn't a case of the OWS just rushing head-long into, into litigation, there was correspondence prior to all of this happening. I've got copies if Your Honour's interested in reading them. I have provided copies to my learned friend, but essentially, the history is that as far back as September 2005, the OWS wrote to the Defendant and brought to its attention that these breaches had occurred. Over that time, the Defendant's taken a number of different positions, it's initially said well we've got a verbal arrangement with Ms Collins. Then it said, well actually we're paying her above the award in other respects. Then it said, yes well we acknowledge we've underpaid her and we'll, we'll fix that up and when it came time for us to issue proceedings in this case, they turned around and said well actually we're not a respondent to the Award at all. So there's been a degree of flipping and flopping by the defendant which we say is a relevant factor the court should take into account because as is probably evident, it was only when we got to this place that the Defendant put its hand up and said okay, we'll cop what the law requires of us. Now balanced against this of course Your Honour is the fact that as I said before this is the defendant's first offence.
- MC** Yes.
- JS** We acknowledge that the employer is a small employer and I understand from discussions I've had with my learned friend that it's in some degree of financial trouble. I'm sure she'll have some more to say about that. But, in any event, all of these circumstances warrant in our submission more than merely a, a hollow slap on the wrist. The cumulative maximum penalty that's available for 6 breaches of the Act is at least under the \$33,000 regime is in the order of \$198,000. Now, obviously the penalty in this case should be quite a long way south of that, but it's nonetheless a serious breach and it would be inappropriate for, in my submission, for the court to order simply a nominal or a slap on the wrist kind of penalty. I should note before closing Your Honour that in respect of any penalty that you might order, we do seek an order under section 356 of the pre-reform Act which is the usual course that the penalty be paid to the plaintiff if the court pleases. Those are my submissions.
- MC** To the plaintiff?
- JS** To the, yes, to the Office of Workplace Services.
- MC** Yes, thanks Ms Serpell.

CS Thank you Your Honour. Your Honour certainly parts of what has been put to you by Mr Snaden is not contested by my clients. Other aspects are and perhaps I'll address you briefly on those before generally going to my other submissions. Importantly, it's said that the defendant has not been compliant, has not been receptive to the contact made by the OWS. In my submission, that's not a fair or accurate account in respect of the circumstances which I'll take you to in much more length shortly. You will see, actually you probably don't have, but there is a copy of a very lengthy interview that was conducted with Mr David Gowans and we had the opportunity to at least visually see the Gowans yesterday. Mr David Gowans was interviewed by Lauren Kelly, Workplace Inspector, on 27 September this year and you will see, I can certainly hand up copies should you wish, but it's a very lengthy interview. I don't think there'll be any contest that Mr Gowans was absolutely forthright in dealing with all the questions that were put to him.

There has been different positions put by the Gowans over the course of time, Your Honour, but that, in my submission, is not indicative of a conniving or a sliding away from the reality, but merely misapprehension and misunderstanding of their position as well as some very serious financial considerations that they have been contending with now for many, many years and as I say I'll take you to the detail of that shortly. But in my submission, they have not been uncooperative, they have misunderstood and not necessarily been simply prepared to take the position expressed by the OWS as the be all and end all and unfortunately in these circumstances and it falls clearly to no one, but the Gowans, it was only very recently that they sought good and appropriate legal advice.

MC Legal advice.

CS Yes. It's certainly accepted that Your Honour has the discretion...

MC Can I just ask are they are a member of an employer association?

CS Not to my understanding at all Your Honour.

MC No. Thanks.

CS Your Honour, there are a great number of factors that I believe are important for your consideration today. I will be urging Your Honour to only order a very modest penalty for the number of reasons I'll take you to now. As you've heard, there have been no previous prosecutions against the Gowans, the defendant, and the Gowans, it may come as no surprise to you with what I say, have never before previously run a hotel. Neither have they previously directly employed any employees, and it's certainly not suggested, Your Honour, that ignorance is or should be an excuse in such circumstances. However, in my submission there was never any intent to underpay Lisa Collins, the employee in question. When, your Honour, the Gowans purchased the hotel, they actually purchased the hotel with another couple. Ultimately in the course of time, that changed and it ultimately became all of the Gowans' responsibility. But when they took over hotel, there was a previous manager, one Natalie Raymond, who stayed on for a further 6 months to effectively teach them the ropes and to assist them in running the hotel. They also inherited a payroll system and the manager informed them that the rate of pay at the hotel that was being provided and that wasn't changed by the Gowans was a rate of pay that was above and beyond that that was paid elsewhere in the neighbouring district in the hotels there. As I've said, it's certainly not put that ignorance is an excuse, but they believed and genuinely believed that they were paying more than they were obliged to. Your Honour, the Harrietteville Hotel is one that's very seasonal. The business is one that relies on each season being a very good one to carry them over to the next and you may well know, Your Honour, that Harrietteville is located at the base of Mt Hotham. Mt Hotham's winter 2006 season, Your Honour, was particularly bad. It brought in only half the expected return in sales and there was very little snow. I'm not sure if Your Honour's a skier, but there was 40cm of only man-made snow and, Your Honour, to put that in context, the previous year there was 2 metres of powder, which in skier or

snowboarder language I think is reasonably good.

MC Yes.

CS So comparatively it was very poor and so poor indeed that the mountain closed business and closed to visitors 3 weeks early that season. Now naturally there was very little custom.

MC Yes.

CS The hotel also has motel and there are some 16 rooms, so that was a very major blow to the business and on top of what was already a struggling concern, no doubt due in part to the fact that it was their first attempt at running a hotel as well as the fact that they had to spend significant monies on ...

MC When did they, sorry, Ms Serpell, when did they actually purchase the hotel?

CS They purchased the hotel I think it was November 2003 Your Honour.

MC Yes, thanks.

CS And that certainly fits. November 2003 I got that from the interview.....

MC Yes.

CS .....notes themselves. And Your Honour, the various repairs at the hotel weren't, that were required when they purchased it, not all of them were known to them prior to them taking hold of the property in the hotel. For example, Your Honour, the kitchen which had been passed by the Department of Health almost as soon as they signed and were in possession of the hotel came back in and declared it to be unhygienic, so they had to spend some \$80,000 in ...

MC Sorry \$80,000?

CS \$80,000 straight away in having stainless steel benches and the like put throughout the kitchen, apart from other no doubt additions that needed to be attended to and there was certainly and has been ongoing maintenance that's been significant. Your Honour, by September this year the hotel was in such poor financial shape that the Gowans had to obtain a \$35,000 overdraft in order to try and keep their numerous creditors at bay. For example, they reached agreement with the ATO as well for personal tax liabilities and BAS liabilities so that the business wasn't forced to close at that time. It came to around I believe some \$36,000 Your Honour. And they also began negotiations with the Commonwealth Bank to obtain a business loan of \$120,000. They had to in the process; they had to mortgage their own property. Now due to complications namely an unfortunately turnover of staff at the Commonwealth Bank, people who they'd been dealing with, the loan process has been horribly protracted and indeed Your Honour it was only last week on 7 December that the approval of the loan was given. That loan, Your Honour, will really only have scope to allow the Gowans to repay creditors who have been waiting now for a very long time for their money, the ATO, the overdraft repayment. If they're lucky, to attend to some very overdue maintenance and repairs. The sorts of creditors we're talking about Your Honour are CUB, Coca-Cola, all the expected, we're not talking.....

MC Yes.

CS .....about luxury items here or anything.....

MC Business related.

CS Absolutely. And including basic utilities at the hotel and accountant's fees and now some obviously some legal fees that they'll need to factor into all of that. And Your Honour the

Gowans are reeling in this, if you like, financial black hole. They have been terribly stressed, very distracted and one might say stupidly reluctant to spend money on getting timely legal advice until recently when they finally realised the pressing need for such advice. And Your Honour since February this year, they've placed the hotel up for sale and to no avail. They've had some interest, but that interest has never come through and as you might expect in their somewhat fire ravaged setting, now that's looking even less likely to be changing any time soon. Your Honour, I'll hand up to you a document and this document is the financial statements for the period ending 30 June this year and you'll recall Your Honour that I said winter 2006 was a bad season, well that only really takes into account the start ...

MC Yes, yes.

CS .....it's got worse then. You'll see at page 4 of that document, Your Honour, that down the bottom of the page I've taken the liberty of putting the tab.....

MC Yes, thank you.

CS .....close to you'll see something that indicates accumulated loss and you'll note that that's \$442,779.30. I'm no accountant, Your Honour, but what I understand that to mean is that that amount represents the amount that the Gowans have personally spent on the hotel and it clearly shows the devastating affect that they found themselves in financially from all of what has occurred to date in their running of the hotel. Clearly, they've not, I think it also represents Your Honour approximately, we're looking at some \$100,000 per year loss. Now, Your Honour, the Gowans did offer to pay Lisa Collins amounts to resolve the claim. I believe previously, and I'm sure if Mr Snaden has any information to the contrary, I understood that there was a direct position put by the Gowans to Lisa Collins through another mutual friend I believe, not through Office of Workplace Services. That was not the full amount Your Honour. That was, I believe, about \$1,000 and later I believe there was an offer which was conveyed through Lauren Kelly at OWS of some \$1,500 and Your Honour, clearly, that would not fulfil the claim, but they were amounts offered in the context of both not having confidence that they even were obliged to pay because they didn't have a proper understanding of their obligations at all and also their terribly difficult financial circumstances such that they weren't going to make an offer that they thought they couldn't actually fulfil. What has changed since that time you'll appreciate, Your Honour, is that they have now had legal advice that alerts them to the absolute position with respect to the underpayments and you'll note that yesterday's orders were for the full amount.....

MC Full amount, yes.

CS .....plus interest. The other thing that has changed, Your Honour, that allows the Gowans to attend to that obligation finally is that you will recall the 7<sup>th</sup> approval of the loan.....

MC Of the Commonwealth Bank loan.

CS Yes, and they have not been in that position up to last week. That money hasn't yet come through and I spoke to Mr Snaden about this yesterday, but we anticipate that coming through in the next 1 to 2 weeks.

MC Yes and there was a stay granted wasn't there? Was there? Yes, 10<sup>th</sup> January.

JS 10<sup>th</sup> January.

CS 10<sup>th</sup> January, 28 days.....

MC Yes.

CS .....which we anticipate a safe period in which to.....

MC Yes.

CS .....have that even if the Commonwealth Bank doesn't come good in 1 or 2 weeks. So as you'll understand Your Honour, from what I've put to you already, the Gowans apart from anything else are not in a terrific position to pay a lot of the penalty. Indeed, Your Honour, apart from those matters, I need to raise with you a couple of other factors that I think are relevant and I spoke to Mr Snaden about this yesterday as well. Lisa Collins has a young son who in September this year with a friend and he's 17 years old as I understand it or was at the time.....

MC Sorry, he is 17 years old?

CS I believe so, assuming he hasn't had a further birthday.

MC Yes.

CS Certainly at the time he was 17, he and a friend broke into the hotel at 2.30 am in the morning. They stole significant amounts of alcohol, cigarettes and other items, several hundred dollars worth as I understand it. They were caught red-handed. Not by the Gowans. The police attended and these boys were arrested and interviewed and shortly after Lisa Collins contacted the Gowans extremely upset as you might understand. She was upset also by what her son had done and asked the Gowans to do all that they could to help her son avoid a conviction, especially in circumstances where as I understand it he has plans to join the Army. The Gowans were very sympathetic to their situation and Mrs Gowan made a special trip to Bright Police immediately and spoke with police at length including the arresting officer asking them to deal with the boys leniently which the police then did and my understanding is that they were not prosecuted. Following this, Lisa Collins called the Gowans again and she said to them and I explained this to Mr Snaden yesterday, that she wasn't interested in any penalty, in fact she asked the Gowans to pay her in cash which thankfully they didn't do and Your Honour this is relevant in the sense that the Gowans are good people. In my submission they're people who have made an unintentional and misguided mistake in relation to the underpayment. Clearly, they've now also incurred legal expenses which will also factor into the specific deterrence issue and costs not only with yesterday's appearance, but also today's, Your Honour, as well as.....

MC Yes, yes.

CS .....advice previously given. Now Your Honour Mr Gowan as I said was very helpful and responsive when interviewed with, by Lauren Kelly and I certainly can convey to the extent that it's helpful Your Honour that from my long and meaningful discussions with the Gowans yesterday, they are most contrite and very remorseful and very upset that it's come to all of this. They fully appreciate now the mistake that they made and they want to remedy that as best they can and as best they're able. And to that extent Your Honour I can indicate my understanding that specific deterrence has already occurred. Your Honour, it's clear there's no previous contraventions. These people were simply not aware of their legal obligations. Clearly, general deterrence in my submission is a matter that needs to be taken into account, but it needs to also be weighed against the circumstances that are important for your consideration such as I've outlined to you already. And in my submission Your Honour, even without the extenuating circumstances, such a, such breaches would normally attract not a hefty penalty, they would attract not just a slap on the wrist, but certainly very low end of the potential sums that might be otherwise ordered by penalty and indeed my submission to Your Honour is that we, well I submit to you that it ought to be in total a sum of around \$1,000. Even that is not going to be easy for the Gowans and it does certainly represent to them an amount that is not insignificant at all, every cent counts for them at the moment. They are in a ridiculously bad position and it's only compounding every day that they continue to try and run the hotel. And as I've said there has certainly been no intent in that full sense of the word of any intent to not do what they were supposed to do right from the outset. And Your Honour I should also indicate an amount of that nature could also be paid

in around the period that the previous orders made yesterday.

MC

January.

CS

Yes.

MC

Yes.

CS

Certainly my instructions are they could they believe attend to that. They're the matters I wish to take you to.

MC

Yes, do you wish to address me at all in relation to the, two matters, one is the change in penalty that's conceded the penalty increasing significantly.....

CS

Yes.

MC

.....in the middle of the alleged breaches.

CS

That's certainly conceded Your Honour.

MC

Yes, and in relation to the application made that any penalty ordered by me be paid to the Plaintiff under section 356 of the pre-reform Act.

CS

Thank you Your Honour. In relation to the first issue, as I say, I certainly concede with the change.

MC

Yes.

CS

It doesn't alter my submission that of the type of figure that ought to be considered by Your Honour as appropriate. In the second regard, with respect to who indeed if any penalty ought to be paid to. It's in the circumstances really a matter for Your Honour, but it certainly falls within my submissions that a larger sum is certainly not going to assist Ms Collins who has already indicated to the Gowans that she's not interested in penalty. So to the extent that if it's there to assist Miss Collins in a financial, proper financial sense, well that's not going to occur. Now if any penalty is paid, it might be more appropriate Your Honour for that to be paid to Ms Collins, but it's not a matter really for me I suppose to.....

MC

Yes.

CS

.....put much further to you.

MC

Thank you.

CS

Thank Your Honour.

MC

Do you wish to respond?

JS

Only very briefly Your Honour. Perhaps I'll start on that point that section 356 point (b). The usual course as I understand it is for any penalties ordered to be paid to the party.....

MC

Yes.

JS

.....that prosecuted the application for the penalty and that's the case not only under the Workplace Relations Act, under other jurisdictions where similar provisions apply, so Ms Collins isn't my client. My client is the Office of Workplace Services and particularly Ms Shacklock who is an inspector. They've, as you would imagine, expended some resources in bringing this matter to the position it is now and it is consistent with the practice that it is adopted in relation to section 356 that any penalties that you order should be paid to them. I want to respond as well Your Honour to what was said about Ms Collins' son and I'm at a bit of a disadvantage because as I say Ms Collins isn't my client, that's not to say that I

couldn't have spoken to her, but I haven't and I don't know the circumstances. In any event I say this. Firstly, it's not immediately obvious to me what if any relevance the actions of Ms Collins' son might have. As I understand it it's put to the court in this sense mainly that Ms Collins said to Mr and/or Mrs Gowans that she wasn't interested in a penalty.

**MC** I think it was put for 2 reasons. One is it goes to the character of the directors of the company and two that Ms Collins did indicate a position with respect to any penalty yes.

**JS** That being the case Your Honour, not much I can say about point number one but in relation to point number two I make the same point that I made a minute ago, namely that Ms Collins might not be interested in the penalty but the Office of Workplace Services very much is and you will appreciate of course that the Office of Workplace Services is the body charged under the Act, or specifically workplace inspectors are the people charged under the Act, with ensuring that the awards of the Industrial Relations Commission are upheld so they have an obvious interest in penalties.

**MC** Can I just ask you is this agreed; is the company a named Respondent to the Federal Award?

**JS** The Federal Award refers to the Snowline Hotel.

**MC** Snowline Hotel.

**JS** It doesn't refer to the company. There may, had this case run its course there may have been arguments about that but I think it's conceded...

**MC** Yes but there are cases about Respondents and the naming of Respondents I understand.

**JS** And Your Honour, I just need to say two more things. Firstly with reference to the old Hotel Manager coming across and telling Mr and Mrs Gowans that what they were doing was above industry or what was paid in the area and we've also heard about offers that they made to try and settle this matter, firstly directly through Ms Collins and secondly through the Office of Workplace Services. That, in my submission, underlines what I said initially namely that they've, there have been a number of different responses to this claim by the defendants. They firstly said well, we took advice from the old manager and she told us what we were doing is right. We've done other things to try and settle it in correspondence which I haven't handed up and I don't intend to but they have acknowledged that there has been an underpayment and they have said instead that we've given additional benefits that should be taken into account. The point that I made earlier stands there has been flipping and flopping right from the start of September 2005 right through until yesterday the first time we get to this place where they have stood up and said OK, well cop it on the chin.

Most of the different submissions concern the financial position of the company and its so I don't say that its not a factor that the court should take into account, and nor do I suggest that the financial situation of the defendant is not as bad as has been said but I was going to refer Your Honour to a decision of Justice Gray in *Gibbs v the Mayor Councils and Citizens of the City of Altona*, if I can hand a copy up. This case itself Your Honour is actually authority for the proposition that each of the obligations in an award any breach of any obligation is a separate breach notwithstanding that the single course of conduct provisions.

**MC** Of conduct provisions yes.

**JS** The reason I have handed it up is because at page 221, this is reported at Volume 37 of the Federal Court Reports at page 216 and it's page 221, His Honour refers to towards the bottom of that page to the decision of Justice Keely in *Lynch v Buckley Saw Mills Pty Ltd* and about half way through that quote, this is Justice Keely's quote, there is this, they, being employers, 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.

- MC** That's slightly different though, the way I've read that is that a company can't come to court and say the reason I failed to comply with an award was because we simply couldn't afford to. That's a different thing to what's being put here which is that there was no intention but they are currently in financial difficulty and that should be taken in account for penalty.
- JS** I may have misunderstood; my impression was that the financial circumstances were both the reason why significant penalty should now be awarded and also a reason for the conduct, now if I've got that wrong then this all falls away.
- MC** Well I might just ask Ms Serpell, is my understanding correct?
- CS** My understanding was more in line with Your Honour's understanding of the case and just trying to speed read a little through this as well to better assist Your Honour.
- Yes and indeed if you go down and over the page it talks about its possible the union might have been able to suggest a way in which this could have been done the Respondent should have taken the trouble to ascertain precisely what its award obligations were. Now there all matters that have been conceded before Your Honour but they should have done that and didn't however they didn't stick their head in the sand with any wilful blindness they just were not aware and were clearly distracted by other matters. I don't agree with Mr Snaden's interpretation of what this decision represents Your Honour.
- MC** No I think.
- JS** Your Honour, Justice Keely says that being poor is not an excuse for breaking the law, now it might not in this case be put that the reason that the reason is because they were poor
- MC** For the breach
- JS** And if that's the case then...
- MC** I haven't taken it that that's what's been said rather that the penalty to be imposed should be determined in light of their current financial circumstances.
- JS** This doesn't go into that, I don't think it's a proper reading in that respect. If I could address your Honour with the suggestion that the penalty of \$1,000 should be appropriate. In my submission that is inappropriate, \$1,000 is I would submit a hollow slap on the wrist that would have very little deterrence. That's a lot of deterrence for a company like this that's in financial trouble but would have very little deterrence for companies that aren't. I submit that the penalty should be, whilst no where near the maximum available, significantly higher than \$1,000.
- MC** Yes, thank you.
- MC** Yes in this matter a complaint has been issued by Kerryn Shacklock, a workplace inspector appointed under the Workplace Relations Act of 1996. The complaint is brought against Snowline Management Pty Ltd trading as the Snowline Hotel. In brief the complaint alleges that the defendant, being a Respondent to the Hospitality Industry Accommodation Hotels Resorts and Gaming Award of 1998 being an award it is conceded that was made under the pre reform Workplace Relations Act by the Australian Industrial Relations Commission, has been breached with respect to an employee Ms Collins who was employed by the Hotel between 17 January 2004 and 6 September 2005. Specifically, the complaint alleges that Ms Collins who was employed as a casual food and beverage attendant and falls within a Grade 2 classification of the Federal Award referred to was not paid the prescribed amounts required by the award for ordinary hours worked between a Monday and a Friday; the hours prescribed by the award for both Saturdays and Sundays; public holidays; and that shift allowances for both afternoon shift and night shift penalty allowances prescribed by the award were not paid during the relevant period. The complaint also notes that the defendant having provided Ms Collins with a meal during meal hours was entitled to make deductions

pursuant to the Federal award referred to but did not do that and that amount was offset in the complaint resulting in an entire claim of \$3,375.61 gross being the difference between the amounts to which it was alleged Ms Collins was entitled to less the amount not deducted by way of meal allowances as allowed by the award. On the 13th December 2006 a Consent Order was made by this Court in the amount of the claim together with interest that amount to be paid on or before 10 January 2007.

The Court is today to determine what is the appropriate penalty to be paid under the Workplace Relations Act noting that the penalty is to be determined by the Act free the reforms that took effect earlier this year. It is conceded by the defendant that the maximum penalty applicable under the Workplace Relations Act was amended in August 2004 and was significantly increased from \$10,000 to \$33,000 which can only be an indication by Parliament as to the seriousness with which matters such as the matter before me are viewed in terms of penalty ranges.

On behalf of the Defendant a number of important submissions have been made and I intend to go through those. Firstly that the Gowans being the Directors of the Respondent were forthright in their dealings with the Office of Workplace Services in the record of interview and that is not being challenged. What has been said by the Plaintiff is that the Gowans have not been forthcoming in resolving this matter but rather their position has waxed and waned or flipped and flopped from the start with various offers being made and then withdrawn and the positions of the Gowans changing at various times. In this matter I accept what Ms Serpell has said that the Gowans made a foolish error in not seeking prompter legal advice. In my mind there could to a reasonable person untrained in such matters be a question as to whether the naming of Snowline Hotel as a Respondent properly named the Defendant under the award however obtaining legal advice has settled that matter and the Gowans have now albeit belatedly conceded the amount owed to their former employee Ms Collins. Whilst I accept that the Gowans were not prompt in accepting responsibility my main criticism of them rests with their failure to obtain prompt legal advice in response to the first approach of the Office of Workplace Services. They should clearly have done so.

What is then said on behalf of the defendant and is conceded and is a proper matter for me to consider is that the defendant appears in Court for the first time charged with breaches of the award no prior convictions or prior record as it were is put against the company. It is further said that whilst ignorance is certainly no excuse and it's clear that if you are to take responsibility as an employer of staff you have an obligation to be aware of the statutory requirements and award requirements applicable to staff. But what is said here is that the Directors of this company had never run a hotel before and when they purchased the hotel they relied upon the advice of others and in particular the previous manager who stayed on for a period of 6 months and advised the Gowans that what was being paid was in excess of what was being paid elsewhere in the area. Whilst I accept that the Gowans genuinely believed this to be the case and relied on the advice of the manager I am of the view that that does not override their obligation to obtain proper advice regarding the legal entitlements of employees, the award entitlements of employees under awards of the Federal Commission such as the award in case here.

It has also been put to me on behalf of the company that it is in significant financial difficulties and having viewed the financial statements of the company I accept that that is certainly the case. I accept also that the work and that the income for the company is very much affected by seasonal changes and the snowfalls of the last winter certainly would have affected the income they expected and I have heard that in fact it was half the expected income that they had budgeted for. As I indicated previously I do not take it as being said that the reason for the breach was an inability to pay but rather that is a relevant consideration in determining an appropriate penalty when I turn to consider specific deterrence for the company.

Finally I was advised of the unfortunate event where the son of Ms Collins it is said broke into the Hotel and stole some items from the Hotel and the assistance provided by the

Gowans in dealing with that matter. I am of the view that the only relevance I can attach to that incident is that it shows a sympathy and a character on the part of the Gowans and to the extent that it is relevant I do take that into account however as has been indicated in numerous cases before me the issue of general deterrence is a significant one.

In my view it is not appropriate to impose a minimum or nominal penalty in this matter but nor is it appropriate to impose the maximum penalty and I note that for the majority of the period of the breach or for certainly one year of that breach the maximum penalty was \$33,000. As I indicated the fact that Parliament significantly increased the penalty is a matter I must take into account in determining what is an appropriate penalty in light of general deterrence. Given what I have said about general deterrence I think it is important to restate that it is important, it is vital for all parties to awards to be aware of the obligations that are imposed upon them as a matter of law and they must be obeyed. The obligations under awards have important consequences for employees and breaches of them will have far reaching consequences as was said on behalf of the prosecution and I believe appropriately in this matter whilst this is and it was conceded is not a serious breach it certainly would have been a significant matter for Ms Collins given that she was earning in the vicinity of \$18,000 a year and underpayment slightly in excess of \$3,000 is a significant matter. The breach of the award undoubtedly had serious consequences for her and for that reason general deterrence to people operating hotels in the positions of the Gowans is a significant consideration for me. On balance and having considered all the matters submitted to me in this matter, I am of the view that a penalty in the sum of \$5,000 will be imposed and I do so.

**CS** Your Honour, I would seek time to pay.

**MC** Yes a 3 month stay.

**CS** Your Honour, what I am told is that, and if I work it in this way, my most recent instructions were that if it were something in the order of \$1,000 as I indicated, that, plus the amounts already agreed, could be paid by 10 January.

**MC** Yes.

**CS** Following that I am told that any amounts in terms of my instructions are in terms of thousands of dollars,

**MC** Yes.

**CS** Any thousands of dollars it would be a thousand dollars a month that they would be able to pay and I understand that that makes it quite a significant period we are talking about, however in the circumstances I would much rather the Gowans be able to meet the obligation rather than have further difficulties.

**MC** Certainly,

**CS** I don't know what the position of the Office of Workplace Services is.

**MC** I should indicate that I am also pursuant to Section 356 of the pre reform Workplace Relations Act making an order that the money be payable to the plaintiff prosecutor in this case.

**CS** Yes.

**MC** Would you the parties appreciate an opportunity to have discussions about a time frame for payment or are you happy for me to make an Order?

**JS** Would Your Honour give me one minute?

**MC** Certainly.

**JS** Your Honour we are happy with an Order to be made requiring payment with the instalments over the period that Ms Serpell outlined.

**MC** Yes well I will make an Order that a penalty in the sum of \$5,000 is to be paid by the Defendant with such amount to be paid pursuant to Section 356 to the Prosecutor. I will order that the amount be paid by way of five equal monthly instalments with the first instalment payable within 1 month of today's date.

**CS** Thank you Your Honour.

**JS** Thank you.