# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*ARMSTRONG v BIGENI CONTRACTING PTY LTD & ANOR* [2008] FMCA 485

INDUSTRIAL LAW – Award – breach – civil penalty – consideration of matters relevant to penalty – breaches of award terms contained in Notional Agreement Preserving State Award – accessorial liability – three breaches by each respondent – totality principle – admission of breach and appropriate reduction of penalty – absence of contrition.

*Workplace Relations Act 1996*, ss.167, 171, 182, 235, 717, 718, 719, 728

*Yorke v Lucas* (1985) 158 CLR 661
*Australian Competition & Consumer Commission v Giraffe World Australia Pty Ltd* (1999) 95 FCR 302
*Rural Press Ltd v Australian Competition & Consumer Commission* (2002) 118 FCR 236
*Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17
*Kelly v Fitzpatrick* [2007] FCA 1080
*Mason v Harrington Corporation Pty Limited* [2007] FMCA 7
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8
*CPSU, Community and Public Sector Union v Telstra Corporation Limited* [2001] FCA 1364
*Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076

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| Applicant: | INSPECTOR DAVID ROBERT ARMSTRONG |
| First Respondent: | BIGENI CONTRACTING PTY LIMITED (ACN 072 768 953) |
| Second Respondent: | CHARLIE BIGENI |
| File Number: | SYG 3024 of 2007 |
| Judgment of: | Cameron FM |
| Hearing dates: | 25 March 2008 & 10 April 2008 |

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| Date of Last Submission: | 10 April 2008 |
| Delivered at: | Sydney |
| Delivered on: | 21 April 2008 |

**REPRESENTATION**

| | |
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| Solicitors for the Applicant: | Holman Webb Lawyers |
| Solicitors for the Respondents: | Tony Vella Solicitors |

**ORDERS**

(1) In respect of each of the admitted contraventions of the *Workplace Relations Act 1996* ("the Act"), the notional agreement preserving the Building and Construction Industry (State) Award ("Building NAPSA") and the notional agreement preserving the Pastoral Employees (State) Award ("Pastoral NAPSA"), the first respondent pay the Commonwealth a penalty as follows:

(a) $7,500 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA, for the failure to pay the correct weekly rate of pay;

(b) $3,750 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA, for the failure to pay the appropriate overtime rates; and

(c) $3,750 for the breach of s.235(2) of the Act for the failure to pay accrued annual leave entitlements on termination, and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA, and annual leave loading on accrued annual leave entitlements on termination.

(2) In respect of each of the admitted contraventions of the *Workplace Relations Act 1996*, the notional agreement preserving the Building NAPSA and the Pastoral NAPSA, the second respondent pay to the Commonwealth a penalty as follows:

(a) $1,500 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA, for the failure to pay the correct weekly rate of pay;

(b) $750 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA, for the failure to pay the appropriate overtime rates; and

(c) $750 for the breach of s.235(2) of the Act for the failure to pay accrued annual leave entitlements on termination, and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA, and annual leave loading on accrued annual leave entitlements on termination.

# FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

## SYG 3024 of 2007

**INSPECTOR DAVID ROBERT ARMSTRONG**
Applicant

And

**BIGENI CONTRACTING PTY LIMITED (ACN 072 768 953)**
First Respondent

**CHARLIE BIGENI**
Second Respondent

# REASONS FOR JUDGMENT

## Introduction

1. The applicant is a workplace inspector appointed under s.167(2) of the *Workplace Relations Act 1996* ("Act"). On 10 November 2006 the applicant commenced an investigation into the conduct of the first respondent and its principal, the second respondent, concerning whether they had underpaid wages and entitlements owing to Aaron Meilak ("Claimant").

2. The applicant has brought these proceedings against the respondents because, as is now agreed between the parties, the first respondent breached a notional agreement preserving the Building and Construction Industry (State) Award (NSW) ("Building NAPSA") and a notional agreement preserving the Pastoral Employees (State) Award ("Pastoral NAPSA").

3. It is agreed that the first respondent failed to pay the Claimant:

   a) ordinary time wages at the applicable rate; and

   b) overtime;

   under both the Building NAPSA and the Pastoral NAPSA.

4. It is further agreed that the first respondent failed to pay accrued annual leave on termination pursuant to s.235(2) of the Act and annual leave loading pursuant to the Building NAPSA and the Pastoral NAPSA.

5. For the reasons which follow, a penalty of $15,000 will be imposed on the first respondent and a penalty of $3,000 will be imposed on the second respondent.

## Background

6. The first respondent is a bricklaying contractor which, at the relevant time, had one adult employee working for it in addition to its principal, the second respondent. The Claimant was a 15 year old boy, who was employed by the first respondent with a view to him becoming an apprentice bricklayer.

7. The second respondent says that he cannot read English and relies on his daughter, or others, to explain to him any document that he receives.

8. The Claimant's apprenticeship was never formalised, the Claimant and the respondents both saying it was the other's responsibility to attend to the necessary paperwork. Notwithstanding the absence of a formalised apprenticeship, the Claimant was paid at apprentice rates.

9. Because the Claimant was 15 years old, and thus unable to drive lawfully, it was arranged that the second respondent would take the Claimant to and from work every day because they were not living far from each other. However, the second respondent often worked beyond the normal finishing time which meant that the Claimant either had to wait until the second respondent was ready to go home or he had to arrange alternative transport. Between the Claimant's normal finishing time and the time when he and the second respondent actually left to go

home, the Claimant did do some work for one or other of the respondents although the extent of this is disputed. Whatever the case, the Claimant was not paid for any such overtime.

## Relevant legislation

10. Clause 31 of sch.8 to the Act provides for the preservation of state awards as terms of notional agreements preserving State awards ("NAPSAs"). The relevant provisions of the Award in question are referred to below at [14]. Clause 43 of sch.8 to the Act provides that a NAPSA may be enforced as if it were a collective agreement and that a workplace inspector has the same functions and powers in relation to a NAPSA as he or she has in relation to a collective agreement. Section 718(1) provides that a workplace inspector may apply for a penalty in respect of a breach of a term of a collective agreement.

11. Section 235(2) of the Act is a term of the Australian Fair Pay and Conditions Standard: s.171(3) of the Act. Section 718(1) provides that a workplace inspector may apply for a penalty in respect of a breach of a term of the Australian Fair Pay and Conditions Standard.

12. Section 719 is the provision of the Act relevant to the breaches the subject of these proceedings and it relevantly provides:

> ***719 Imposition and recovery of penalties***
>
> *(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.*
>
> *(2) Subject to subsection (3), where:*
>
> *(a) 2 or more breaches of an applicable provision are committed by the same person; and*
>
> *(b) the breaches arose out of a course of conduct by the person;*
>
> *the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.*

*(3)* …

*(4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:*

*(a) 60 penalty units for an individual; or*

*(b) 300 penalty units for a body corporate…*

13. Section 717 provides:

*In this Part:*

*"applicable provision", in relation to a person, means:*

*(a) a term of one of these that applies to the person:*

*(i)* …

*(ii) the Australian Fair Pay and Conditions Standard;*

*(iii)* …

*(iv) a collective agreement…*

## Agreed statement of facts

14. The parties filed an agreed statement of facts. The first respondent admits that it breached the following provisions:

a) ordinary time wages:

i) s.182 of the Act;

ii) Building NAPSA, cl.18;

iii) Pastoral NAPSA, cl.50(c)(i);

b) overtime:

i) Building NAPSA, cl.29.1;

ii) Pastoral NAPSA, cl.51(a)(iii)(3);

c) accrued annual leave on termination:

i) s.235(2) of the Act;

d) annual leave loading:

i) Building NAPSA, cl.32.7;

ii) Pastoral NAPSA, cl.57(c).

15. Additional facts which were agreed included:

*23. On 8 January 2007, the Workplace Ombudsman sent a facsimile to the First Respondent:*

*(a) stating that it had received a complaint from the Claimant alleging underpayment and/or non-payment of employment entitlements; and*

*(b) requested the Respondent produce records relating to the Claimant's employment with the Respondent.*

*24. The Applicant contacted the Second Respondent via telephone on 17 January 2007 to follow up on the request for records. A number of documents were subsequently provided to the Workplace Ombudsman on 24 January 2007 and again on 30 January 2007, received via facsimile. The documents included time, wage and payroll records in respect of the Claimant.*

*25. A telephone call was received from the Second Respondent by the Workplace Ombudsman on 18 January 2007 in which the Second Respondent stated that the Claimant had been engaged as an apprentice. This was investigated by the Workplace Ombudsman with the New South Wales Department of Education and Training, who confirmed on 27 February 2007 that the Claimant was not registered as an apprentice of the First Respondent.*

*26. On 26 February 2007, following a review of the relevant records of the First Respondent, and discussions with the Claimant, the Workplace Ombudsman issued an initial Breach Notice to the First Respondent relating to the employment of the Claimant.*

*The Breach Notice:*

*(a) particularised breaches of the WR Act and the NAPSA – Building and Construction Industry (State) Award;*

*(b) provided the First Respondent with 14 days to advise the Workplace Ombudsman of the actions taken to*

*comply with the WR Act and the NAPSA - Building and Construction Industry (State) Award;*

*(c) advised that the First Respondent's obligations to the Claimant could be discharged by making payment of the underpayment amount specified in the breach notice, payable to the Claimant and remitting it to the Workplace Ombudsman; and*

*(d) advised the First Respondent that where breaches are corrected through voluntary compliance, prosecution action is not normally pursued.*

*27. On 14 March 2007, having had no response to the Breach Notice, the Workplace Ombudsman issued a Final Breach Notice to the First Respondent.*

*28. In a letter dated 12 March 2007, received by the Workplace Ombudsman on 14 March 2007 after the issue of the Final Breach Notice, the Second Respondent:*

*(a) rejected the breaches specified in the Breach Notice;*

*(b) asserted that the Claimant was engaged as an apprentice and as such had been paid the correct apprentice rates; and*

*(c) stated that the Claimant was not entitled to overtime payment as he was provided with a lift to and from the various work sites during his employment.*

*29. Following receipt of this letter, the Workplace Ombudsman was contacted by the Second Respondent, who again asserted that the assessment by the Applicant was wrong and that he wished for the matter to proceed to court.*

## Consent orders

16. On 1 February 2008 the Court:

a) noted the first respondent's admission that it had contravened ss.182, 208 and 235(2) of the Act and had contravened cls.27.1, 29.1, 32.7 and Pt.B Table 1 of the Building NAPSA and cls.50(c)(i), 51(a)(iii)(3) and 57(c) of the Pastoral NAPSA; and

b) ordered the first respondent to pay the Claimant $7,000, being the agreed amount outstanding, by 7 February 2008.

17. When the matter was listed for hearing on penalty on 25 March 2008, most of the unpaid wages and entitlements were still unpaid.

## The evidence

### The applicant

18. In his affidavit sworn 28 September 2007 the applicant deposes to the inquiries undertaken by him and the correspondence passing between him and the first respondent and between him and the New South Wales Department of Education and Training concerning the apprenticeship to which the respondents alleged the Claimant was a party.

19. In her affidavit sworn/affirmed 2 November 2007 Arvind Bali of the New South Wales Department of Education and Training deposed to results of searches conducted by her of that department's record of apprentices and trainees. Ms Bali deposes to having found no record of an apprenticeship in the name of the Claimant other than one which the Claimant commenced with another employer on 23 January 2007.

20. In his affidavit sworn/affirmed 24 October 2007 the Claimant deposed:

> *3. I met Mr Bigeni at what I understand was his girlfriend's house … and we discussed me commencing work with him as part of his bricklaying business, Bigeni Contracting Pty Ltd. I understood from that conversation that I would commence work on a trial basis as an appreciate bricklayer. I understood from this discussion with Mr Bigeni that I would need to go to TAFE to study the theory of brick laying and that I would receive on the job training from him.*
>
> …
>
> *5. I worked for Mr Bigeni for 33 weeks from 20 February 2006 to 10 October 2006. During my period of employment with Mr Bigeni, I did what I would call labouring work. My duties included transferring bricks to supply Mr Bigeni and Daryl Rochester. I also got tools for Mr Bigeni and Daryl*

*from the truck, as they needed them. I cleaned the mixer that made mortor and I cleaned their tools as well. I also cleaned up sites after we had worked on them. I mixed water, sand and cement to make mortar. I also raked the mortar joints in the brickwork, which removed excess mortar to give the desired effect. There were three ways to finish the mortar joints (raked, flush and ironed). I also loaded and unloaded the work truck of a morning and afternoon.*

6. *When I wasn't doing this type of work Mr Bigeni would get me to work on his farm … I would tend to his cattle. Mr Bigeni had about 50 head of cattle, which meant that I would mix breakfast cereals, flour, and other things to make cows food. I'd clean Mr Bigeni's shed and help deliver rubbish to the tip. I would also inject the cattle with worming fluid and do general maintenance around Mr Bigeni's property like repair fences. I would occasionally wash the work truck. On many occasions I would be left on the farm alone for a few hours. During this time, Mr Bigeni would tell me that he was going to buy food for the cows, or go to the auctions to buy cows.*

7. *I would usually work on Mr Bigeni's farm when it was raining or when work was required on the farm. I'd also work on the farm when the bricklayer's couldn't lay bricks because the materials hadn't arrived on a site.*

8. *I would spend around 70% of my time working on construction sites and the remaining 30% on Mr Bigeni's farm.*

…

11. *When I would do labouring work for the bricklayers a typical day would see Mr Bigeni pick me up at home at 6:00am to start work at the site around 7:00am. I would have around one hour for lunch and then finish work 5:00pm. Mr Bigeni would then give me a lift home once we finished work. I would work Monday to Friday.*

12. *Mr Bigeni would give me a lift home with him from the work site, I would get home around 6:00pm. Mr Bigeni told me that he slept at his girlfriend's house every night … This house … is only about five minutes drive from my house ... When I first started working with Mr Bigeni, I would walk down to … where Mr Bigeni would pick me up in transit to a*

*job site. As time went on, Mr Bigeni started picking me up from my house which was only a one-minute drive from whee [sic] he picked me up ...*

*13. When I worked on Mr Bigeni's cattle farm I would work from 7:00am and not finish working until 7:00pm. I would then get home about 7:30pm.*

…

*22. Around August or September 2006 I had another conversation with Mr Bigeni. I asked him if I would be getting overtime for the long hours I was working and if I would get paid when I took my holidays.*

*Mr Bigeni said to me, words to the effect of "I pick you up and drop you home so I don't have to pay you overtime or travel allowance".*

…

*25. I had around half a dozen conversations about overtime and holiday pay with Mr Bigeni. He would just say the same thing to me – that he picked me up and dropped me home and so he didn't have to pay me over time. As for holiday pay he always said that I wasn't entitled to it and that I had to work. Mr Bigeni further said "the new laws just came out and I don't have to pay holiday pay."*

**The respondents**

21. In his affidavit sworn/affirmed 1 December 2007 the second respondent said:

a) he would pick up the Claimant from his home and return him there after a day's work:

b) sometimes when he went to collect the Claimant, the latter was still in bed which delayed their journey. As a result, rather than be delayed getting onto a worksite, the second respondent preferred to go to "the company yard" and carry out some work there instead;

c) it was generally not the second respondent's practice to return home before 7:00 or 7:30pm but he gave the Claimant the choice

of staying until then when he could get a lift home or he could leave earlier if he could arrange alternative transport as, being 15 years old, he did not have a driver's licence;

d) he disputed that the Claimant spent 30% of his time at the company yard;

e) the second respondent was always on the lookout that the Claimant, considering his age, would not do work that was too hard for him;

f) it was not correct that the Claimant worked 9-10 hours a day and worked 45-50 hours per week. The reason why the Claimant spent any time over 40 hours per week was that he did not have anyone to pick him up from the worksite or from the company yard. The respondents never wanted or needed the Claimant to work any overtime; and

g) the respondents believed that in order to formalise the Claimant's apprenticeship status it was the Claimant's responsibility to enrol as an apprentice and to have the second respondent sign the appropriate papers.

## Accessorial liability

22. Section 728 of the Act provides:

> ***728 Involvement in contravention treated in same way as actual contravention***
>
> *(1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.*
>
> *(2) For this purpose, a person is **involved in** a contravention of a civil remedy provision if, and only if, the person:*
>
> *(a) has aided, abetted, counselled or procured the contravention; or*
>
> *(b) has induced the contravention, whether by threats or promises or otherwise; or*

*(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*

*(d) has conspired with others to effect the contravention.*

23. The authorities show that in order for a person to have accessorial liability under s.728(2) of the Act he or she

- must have knowledge of the essential facts constituting the contravention;
- must be knowingly concerned in the contravention;
- must be an intentional participant in the contravention based on actual not constructive knowledge of the essential facts constituting the contravention – although constructive knowledge may be sufficient under s.728(2)(c) in cases of wilful blindness; and
- need not know that the matters in question constituted a contravention.

[*Yorke v Lucas* (1985) 158 CLR 661; *Australian Competition & Consumer Commission v Giraffe World Australia Pty Ltd* (1999) 95 FCR 302; *Rural Press Ltd v Australian Competition & Consumer Commission* (2002) 118 FCR 236; *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17.]

24. There can be no doubt, based on the evidence and the agreed statement of facts, that the second respondent satisfies these criteria.

## Considerations as to penalty

### Introduction

25. As Tracey J said in *Kelly v Fitzpatrick* [2007] FCA 1080 at [14], in *Mason v Harrington Corporation Pty Limited* [2007] FMCA 7 at [24] Mowbray FM identified "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 the

penalty". Tracey J adopted those considerations and described them as follows:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.*

26. When the matter returned to Court on 10 April 2008 the respondents tendered an ASIC printout which discloses that an application has been made for the voluntary deregistration of the first respondent. As the first respondent has not yet been deregistered the Court should proceed to determine the penalty to be imposed upon it.

**The nature and extent of the conduct**

27. The Claimant worked for the first respondent from 20 February 2006 until 10 October 2006. It is conceded that throughout this period the Claimant was not paid the appropriate ordinary wage rate or the appropriate overtime rate, or indeed any amount for overtime. The Claimant was paid as an apprentice but as no apprenticeship was actually in place, he ought to have been paid wages in accordance with the two NAPSAs.

28. The respondents' conduct is restricted to one teenage employee. The respondents claim that the non-payment of ordinary wages arises out of their misunderstanding of how an apprenticeship was to be affected. It is not obvious from the second respondent's affidavit that much substance was given to the Claimant's supposed role as an apprentice. Even though the respondents were content to pay the Claimant as an apprentice, it is not apparent that they were willing to assume the concomitant training obligations.

29. The non-payment of overtime arises out of the second respondent's desire to stay at work later than the Claimant's ordinary finishing time. Although it is conceded that the Claimant was entitled to be paid overtime, the evidence in support of him having done much work while waiting for the second respondent to leave for home is not powerful.

30. In this regard, the Claimant said that when he was working on site he would finish at 5:00pm and when he was working at the company yard, which he described as Mr Bigeni's cattle farm, he would not finish working until 7:00pm. The 5:00pm finish on building sites is partly echoed in the affidavit of the second respondent who conceded that on average he use to put in an extra hour every day to finish the cement which had been mixed and that there were times when the Claimant would come over and assist him in this final hour. However, the second respondent disputes the Claimant's allegations to have contributed much to his farm. It is difficult to accept the Claimant's version of events in its entirety. For instance, it is questionable that the tasks which the Claimant says he performed at the second respondent's farm were undertaken after dark, as would have had to have been the case in winter, based on his allegations.

31. Further, the arrangement that the second respondent would drive the Claimant to and from work was clearly convenient to the Claimant and his family, as revealed by the affidavit of his stepfather sworn 12 December 2007. In a conversation with the second respondent deposed to by the stepfather, the latter rejects as unreasonable the second respondent's suggestion that the Claimant might like to find his own way to and from work. The travelling arrangements entered into between the parties were partly suitable and partly unsuitable to both of them. However, if the first respondent had an obligation to pay overtime to the Claimant, which it has conceded it had, it should have made those payments without the compulsion of these proceedings.

**The circumstances in which the conduct took place**

32. See [27] – [31] above.

**The nature and extent of any loss or damage**

33. The annexure to the application commencing the proceedings reveals that the Claimant was paid $7,910 in respect of ordinary time wages and $601.82 in respect of overtime (which amount was paid after the employment ceased). The parties agree that the applicant was underpaid $3,292.86 in respect of ordinary time wages and $2,293.78 in respect of overtime. Together, these figures total $5,586.64. To this should be added $1,228.87 for accrued annual leave on termination and $215.05 in respect of unpaid annual leave loading. That is to say, the Claimant's unpaid entitlements total $7,030.56, an amount which is approximately 80% of the amount which was actually paid.

34. Clearly then, the loss and damage suffered by the Claimant was significant.

**Similar previous conduct**

35. It has not been submitted by the applicant that the respondents have engaged in similar conduct in the past.

**Whether the breaches were properly distinct or arose out of the one course of conduct**

36. Notwithstanding the various statutory and NAPSA breaches, the applicant has submitted that there were three distinct courses of conduct in this case, namely:

    a) non-payment of ordinary wages;

    b) non-payment of overtime wages; and

    c) non-payment of annual leave entitlements including annual leave loading.

37. Such an approach was seen in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 where it was referred to although not expressly approved by the majority of the Full Court of the Federal Court.

38. In any event, the failure by the first respondent to pay the Claimant's full entitlement to ordinary wages did arise out of a single course of conduct which, for the purposes of s.719(2) of the Act, is to be taken as a single breach of s.182 of the Act and of the relevant terms in each of the two NAPSAs. The same may be said in relation to the first respondent's failure to pay the Claimant's overtime entitlements in breach of the relevant terms of the two NAPSAs. On the approach advocated by the applicant, the failure upon termination to pay the Claimant's annual leave entitlements under s.235(2) of the Act and the relevant provisions of the Building NAPSA and the Pastoral NAPSA should also be considered to amount to a particular course of conduct.

**Size of the business enterprise involved**

39. The first respondent is a very small company. The second respondent is its sole shareholder and director. No evidence was put before the Court concerning the turnover or profits of the first respondent but it can be assumed that they are not great. The first respondent relied on members of the second respondent's family to attend to paperwork associated with the business. Clearly, it was not well resourced or well provided

with advice on how to comply with statutory requirements. However, as Tracey J said in *Kelly v Fitzpatrick* at [28]:

> *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13]*.

**Whether the breaches were deliberate**

40. The first respondent intended to pay the Claimant at the rate of an apprentice and there was no inadvertence in this conduct. The first respondent's submission that it was unaware of the correct steps to take in order that the Claimant's apprenticeship could be put in place were unsupported by any evidence that it attempted to determine what those steps were, other than by reference to what the second respondent's daughter had had to do in connection with her hairdressing apprenticeship. The evidence led by the first respondent does not support a conclusion that it was concerned to make the Claimant's status appropriate to the level of his pay.

41. As to the Claimant's overtime entitlements, the second respondent himself concedes that the Claimant did assist him on occasions while the Claimant was waiting for the second respondent to finish work. The extent to which the Claimant provided such assistance, and the extent to which he worked at the second respondent's farm or the first respondent's yard, is disputed. However, the extent of the dispute does not mean that the Claimant did not work overtime. Indeed, the respondents have conceded it. It can only be concluded that the first respondent's failure to pay overtime to the Claimant was not inadvertent. I conclude that regardless of whatever work the Claimant did after his nominal finishing time, the first respondent was not minded to pay him anything. In this regard, I note the conversations referred to in the affidavit of the Claimant's stepfather, where the second respondent is recorded as saying that he would pay no overtime as he was providing transport to the Claimant, the substance of which

was repeated in the respondents' correspondence with the applicant which is set out in the agreed statement of facts, [15] above.

**Whether senior management was involved in the breaches**

42. As already noted, the second respondent is the sole director and shareholder of the first respondent. All the acts of the first respondent were undertaken by the second respondent.

**Contrition, corrective action and co-operation with the enforcement authorities**

43. The respondents explained their culpability by saying they misunderstood the means by which the Claimant's apprenticeship would be put in place. They admit that they did not know this vital information and say that they now appreciate that they were wrong and mistaken; however, they make this admission without any demonstration of penitence or regret.

44. The respondents took some small corrective action by the payment of $601.82 after the issuing of the breach notice.

45. The respondents only accepted their responsibilities to the Claimant after commencement of these proceedings and, in particular, after mediation. But even so, and as already noted, consent orders made on 1 February 2008 requiring the first respondent pay $7,000 in respect of the Claimant's unpaid entitlements were not substantially complied with at the time the matter was listed for hearing on penalty on 25 March 2008. The respondents submitted that they no longer had the funds to be able to make the payment and the matter was stood over for further submissions to 10 April 2008 in order to give the first respondent further time to make the payment before a decision on the appropriate penalty was reached. This conduct suggests that the respondents were only willing to make payment to the Claimant according to a timetable suitable to them. This demonstrates inadequate appreciation of their responsibilities and a continuing lack of contrition.

46. When the matter was re-listed on 10 April 2008 the parties were able to advise the Court that the outstanding wages, net of tax, had been provided to the Workplace Ombudsman.

47. Prior to the commencement of these proceedings, the respondents co-operated with the Workplace Ombudsman to the extent that wages records were provided. However, they failed to appreciate and to meet their obligations, notwithstanding notices served by the Workplace Ombudsman in connection with the Claimant's entitlements. They only accepted their obligations, and thus co-operated adequately with the authorities, following the mediation which occurred earlier in these proceedings.

48. The respondents' ultimate co-operation with the applicant has meant that a contested hearing on contravention was not necessary. This freed public resources to be applied elsewhere and the respondents' concession must be recognized. A deduction of 25% of the penalties to be imposed will be allowed in this connection.

**Deterrence**

49. I am not satisfied that the respondents properly understand their obligations to workers such as the Claimant. It was submitted that the first respondent was not trading and was in the process of voluntary deregistration, the second respondent having obtained employment elsewhere. It appears that the first respondent will never resume operation but it cannot be predicted whether the second respondent will take the opportunity to operate his business once again, notwithstanding submissions made on his behalf that he will never again be an employer. As the possibility cannot be excluded and given the respondents' attitude to these proceedings and the Claimant's entitlements, some special deterrence against repetition of such conduct is appropriate, particularly in respect of the second respondent.

50. Further, this is also a matter where general deterrence must be considered. The position of vulnerable workers such as the Claimant is protected by the law and that protection should be enforced by the courts. Such protection involves sending a message to other participants in the relevant industry that such conduct will not escape

punishment. A penalty should be imposed to serve as a warning to others not to engage in similar conduct: *CPSU, Community and Public Sector Union v Telstra Corporation Limited* [2001] FCA 1364 at [9]. A price should be put on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act: *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076 per French J at 52,152.

**Further matters**

51. In this case I find that each breach of each category of obligation set out above at [14] arose out of one course of conduct with the consequence that, based on the applicant's submissions, there have been three breaches in respect of which penalties much be considered. The maximum penalty for each of those is 300 penalty units for the first respondent and 60 penalty units for the second respondent, or $33,000 and $6,600 respectively. In the circumstances of this case, the maximum penalties are $99,000 and $19,800 respectively.

52. Further, this is a matter in which the totality principle must be considered. That principle requires the Court to determine an appropriate level of penalty for each contravention as if it were a separate offence and then look to the aggregate of those penalties in light of the overall conduct of the respondent in question to form a view as to whether the aggregate is an appropriate response to the conduct which led to the breaches: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith; Kelly v Fitzpatrick.*

**Penalties**

53. I find that the first respondent has contravened:

    a) s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA for failing to pay the correct weekly rate of pay to the Claimant;

    b) cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA for failure to pay appropriate overtime rates to the Claimant; and

c) s.235(2) of the Act for failure to pay the Claimant accrued annual leave entitlements on termination and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA for the failure to pay the Claimant an annual leave loading on his accrued annual leave entitlements on termination.

54. I find that the second respondent was involved in the first respondent's contraventions within the meaning of s.728 of the Act and has contravened:

a) s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA for failing to pay the correct weekly rate of pay to the Claimant;

b) cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA for failure to pay appropriate overtime rates to the Claimant; and

c) s.235(2) of the Act for failure to pay the Claimant accrued annual leave entitlements on termination and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA for the failure to pay the Claimant an annual leave loading on his accrued annual leave entitlements on termination.

55. I find that in respect of each of the respondents, three breaches have occurred.

56. I have taken into account the matters considered above. In the circumstances, I consider the appropriate penalties in this matter to be:

a) as to the first respondent:

i) $10,000 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA, for the failure to pay the correct weekly rate of pay;

ii) $5,000 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA, for the failure to pay the appropriate overtime rates; and

iii) $5,000 for the breach of s.235(2) of the Act for the failure to pay accrued annual leave entitlements on termination, and

cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA, and annual leave loading on accrued annual leave entitlements on termination.

b) in respect of the second respondent:

i) $2,000 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA, for the failure to pay the correct weekly rate of pay;

ii) $1,000 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA, for the failure to pay the appropriate overtime rates; and

iii) $1,000 for the breach of s.235(2) of the Act for the failure to pay accrued annual leave entitlements on termination, and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA, and annual leave loading on accrued annual leave entitlements on termination.

57. In respect of the first respondent the total penalty is therefore $20,000. I am satisfied that this is a just and appropriate amount as an aggregate figure. After a 25% reduction for co-operation the total penalty is $15,000 and the individual penalties are:

a) $7,500 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA;

b) $3,750 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA; and

c) $3,750 for the breach of s.235(2) of the Act and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA.

58. In respect of the second respondent the total penalty is $4,000. I am satisfied that this is a just and appropriate amount as an aggregate figure. After a 25% reduction for co-operation the total penalty is $3,000 and the individual penalties are:

a) $1,500 for the breach of s.182 of the Act, cl.18 of the Building NAPSA and cl.50(c)(i) of the Pastoral NAPSA;

b) $750 for the breach of cl.29.1 of the Building NAPSA and cl.51(a)(iii)(3) of the Pastoral NAPSA; and

c) $750 for the breach of s.235(2) of the Act and cl.32.7 of the Building NAPSA and cl.57(c) of the Pastoral NAPSA.

59. The applicant sought an order that any penalty should be paid to the Commonwealth and there will be an order accordingly.

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**I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Cameron FM**

Associate:

Date: 21 April 2008