CHIEF INDUSTRIAL MAGISTRATE'S COURT
SYDNEY

CHIEF INDUSTRIAL MAGISTRATE HART

WEDNESDAY 28 NOVEMBER 2007

07/113623 - DAVID ARMSTRONG v V & K HOLDINGS PTY LIMITED

Workplace Relations Act

Mr S Boatswain for the Complainant
Mr B Williamson for the Defendant

HIS HONOUR: What's the situation with this matter? Who would like to tell me about it? Mr Boatswain?

BOATSWAIN: Thank you, your Honour. As you might have noted from the papers, the matter proceeded by way of summons essentially seeking the imposition of civil penalties for alleged breaches of the Workplace Relations Act. When the matter was last before this court in the form of the court's registrar it was indicated to the court that the defendant had admitted to the majority of breaches that were contained in the summons and the matter today was listed for the purpose of appearing on penalty only.

It was also indicated to the learned registrar that the parties had proposed to proceed by a statement of agreed facts for the convenience of the court but also to save resources and the like.

HIS HONOUR: Yes.

BOATSWAIN: If it is convenient, there is a signed statement of agreed facts that is seven pages long. I was proposing to tender that, together with a working copy for your Honour's purposes.

HIS HONOUR: Yes, thank you.

BOATSWAIN: Depending on your Honour's approach, I would suggest it would be appropriate for you to read that document before the parties address you further.

HIS HONOUR: I assume that there's no objection to that tender, Mr Williamson?

WILLIAMSON: No. I agree with my friend's approach, your Honour.

HIS HONOUR: Thank you. I note that the court papers also include at least one affidavit. There's an affidavit of Mr Armstrong. Did that go to the question of liability or to the question of culpability?

BOATSWAIN: If I can just briefly take you to the agreed statement of facts, and obviously you're going to read it, but to try and make it self-contained in some respects if I draw your attention to para 32 at p 6.

HIS HONOUR: Yes.

BOATSWAIN: Paragraphs 9, 12, 18, 24, 27 and 30 of the summons have been admitted.

HIS HONOUR: Yes.

BOATSWAIN: You will see that the plaintiff is not proceeding with the alleged breach, which was para 15 of the summons, and that relates to a sick leave payment.

HIS HONOUR: Yes.

BOATSWAIN: Paragraph 19 of the summons was an alternate to para 18, and that was involving an issue as to when notice was asserted to have been taken. Obviously the admission to para 18 disposed of the alternate claim at 19.

So in terms of liability, we can indicate that there is admission to essentially all of the alleged breaches contained in the summons that are being pursued by the plaintiff. For completeness, and I haven't broached this with my friend, the affidavit could be tendered, but given the admissions I just do not think it was appropriate or necessary in the matter.

HIS HONOUR: I suppose it should be a matter for Mr Williamson. Would you like me to read the affidavit of Mr Armstrong as well as the statement of agreed facts?

WILLIAMSON: I don't know that it's necessary. I've actually marked up the statement of agreed facts in reference to the summons and I'm wondering if it would be of assistance if I make the cross-references for you.

HIS HONOUR: Yes, thank you.

WILLIAMSON: In the statement of agreed facts at para 10, above that is the heading Underpayment of Ordinary Time Wages. I will call that the first matter. That relates to para 9 of the summons.

Over the page above para 13 are the words Failure to Pay Overtime. I will call that the second matter. That relates to para 12 of the summons.

Above para 15, Failure to Provide Notice is the third matter. That's para 18.

Above para 17, Failure to Pay Accrued But Untaken Annual Leave is the fourth matter. That's para 24.

Above para 19, Failure to Pay Annual Leave Loading is the fifth matter. That's para 27 of the summons.

Over on p 6 of the document above para 33 is Failure to Make Superannuation Payments. That's para 30 of the Summons.

HIS HONOUR: What I might do is go off the Bench for a short time and read through that document. When I come back I'll hear your submissions. There's no further documents to be tendered, is that the position?

BOATSWAIN: In terms of what is before you at the moment, your Honour, no. My intention was to hand up to your Honour some, what we would submit on behalf of the prosecution, if I can use that term, some relevant authorities.

HIS HONOUR: Yes.

BOATSWAIN: But I would have thought that that was a matter we would deal in submissions and not in terms of this issue.

HIS HONOUR: Part of the submissions, yes, thank you.

WILLIAMSON: I also have four references to tender which I have given to Mr Boatswain to have a look at. He has not seen them yet.

HIS HONOUR: Yes. I'll have a look at those in due course.

SHORT ADJOURNMENT

HIS HONOUR: What I propose to do is hear the submissions on behalf of the prosecution, and then hear from the defendant, if that suits.

BOATSWAIN: Your Honour, as you will note from the tendered agreed statement of facts, it has been prepared in a way so that what I might describe as some of those threshold jurisdictional issues have been agreed.

HIS HONOUR: Yes.

BOATSWAIN: So for the interests of time, it is not proposed by me, unless your Honour requires it, to address any of those sort of threshold formal jurisdictional aspects of it otherwise that would normally be established. I spoke to my friend and, because they are admitted, he doesn't require that to be addressed.

HIS HONOUR: Yes. I'm satisfied in those circumstances, Mr Boatswain. It certainly assists the court.

BOATSWAIN: In terms of the penalty, as I foreshadowed

prior to your short adjournment, I have prepared a small bundle of what I consider to be relevant authorities in terms of sentencing guidelines. If I could hand that up to your Honour for the moment.

HIS HONOUR: Thank you.

BOATSWAIN: Before I take your Honour to that bundle, can I just firstly indicate as well that unfortunately I omitted from the bundle a decision of this court by the previous learned Chief Industrial Magistrate Mr Miller in the matter of Inspector Polgar and Raxigi Pty Limited. That's a decision of 24 July 2007 on liability, and 9 August 2007 on sentence. I have spoken to my friend and he will also be relying on that. I do not have a copy of it for you, but I will be relying on my learned friend providing it to you.

In terms of that, the learned Chief Industrial Magistrate made a reference in terms of general considerations applicable to the assessment of penalty on p 9 of that document. You will see that there is a consistency in approach adopted by his Honour in that matter to the cases which I have just handed up to you.

Turning to those cases very briefly, and somewhat ironically, can I take you to the third case in your list, and I can indicate to your Honour I do not propose to take you at any great length to these cases but just briefly draw your attention to what I consider the salient factors.

The decision of Mason and Harrington Corporation, Federal Magistrate Mowbray outlined some general principles on penalty at paras 18 to 24 of that decision. I can indicate that this decision has been generally adopted and accepted as setting out the principles by Federal Magistrates in addressing civil penalty proceedings in the Federal Magistrate's Court since this time. I have counted up to about fourteen or fifteen since which have all sided with approval. I don't think that's contested.

Very briefly, I can indicate that as you will see at para 18 the learned Federal Magistrate makes a reference to a decision of Justice Birchett in the Trade Practice Commission TNT Australia matter. I won't read in total but just the reference that, "It cannot be denied...application of formula." There is a reference in paras 19 and 20 to the principal objects of the Workplace Relations Act. Fundamentally, as in para 20, the principal object "of ensuring compliance...employee entitlements".

His Honour then goes on to set out in the ensuing paragraphs principal considerations that should be taken into account. I do not propose to take you in any detail to those other than to summarise them, and that is the nature and extent of the conduct, the circumstances in

which the conduct took place, the nature and extent of the loss and/or damage, the prior conduct of the defendant, the size of the company, the deliberateness of the breaches, the involvement of senior management, contrition and cooperation, deterrence, and the principle of totality.

I am aware that these are considerations and concepts that you would be well familiar with, reflecting decisions of the industrial court of New South Wales and this court in terms of both civil penalties as well as prosecutions under the Occupational Health and Safety Act. As you would be familiar with them, I do not propose to take you to them in any great detail.

The other two decisions that I have provided you with, if I again address the second matter of that, the Inspector Karen Shacklock and Amanda Mary McFarlane and Lindsay Kenneth McFarlane matter. Again, I do not propose to take you to any great detail in that matter other than to indicate that that was a matter that involved a failure to pay at the correct rate of pay and loading under an award and the Australian Pay and Conditions Standard post the reform.

The significance of this matter is that, first of all, the adoption of the principles that were set out in the Mason decision, reference to the extent of the underpayment, the fact the defendants were aware of the prescribed rates but decided to pay less, the uncooperative approach of the defendants, the absence of a prior record, and the totality principle were applied by the learned Federal Magistrate in that matter. In that case, the learned Magistrate fixed the penalty of $11,000.

The last case I've provided to you is the first in the bundle, and that's Martin and W K Cross Pty Limited. That matter involved a panel beating workshop, breaches of NAPSA. Significantly, in that matter the various breaches were treated as separate and distinct breaches. There was a reference to s 719(2) of the Workplace Relations Act. Your Honour will be familiar that that provision enables the court "where two or more...of the term".

It is relevant the way the matter was approached in that case was that s 719(2) is not available in circumstances where there are separate breaches of provisions of the relevant instruction, if I can use the generic term. However, if there are repeat breaches of that provision; for example, if there are a series of underpayments of the minimum wages that would be treated by the application of s 719(2). On that basis, the agreed statement of facts appear to indicate that there were six breaches of relevant instruments, if I could use that term.

It would have to be conceded on behalf of the prosecution that some of those, such as the overtime and the like, would appear to involve a series of conduct where there is

continued breaches. Those breaches could be treated under s 719(2) as a single breach. I have had discussions with my friend and he is making that submission I anticipate in terms of grouping, but for the purpose of the prosecutor we regard it as six separate breaches, while conceding I must say in our discussions that there is some logic to the grouping that my friend has informed me he will be submitting.

In terms of the penalty, as I said, I don't want to take a lot of your time today in terms of these matters. I think it is appropriate for the prosecutor to indicate that having made those remarks in terms of the breaches and the potential application of s 719(2) the plaintiff considers the breaches involved to be at the lower end of the range. That range, your Honour would be aware, there is a potential penalty for each breach of up to $33,000. However, assessing the breaches at the lower end of the range, the prosecutor does say that they are serious, any breach is serious, but we say that they are not the most serious of breaches that have been the subject of investigation and prosecution by the office of the Workplace Ombudsman.

One of the matters that I think is a fair assessment as well, a number of the breaches would appear to be more technical in nature and not demonstratively calculated to be informed non-compliance. That would be a fair assessment in terms of the award classification and the like.

It should also be indicated that, as demonstrated in the facts, from the prosecutor's point of view the defendant was not cooperative in the voluntary compliance stage of the proceedings. As a result of that, the proceedings were commenced. But it must be conceded, as it is in the agreed statement of facts, that once the proceedings had been commenced the defendant adopted a co-operative approach. That was seen by the payment that had been made, which is referred to in the statement of agreed facts, and it should also be indicated that even though the sick leave breach has not been prosecuted as indicated in para 31, that the payments that were made by the defendant in discussions directly with the office of the Workplace Ombudsman in an attempt to resolve this matter included payments of sick leave.

Unless there are other matters that you wish me to address, your Honour, that is all we would like to submit on behalf of the plaintiff.

HIS HONOUR: Thank you, Mr Boatswain. Mr Williamson?

WILLIAMSON: Thank you, your Honour. Might I hand up the case of Inspector Polgar v Raxigi Pty Limited, the one that my friend has forecast.

HIS HONOUR: Thank you.

WILLIAMSON: That particular case that I've handed up to you is useful because it does contain a discussion on s 719(2) of the Workplace Relations Act and repeats that section at p 4. Perhaps if I could just take your Honour to that. Basically what 719(2) at p 4 states is that - and we're dealing with penalty on the breaches, and I agree with my friend we've consented to the jurisdiction of the court and that's not an issue - is subject to subs 3, which we say has no relevance, "where two or more...of the term".

This provision has been discussed in its prior forms in a number of cases, and commencing at the bottom of p 4 and over onto p 5 are the principles governing the application of the section. So firstly, and if I could summarise it I'm sure you'll take it away and read it in full, but there has to be clear and unequivocal evidence that the course of conduct is apparent and the evidence has to be there to support a submission.

The second thing is that each obligation of industrial instrument is to be regarded as a term for the purposes of the section. We acknowledge that each of the six matters that the company has pleaded guilty to constitute a separate term, but I will address more on that in a moment. Repeated breaches of a particular provision of an instrument may attract s 19. The next one is quite irrelevant to us, and then it says, and most important at item (v) on p 5, "even where s 719(2)...a single action".

This series of six pleas should be divided up into several categories. If I can take your Honour to the statement of agreed facts and particularly to para 10. This is the one for underpayment of ordinary time wages and is referred to in para 9 of the summons. We say that that is subject to totality in that the sixth matter, failure to make superannuation payments, which is referred to at para 33 of the statement of agreed facts, arises out of the same set of facts. It was that the company had failed to pay Ms Mills the correct award entitlement following the granting of her certificate 3 under the Community Services training scheme. We would say that this falls well within the principles enunciated in (v) of the case that I have been reading from in that they have a interlocking relationship and arise out of a single action.

We would therefore say that the failure to pay overtime, which is in para 13 of the statement of agreed facts, stands alone but the principle in s 719 that the breaches arose - I withdraw that. There are two or more breaches of an applicable provision committed by the same person, and the breaches arose out of a course of conduct by the same person. The breaches shall, for the purposes of the section, be taken to constitute a single breach. We would say that whilst there are twenty-seven occasions that there was a failure to pay overtime, that these be regarded as one breach because of s 719(2).

We would then say that the remaining matters, which is the failure to pay notice, para 15 of the statement of agreed facts, the failure to pay accrued but untaken annual leave, para 17, and the failure to pay annual leave loading all fall out of the totality principle and that (v) in the case also applies. Just reading that again, it says, "where breaches have...a single action", and we say the single action here was the termination of the employment. If the employment had not occurred, those three matters would not have arisen.

So, using s 719 or the totality principle, there are three clusters or three groupings that apply here.

If I can now deal with some matters generally. My friend has listed the matters which should be taken into account in sentencing. We came up with a similar list. These are also mentioned in the case I have provided, the Raxigi case. They are referred to in p 10 of that document that I've handed up. You'll see there's (i) through to (viii) at the top part of the document.

That's a non-exhaustive list. There is another case which I am not going to worry about handing up, your Honour, but it's Coles v Brisbane Rock and Sales, and the court reference is 2007 FMCA at 1838. It lists several other considerations, and those are ones that I'll address on as well, and these include whether the breaches are deliberate, whether the breaches were properly distinct or arose out of one course of conduct, and the nature and extent of any loss or damage sustained as a result of the breaches.

So what I would propose to do is to now address these points with your Honour. Can I just indicate at the outset that the company is a holding company; it has two childcare centres at Ermington and Sylvania. They're not large operations. The Ermington operation has nine employees and the Sylvania operation has seven employees, and this was the first trainee that they had ever dealt with.

The company, whilst it's been around a considerable time, and its managing director is in court today, has a clean record, and this is the first time it's come before the court on a matter of this nature, and it is deeply sorry that this matter has occurred, your Honour.

When we became involved in the matter a few months ago, the summons was brought to us, and I have to say that my client was visibly upset about the matter, and effectively wanted it to go away. To this extent, all payments have been made, and as you've heard, the payment for sick leave was made, and this is referred to in paragraph 31 of the statement of agreed facts, even though the sick leave prosecution was eventually discontinued.

It also paid in respect of overtime in an environment where it believed that it had an argument that overtime wasn't payable. What the company did was ran an overs and unders situation, but my client was, or its managing director was sufficiently upset about the matter that he just paid the whole lot, and that became an admission, of course, so on that basis, the company has pleaded guilty to that matter, even though the company believes it had an argument that there had been an overs and unders arrangement. And by overs and unders, what I mean is that she left early on Sundays, she worked late on others, and it was a quid pro quo.

HIS HONOUR: An informal give and take situation.

WILLIAMSON: Yes it was. And whilst the company has been around a long time, your Honour, I have to say to you that the company is not sophisticated in its back room operations, on my instructions. What's happened is that they have had a part time bookkeeper, that bookkeeper left around the critical time, and has only been replaced this August, and it's only now that they're getting on top of their back room function, and paying far more attention to

it. And I suspect that this is part of the reasoning why this matter fell through the gaps.

As I've said to you, they had a trainee that they put on. The trainee passed her course. The company wasn't diligent in understanding the nature of the certificate that was supplied, and that this related to the award, and this is where the award breaches come from that are referred to in the paragraphs dealing with underpayment of ages at paragraph 10, and the superannuation payments at paragraph 33.

The other thing I just want to say about the facts generally is that any sense from the plaintiff of lack of cooperation from the company, I suspect has arisen for two reasons; partly its lack of sophistication, and also the unfortunate nature of Ms Mills' departure. And there has been a resignation. Ms Mills has attempted to withdraw that resignation. The law is very clear around the area of resignations. They can only be withdrawn with the consent of the employer. But the resignation was referred to the head office of the company by the site manager; Ms Mills worked the next day, and that would be evidence of the fact that she is filling out or completing her notice obligations, but indeed, from the company's perspective, it wasn't up to her to withdraw the notice.

That has become a matter for discussion between the parties, and as a result of that, Ms Mills, in a heated conversation, has told company representatives at the conclusion of the call, which became heated, and this is from the statement of facts at paragraph 10(d), Ms Mills said the words, "Stick your job up your arse, I don't need your money."

On one interpretation of the facts, this could mean that she evinced some intention not to complete her notice period, and not to seek payment in lieu of notice. Particularly, "I don't need your money" seems to be referring to the notice period. The company has nevertheless pleaded guilty to that matter, and has paid that notice payment.

So its lack of sophistication in the back room and Ms Mills' aggressive nature, I think, has contributed to the matter.

The other aspect of the facts that are worth remembering, your Honour, or worth drawing to your attention, your Honour, is that at paragraph 25, the 11 August letter, on my instructions, was not received by the company. Now, my friend tells me that it was faxed and also posted, but I have no instructions as to why it wasn't brought to the managing director's attention. And indeed, at paragraph 26, the Workplace Ombudsman, on 15 August, received a letter from the defendant dated 2 August in response to the 27 July letter.

So what we have at paragraph 24 is the 27 July letter. There is a follow up a fortnight later. In that intervening period, the company has written a letter dated 2 August and got it away, albeit that it doesn't arrive till 15 August.

We have a similar problem with paragraph 28, where the company again says it did not receive that particular letter of 29 September. And I guess this is the problem with the matter; it does fall into a hole during the period 29 September to 20 June, and that hole has to be answered as to why that happened. Very simply, poor back office functioning. The matter slipped off the radar screen and was not dealt with. It wasn't a malicious holding back. I put it in the category of either lack of sophistication or negligence. It was probably a matter that falls into the too-hard basket and wasn't dealt with aggressively as it should have been, and hence we're here today.

So, your Honour, if I deal with the matters that have been taken up in the cases; the first is the nature and extent of the conduct, and its objective seriousness. I have already mentioned to you that Ms Mills was a trainee at the time. The company has no other trainees at the moment. It had a couple of trainees after this and has learnt by this experience. And I note my friend's submission from the bar table that, whilst the matter is serious, it's at the lower end of the spectrum. I submit that there is no intention here to defraud. This has been really a matter of negligence and poor company management.

As to the second matter, the circumstances in which the relevant conduct took part, I have addressed those matters and I've dealt with that in the context of the grouping, and I have made, I hope, a strong submission that this matter should be regarded as three issues, not six.

The extent of the loss or damage sustained - yes, I acknowledge that Ms Mills was out of pocket until August of this year, but she has not only been recompensed beyond the six matters that we're addressing today; she has also been recompensed for her sick leave, and she has been recompensed for any overtime, which we say was subject to an informal over and unders arrangement. So there is potentially a double payment for her on that one.

Whether the defendant has been found to have been engaged in similar conduct - we say that they have got a clean record and we ask that to be taken into account.

Indeed, your Honour, I have some references for Mr De Skouris, who is the managing director of the company. Because of the sensitiveness of this matter, they are not current references. He's embarrassed by this matter, and he's embarrassed on behalf of the company, so they are somewhat old, but they do still attest to his sound character. My friend has seen those.

HIS HONOUR: So I read those on the basis that the referees are not aware of these proceedings.

WILLIAMSON: Correct.

HIS HONOUR: Thank you.

BOATSWAIN: Your Honour, in terms of that, I did mention to him I had no objection, but I also noted that each of the references pre-date the filing of these proceedings as well.

HIS HONOUR: Yes, thank you.

WILLIAMSON: I agree with that. Would your Honour like to just read those at the moment?

HIS HONOUR: Yes, I'll just have a look through those, thank you. Yes, thank you, Mr Williamson.

WILLIAMSON: Thank you. The next issue is whether the breaches are simply technical or they involve an actual detriment. I've already dealt with the detriment issue, but a couple of the breaches, in my submission, would be technical, particularly in relation to the superannuation matter. That has been paid. It was $197 by recollection, and that's been dealt with. The annual leave loading automatically follows the annual leave matter. So I'm not going to take away from the fact that they are separate terms for the purpose of section 719, but I'd ask the court to take into account that they're a follow on from a particular entitlement.

HIS HONOUR: Yes.

WILLIAMSON: Financial size and status of the defendant - on my instructions, the company doesn't have its balance sheet for 30 June 2006 at this stage, but certainly at 30 June 2005 there was an excess of liabilities over assets of $154,000. The company is a holding company. It's clearly trading through the two entities at Sylvania and at Ermington. But it is not a company of deep pockets. It does have a building, but there are liabilities in respect of the building, and its trading position in 2005 was not terrific.

Whether the defendant has admitted or contested the breaches in the relevant court proceedings - your Honour, when we became involved in the matter, our client was adamant that he wanted the matter to go away. He felt that he had some defences to several of the matters. We entered into negotiations with my friend. One matter has been withdrawn. I have indicated to you the overs and unders arrangement for the overtime. But he's pleaded guilty to that.

The issue of whether notice should be paid for someone who

tells you to stick their job up their arse and the money doesn't matter is another matter which arguably could have been contested, but my client has taken the view that, having made the payments, that was an admission, and it has dealt with these matters as quickly as humanly possible in these proceedings.

Whether the defendant has cooperated with the prosecuting authority and corrective action or demonstrated contrition - well, I've certainly indicated that it's demonstrated contrition, and my firm instructions are to offer an apology to Ms Mills and to the Workplace Authority.

It has also demonstrated contrition by making the payments in August this year, once the matter came back onto the radar, and I'd ask the court that this be appropriately taken into account in determining the penalty, that there be a substantial discount for that.

The other issue is the need for deterrence, both general and specific. Given the history of the company, its longevity, my submission would be that, as this is the first time it's come before this court, there is no need for a specific deterrence. In terms of general deterrence, I can't see the need for that in an environment where this company has really been caught out by having a trainee and not being sophisticated enough to manage that, and we'd be asking that, in terms of society's need to know about this as a deterrence, that the court exercise its judgment and that it say in this circumstances, this has just been a very unfortunate set of circumstances, contributed to by Ms Mills telling to company to stick its job up its arse.

Your Honour, I'm not going to prolong and plead. My view of the world is that we get in and get out very quickly. I've got nothing other that I need to say, but if your Honour has any questions, I'm happy to address them.

HIS HONOUR: No, thank you, Mr Williamson.

BOATSWAIN: Your Honour, if I could just raise a couple of matters in reply?

HIS HONOUR: Well, I'll give you a right of reply, but in circumstances where Mr Williamson will have the last say. That's the policy I adopt.

BOATSWAIN: Thank you, your Honour. I appreciate that, your Honour. I don't wish to traverse the various matters, but I must say my learned friend has made often, repeated references to the phone call matter and made submissions in terms of the, as my note is, aggressive manner of Ms Mills.

Your Honour, if I draw your attention to paragraph 9 of the agreed statement of facts, in particular paragraphs 9(a) and 9(d). The circumstances in paragraph 9(a) is

that Ms Millis purported to resign to her line manager. On the same day and following discussions with her line manager, she withdrew her resignation. I do not want to traverse this issue in great detail, other than drawing your attention to the fact that it is in the agreed statement of facts. It is one thing to now try and suggest that following discussions with the line manager that the withdrawal of the resignation was not consented to, and that somehow head office had to authorise that withdrawal for it to be effective is a matter that I would say is highly arguable.

HIS HONOUR: We're not going to discuss ostensible authority, are we, Mr Boatswain?

BOATSWAIN: No; I'm just making that note, your Honour. But more significantly, in paragraph 9(d), my friend has made reference to the remark, and my note of his submission to you was in the circumstances of a call relating to the withdrawal of the resignation. As you can see there, the purpose of the call was a challenge to the genuineness of her illness, as she was leaving with her mother to attend a doctor's appointment. It was at the conclusion of that call, which did become heated, that the remarks were made.

My friend also did not draw your attention to subparagraph (f) of paragraph 9, where, having attended a medical appointment, she subsequently received a text message as described there.

So, in the sense that there is some purported attempt to describe Ms Mills as aggressive and that those remarks that she is referred to have made in subparagraph 9, I just simply draw to your Honour's attention the full context of the matter, and certainly do not wish to concede that it was an aggressive manner of Ms Mills that led to that.

Equally, your Honour, a submission was made to you in terms of not having deep pockets and the financial situation. I will not take your Honour to the particular cases, but remind you, your Honour, but you are no doubt aware, that there are certain authorities which say that the absence of funds is not a basis for refusing to impose a penalty.

Finally, your Honour, in terms of general deterrence, my friend made some submissions to you. From the plaintiff's perspective, we would submit that there is grounds for general deterrence to be taken into account. This is the childcare industry, your Honour. As my friend has indicated, she was a trainee. As is clear from the summons and from the agreed facts, the employee in this case, and generally in this industry, are aware-reliant employees by their very nature. In my respectful submission, on behalf of the Office of the Workplace Ombudsman, there is a significant issue in terms of

trainees being properly remunerated in terms of the awards upon which they are reliant, and particularly in this industry.

Thank you, your Honour.

HIS HONOUR: Mr Williamson, I'll give you an opportunity to respond to those further submissions if you wish.

WILLIAMSON: Thank you. I note my friend's comments about the contextual issues. Can I just say that in relation to the matters, there were originally seven, and one of those was a prosecution over failure to pay sick leave. Whilst Ms Mills did obtain a medical certificate, it wasn't submitted to the company for many months later, and this is one of the reasons why that matter was dropped.

Yes, the call was about the sick leave, but it was also in the context of the resignation having been sent to head office, and yes, it was at that stage that the company understood that she'd be undergoing a period of notice that she was working out, but the "stick your job up your arse, I don't need your money", the company took the view that it was an intention to walk away from work. She never returned to the role.

Yes, at paragraph (f), "You're no longer required to come to work." This is one of the reasons why the company pleaded guilty to the matter, your Honour. That statement could be seen as one of two things - "Yes, we accept that you're going to walk away from your job, but we're just making sure you're not going to come back;" or is it payment in lieu of notice. Given that the company had made the payment in lieu of notice, we took the view that it was, on the balance of the facts, probably more sensible to plead guilty to the matter, but we're saying at the same time that that be taken into account, that it was by no means clear, and that's as high as I'll put it.

Your Honour, my friend just reminded me of one matter in his submissions about the capacity of the company to pay. I'm not sure what fines your Honour is going to come to, but I certainly, if it's going to happen now, I would like to address on the issue of time to pay. If your Honour is going to reserve, perhaps I could make some submissions around an application for time to pay.

HIS HONOUR: Well, I'm probably going to reserve, but only until later today, perhaps 3 or 3.30, or something of that nature. So it won't be a written decision. I'll be giving a decision from the bench later this afternoon, when I have read some of the materials that have come up. So it's a matter for you whether you wish to make some submissions about that. I should make it clear to you that I'm not entirely certain of my powers in relation to the question of time to pay. I know in the New South Wales jurisdiction it's a matter for the Registrar, rather than for the Magistrate. Whether that's different in the

Federal jurisdiction, I haven't had to enquire into previously, and you may wish to make some submissions about that.

WILLIAMSON: Yes. Well, perhaps if we get a marking for what time you consider is appropriate this afternoon, your Honour, I'll have a look at that during the adjournment and make an appropriate submission then.

HIS HONOUR: Yes, all right. I do propose to reserve until later in the day, and I will reserve my decision on the question of the appropriate sentence in this matter until 3 o'clock this afternoon, subject to that being a bad time for the advocates. Mr Boatswain, does that cause you any great difficulty?

BOATSWAIN: It does cause me some difficulty, your Honour, but--

HIS HONOUR: I can be a bit flexible. I can push it back later.

BOATSWAIN: Well, no, it's the later where it's the difficulty, your Honour. But, look, I can make arrangements. We have a commitment out at Parramatta, I think at 3.30, commencing at 3.30, your Honour. But if I cannot be here, I can make arrangements for someone to be present to take the judgment.

HIS HONOUR: What if we make it 2.30? Would that be of some assistance?

BOATSWAIN: 2.30 suits me much better, your Honour, thank you.

WILLIAMSON: Your Honour, to the best of my recollection, that's fine as well. Might I just ask whether the managing director of the company might be excused at that time?

HIS HONOUR: Yes, certainly. There will be no discourtesy to the court if he's not here this afternoon.

WILLIAMSON: Thank you. Yes, that's what I'd be concerned about.

BOATSWAIN: Before you rise, your Honour, it just may assist in terms of that last, that exchange in terms of power and the like. For what it is worth, your Honour, my view of the Act seems to suggest that the rules that govern the industrial court, in other words, the former Industrial Relations Commission rules apply to the conduct of these proceedings.

HIS HONOUR: Yes. Thank you. Well, the matter is now adjourned till 2.30 this afternoon. Thank you for your assistance.

MATTER STOOD IN LIST

HIS HONOUR: For the record, I note that I have before me the matter of David Armstrong and V & K Holdings Pty Limited. I propose to give my reasons for decision in that matter.

The defendant company pleads guilty to six breaches of a notional agreement preserving a State award, being the Miscellaneous Workers Kindergartens and Child Care Centres State Award. I have been provided with an agreed statement of facts which sets out the relevant background facts and circumstances.

The defendant employed Ms Chantelle Mills initially as a trainee in its child care centre business. Between February 2005 and February 2006 Ms Mills completed her traineeship and gained a recognised certificate which entitled her to be paid as a step 5 child care worker pursuant to the award. Ms Mills became entitled to a weekly wage of $550.58 instead of the $304 per week she was actually paid. Her underpayments continued until the termination of her employment in May 2006, following a breakdown in the relationship apparently over a dispute concerning sick leave.

The breaches concern underpayment of ordinary time wages, failure to pay for overtime worked, failure to provide notice or a payment in lieu of notice, failure to pay for untaken annual leave and annual leave loading, and failure to pay superannuation payments in the correct sum.

I have received submissions from the parties concerning the provisions of s 719(2) of the Workplace Relations Act and the intersection of that provision with the principle of totality within the sentencing process. It is clear that there are six separate breaches of relevant industrial instruments.

It is submitted on behalf of the defendant that due to the interlocking nature of some of the breaches, it would be reasonable for the court to treat the six breaches as three separate groupings for the purpose of sentencing. The failure to pay correct award wages had an interlocking and flow-on effect on the calculation of superannuation.

The circumstances surrounding the end of the employment relationship were somewhat confused. The breaches concerning pay in lieu of notice, accrued annual leave payments and annual leave loading are all interconnected with that confusion. Whether the former employee was summarily dismissed or constructively dismissed or resigned or announced an intention to abandon her employment need not be determined by this court. The defendant pleads guilty to the breaches and asks the court to treat these particular matters as being interlocked.

The stand-alone matter is the overtime breach. The defendant acknowledges that it was required to pay overtime. It failed to do so apparently because it believed it had an informal give-and-take arrangement with its employee who would sometimes be permitted to leave work early.

The prosecutor does not disagree with the defendant's

submission that the six breaches can logically be described as three separate groupings.

The prosecutor and the defendant have drawn my attention to a number of relevant authorities and some recent decisions of Federal Magistrates and New South Wales Magistrate Miller. I have received helpful guidance concerning the range of matters relevant to the sentencing process.

The first consideration is the nature and quality of the offences before the court. I accept the submission of the defendant that the breaches occurred through negligent conduct, rather than deliberate avoidance of the relevant award provisions. In that context, I note the absence of any prior convictions and the prior good industrial record of the defendant.

However, negligence in this area is far from excusable. An employer has an obligation to find out and provide the minimum lawful entitlements prescribed for its employees. When the employee is a young, vulnerable employee, such as a trainee, the obligation upon the employer is even greater. For this reason, I am satisfied that there is a need for a general deterrence factor to be included in any penalty.

There is also a need for a specific deterrence factor where the defendant remains an employer in the industry. However, I accept that the defendant has corrected its errors and has resolved not to ignore its obligations to employees in the future. The plea of guilty, the full restitution to Ms Mills, and the recent cooperation of the defendant indicate that the specific deterrence factor can be reduced on the basis that the defendant is unlikely to re-offend.

There are a number of subjective matters which mitigate in favour of the defendant. I have already referred to the defendant's good industrial record with no prior convictions despite many years of operation in the industry. The defendant expresses contrition and remorse, and apologises to Ms Mills. The plea of guilty and the full restitution to her prior to any order of the court underline the genuineness of the contrition.

The court has received a number of favourable references testifying to the good character and reputation of Mr Kareem de Skouris, the owner and director of the defendant. Initially during the investigation phase there was little cooperation between the defendant and the prosecutor. However, once the prosecution commenced the attitude of the defendant changed and the cooperation that did occur from then on should be acknowledged. This change of attitude may have been at least in part associated with the defendant taking the step of obtaining legal advice concerning its obligations. It is unfortunate that the defendant did not seek early advice

concerning its obligations to employees under the relevant award. Whilst it is put that the defendant had not previously taken on a trainee and was unfamiliar with the legal requirements, it would obviously have been a simple matter for an enquiry to be made at some time after February 2005 when Ms Mills was engaged as a trainee.

The legislation provides for a maximum penalty of $33,000 for each of the six breaches. Consequently, the total maximum penalty would be $198,000. The court must consider the appropriate penalties for the offences, as well as the total penalty taking into account the principle of totality. In doing so, the court takes into account the fact that the defendant, although incorporated, is a relatively small business employing less than twenty people. It is not a large powerful corporation.

Relying on s 719(2) of the Act and applying the approach urged upon the court by Mr Williamson on behalf of the defendant, I intend to approach the six breaches as though they constituted three separate matters rather than six. The total maximum fine therefore reduces to $99,000.

Taking into account both the objective seriousness of the offences and the subjective matters in mitigation, I find that the appropriate penalty in each of the three cases is $7,500, being a total of $22,500. From this there should be a discount of 25 per cent to acknowledge the plea of guilty. This reduces the total penalty to $16,875, or $5,625 for each of the three groups of breaches.

The discount for the plea of guilty takes into account both the fact that the initial stance of the defendant was not to cooperate with the prosecutor and also the positive consideration that, at least in relation to the three braches interlocked with the termination of employment, there were complicating factors that may have caused the defendant to hold a genuine view that it had a valid defence to the charges.

THE ORDER OF THE COURT IS THAT THE DEFENDANT PAY TO THE COMMONWEALTH THE SUM OF $16,875.

I will hear submissions in relation to any further or supplementary orders, including the question of time to pay. Do you wish to address the court, Mr Williamson?

WILLIAMSON: Can I indicate my client’s thanks for the way in which you have approached the assessment of this matter, your Honour.

In terms of the ability to pay, my instructions are that if it can be broken up into either three lots of approximately $5,000, or alternatively if it could be a payment within ninety days. Either would be acceptable to my client and manageable by my client.

HIS HONOUR: Thank you. Do you have a view as to the power that I have under the legislation to make such orders?

WILLIAMSON: I've had a look at the law, but I must confess I couldn't find a precise example. But in terms of the cases that you have been provided, under tab 3 of what my friend handed up, Mason and Harrington, there was the capacity of the court in that case to give sixty days to pay the penalty.

In the case that I handed up of Polgar v Raxigi there is a reference there that, "A period of twenty-eight days...made by instalments."

There is also the case that I refer to of Coles v Brisbane Rock Sales (2007) FMCA 1838. In that instance, "The applicant did...will so order," are the words the court used in that example.

So as far as I can see, if your Honour had any concerns about the capacity to order payment by instalments, perhaps the alternative approach of payment within ninety days would be acceptable to your Honour.

HIS HONOUR: Yes. I'll just hear what Mr Boatswain has to say about that.

WILLIAMSON: Just while Mr Boatswain is obtaining instruments, as I understand it the order should be that the payment be made to the Commonwealth Consolidated Revenue Fund as well.

HIS HONOUR: Yes.

BOATSWAIN: In respect of the issue as to time to pay, I don't have all the cases with me as I had this morning, but I just can indicate for your Honour that my recollection of all of those cases was there was a range, particularly with the Federal Magistrate, between sixty and thirty days in most of the decisions. So the approach seemed to be to address it in terms of time to pay through that aspect.

HIS HONOUR: Yes.

BOATSWAIN: I saw nothing that would prevent you from awarding ninety days.

As to the relative powers, as I indicated, I am remiss and I didn't bring it down, but my review of the matter when we were first formulating this matter is that there is provision in the Industrial Relations Act which provides that it is the rules of the Industrial Relations Commission of New South Wales that governs your jurisdiction here. So there is that aspect as well.

Finally, I just took instructions from the office of the

Workplace Ombudsman. In terms of an application to have time to pay, the office does no oppose the application. So it has nothing further to say in that regard.

HIS HONOUR: Yes.

BOATSWAIN: Whether it is by, as suggested, through a ninety day configuration or another format is a matter for this court.

HIS HONOUR: Thank you, Mr Boatswain. That's very helpful.

I note that in the case of Raxigi Magistrate Miller, although he might have discussed there being submissions, he doesn't say to whom. He might have been referring to the normal practice in the New South Wales jurisdiction of a party approaching the registrar for time to pay and that may be all he is referring to. I note he has stuck to the twenty-eight days, which is the standard order that is made usually in this court.

My understanding is that the rules of the Industrial Relations Commission normally apply when I sit, even if I am hearing a Federal matter, subject always to there being a specific Federal rule or regulation which would then overshadow any State provision. It may be an area that hasn't really been considered. But in the circumstances, I am greatly assisted by the stance adopted by the prosecutor.

WHAT I PROPOSE TO DO IS TO MAKE AN ORDER BY CONSENT THAT THE RESPONDENT HAVE A PERIOD OF NINETY DAYS IN WHICH TO PAY THE SAID SUM TO THE COMMONWEALTH. WITH THE ASSISTANCE OF MR WILLIAMSON, IT WOULD APPEAR THAT THERE IS A SPECIFIC FUND INTO WHICH THE MONEY SHOULD BE PAID; THE COMMONWEALTH CONSOLIDATED REVENUE FUND.

WILLIAMSON: The only other issue is that I understand that this is not a jurisdiction in which costs can be ordered. Some of the cases refer to s 824. So that I think the approach is consistent with that section--

HIS HONOUR: I've made no order as to costs and I have heard no application as to costs. I haven't closed it off if anyone wants to make an application, but I've made no order and I've heard no application.

BOATSWAIN: I trust my friend is not inviting me to make one.

WILLIAMSON: Definitely not.

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