Australian Government
Workplace Ombudsman

**IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION**

**COURT NUMBER: W01742358**

BETWEEN

**Bill Boin (a workplace inspector appointed pursuant to section 167(2) of the Workplace Relations Act 1996)**

Plaintiff

AND

**Kathryn Lisa Harvey**

Defendant

# TRANSCRIPT OF HEARING ON 13 MARCH 2008

Magistrate: Magistrate Hawkins
For the Plaintiff: Ms Fiona Ryan
For the Defendant: Mr Daniel Pollak

**DISCLAIMER: THIS IS AN UNEDITED EXCERPT OF THE ABOVE HEARING. NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.**

Her Honour:

1. In relation to this matter, yesterday I heard evidence from the two employees concerned, together with evidence from Ms Harvey and also from Ms Tensek, a former employee of the Defendant company.

2. I also heard from the workplace inspector, Mr Boin, in relation to his investigations.

3. I gave my conclusion last evening before rising, that I had concluded on the basis of that evidence, that the relationship between Ms Diamataris and Ms Dessent and Kathryn Harvey was clearly one of an employment relationship and I adjourned my reasons for that decision until this morning. I now give those reasons.

4. An examination of the documentary evidence between the parties unequivocally leads to a conclusion of an express agreement of an employment relationship. Ms Harvey adapted her own standard form contracts to use with people she engaged at Barton Harvey, and those included Ms Dessent and Ms Diamataris.

5. They were headed subject "Employment Forms and Introduction Package". They said they enclosed several employment forms. They included, allegedly… or they expressly stated that several forms would be attached, which were very typically in the nature of those that might be attached in a standard employment relationship: "Job Description"; "Planning Performance and Evaluation Package"; "Benefit Details"; "Time sheets"; "ATO Employment Declaration" most tellingly; and "Superannuation Disbursement Request Form"; "Annual Leave Request Form" and "General Terms and Conditions of Employment".

6. On the face of the contract between the parties, it is expressed to be a contract of employment. Yet the Defendant persisted, to a hearing of this matter, arguing that the relationship was not one of employment and award applicability but one of a contract… an individual contract for services.

7. The contract is contradictory in that, on the face of it, it provides for superannuation, annual leave request form, sick leave form, but then goes on in the particulars to say that these things are not to be included as benefits under the contract.

8. The contract provides for a 3 month probationary period, and it also provides for an hourly rate of $15 of pay per hour.

9. This is for the position of a casual sales assistant in a retail store, so from an express contractual… or from a written contractual analysis it is clearly an employment relationship.

10. Furthermore, applying the tests which have been so well enunciated by the High Court in cases like *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16 and the bicycle courier's case, *Hollis v Vabu*

[2001] 207 CLR 21, the totality of the actual relationship clearly also leads to a similar conclusion.

11. That much was conceded at the first response by the employer via her solicitors when the employees sought to claim what they alleged were their entitlements.

12. Ms Harvey conceded that she instructed MP Lanza Lawyers to respond to their letters of claim by letter dated 6th of June 2006.

13. Again, that letter is headed "Barton Harvey Employment". It goes on to admit that it is a casual employment and refers to that employment throughout the letter and also acknowledges that the employment is subject to certain award coverage.

14. Despite those concessions, and I might note a concession initially made by counsel on Monday that this in fact was an employment, the Defendant persisted in resiling from these express statements and maintained what I will describe as a pure artifice that this in fact was an individual contract for services, rather than a contract of employment.

15. Accordingly, yesterday we heard evidence such that the court could consider the totality of the relationship and relying on those tests in *Brodribb* and *Vabu* and other cases which have historically considered the nature of the employment relationship assess the indicia of employment to determine whether in fact this was a contract of employment.

16. From that assessment of that evidence the court can clearly conclude in a practical sense even separating out the expressed contractual wording used, that Ms Harvey had day-to-day control and direction of these employees. They were paid for by virtue of the hours worked, not on the basis of any task completed. They were paid wages rather than recompensed for a task completed. They had PAYG tax deducted. The employer supplied the tools of trade such as they were for a retail sales assistant, a cash register, computer, that sort of thing. The employer carried all the financial risk of the business.

17. Creighton & Stewart's fourth edition text, *Labour Law*, which is published by the Federation Press, discusses the indicia of employment and the balancing act which must be gone through to assess these types of relationships and pertinently comments that merely describing something or categorising something as a contract of services because superannuation, sick leave and annual leave and those types of things are not paid, is not definitive of the relationship.

18. At paragraph 11.34 the authors state, however, the better view is that these are matters which should receive little or no weight. Whether or not these things should be done depends on whether the relationship is one of employment and not the other way around. That's actually a quote from *Re Porter* [1989] FCA 226; 34 IR 179 at 185 .

19. These employees shifted their hours with, or swapped hours with other employees with, and I conclude, with the consultation of Ms Harvey. That is typical of casual labour where hours are not necessarily set on a permanent basis, although for the majority of employment on both cases, those hours were set.

20. The employees did not have or there is no evidence that they had any right to delegate any work to non-employees other than between persons already associated with the company.

21. Clearly, the overwhelming weight of evidence suggests that the totality of the relationship is clearly one of employment, not a contract for services.

22. That leads to the secondary question if it is employment which award ought to apply. The Defendant submits that, particularly in the case of Ms Dessent, her primary work was one of graphic type design rather than sales and therefore she ought to be covered by the *Graphic Arts – General – Award 2000* rather than the relevant various sales Awards and Minimum Wage Orders.

23. This requires a determination on the facts and there is a contest in the evidence about the work done. So I must choose between the versions about descriptions of the work done between the employees particularly Ms Dessent and Ms Harvey.

24. I conclude that the employer's credit has been significantly diminished by her willingness to alter contractual documents after they had been signed by the employees to add contractor and other descriptions. Also, to step away from concessions made on her behalf by solicitors instructed on her behalf describing the nature of the work and adherence to Awards. She seems quite willing to change versions as she sees it suits her.

25. By contrast, the employees gave clear and consistent evidence which I find compelling. On balance, I prefer their evidence and accept that the majority and the substantive work which they both undertook was that of sales in nature.

26. Ms Dessent, it is true, produced a few posters which were used around the store and helped with some minor design work for catalogues. I, however, conclude that that was entirely secondary to her sales role which was a primary focus of the employment.

27. Accordingly, I am satisfied that the substantive work undertaken by both employees was that of sales and accordingly determine that award applicability is as outlined at the relevant times in the statement of claim filed by the Plaintiff.

28. There is a secondary question which then arises for determination by the court, and that is, what is the relevant classification under the various Roping-In Awards and under the various Awards and Orders at the relevant times?

29. Now, the employees, if there is a preliminary matter I'll just, whilst the Defendant put the Plaintiff to proof as to the Plaintiff's authority as a workplace inspector, I note that that was conceded at the outset.

30. In relation to classification, I am satisfied that at all relevant times the employees concerned were engaged in businesses located in Collingwood and Richmond clearly in the State of Victoria and therefore clearly subject to the provisions of the *Retail Trade Industry Sector - Minimum Wage Order - Victoria 1997* from the period between the 1st of July 2000 and the 31st of August 2005.

31. The employees were concerned with operating a retail shop. They worked alone often. They opened and closed the shop. They conducted sales activities, handling cash, operating a cash register, customer service duties, cleaning duties. They exercised their discretion in relation to setting out window displays. They conducted inventory and store reconciliation, stock-take and the likes. They handled the stock and they also particularly in the case of Ms Dessent operated various computer registers. These are duties which clearly fall within the classifications which have been alleged or have been pleaded by the plaintiff.

32. After the 1st of September 2005 I am satisfied that the Defendant was bound by the *Federal Shop Distributive and Allied Employees Association - Victorian Shop Interim Award 2000* and the subsequent Roping-in Award of 2003. That's by virtue of the common rule declaration of 2005.

33. Pursuant to that Award, I am satisfied that they were performing the duties of a Retail Trade Employee Level 6 and a Retail Worker Grade 1 defined under the Award.

34. Pursuant to the rates of pay set out by the Order and the Award, I am also satisfied on the evidence that the Defendant underpaid the workers significantly less than what she was required to by the relevant industrial instruments which she further failed to provide pro rata payment in lieu of annual leave to each worker pursuant to clause 32.4 of the Award.

35. There was a further dispute about whether or not these employees were entitled or did take lunch breaks, an hour lunch break on each day they worked. Again there is a clash in evidence between the employees and Ms Harvey. On the basis for the reasons I have already given, I conclude that Ms Diamataris did not receive time off to enable her to take a lunch break after Ms Tensek left and Ms Dessent did not receive lunch breaks at all.

36. The employer wasn't able to produce records of any time taken and nor was she able to give specific evidence of days when lunch breaks were taken. So I prefer, in conclusion, on balance of the evidence of the employees that they did not get that time off for lunch and generally ate lunch on the run at the cash register.

37. In conclusion, therefore, I find that all material elements pleaded in the statement of claim are proven and I conclude that the Defendant breached the Minimum Wage Order by underpaying or failing to pay Ms Diamataris the amounts set out in the up to date annexure and also breached the Award and the Roping-in Award by underpaying and failing to pay her the amounts set out.

38. Similarly, I find that the employer breached the Minimum Wage Order and the Award and Roping-in Award by underpaying Ms Dessent, the amount set out in the annexures.

39. I will make the appropriate orders sought in respect of those underpayments.

40. We will now proceed to the question of penalty. I find proven the claims that the employer breached clause 5.3 of the Minimum Wage Order, clauses 10.4.2 (b), 14 and 32.4 of the Award and clauses 6 of (c) and (d) (iii) of the Roping-in Award as they applied to Ms Diamataris and Ms Dessent as set out in the statement of claim.

41. Proceed to penalty…

[Submissions were then made by the parties on the question of penalty.]

Her Honour:

42. Alright. I'll now give my decision in relation to penalty.

43. I have in my decision concluded that the Defendant has breached the *Retail Trade Industry Sector - Minimum Wage Order - Victoria 1997*, t*he Shop Distributive and Allied Employees' Association - Victorian Shops Interim (Roping-In No 1) Award 2003* and the *Federal Shop Distributive and Allied Employees' Association - Victorian Shops Interim Award 2000*.

44. I conclude that the Defendant has underpaid the worker Ms Diamataris by a total of… now in your submissions on penalty, is that the updated amount?

Ms Ryan:

45. Yes Your Honour it is.

Her Honour:

46. Alright. Do you concede Mr Pollak that the amount set out in the Plaintiff's submissions on penalty accurately reflect the calculations that were set out in the Schedule?

Mr Pollak:

47. I do Your Honour, with the exception of the fact that I'm instructed that at one point there was a cash payment made to Ms Diamataris that wasn't recorded.

Her Honour:

48. Well that's the first I've heard about it.

Mr Pollak: 49. And I would have informed Your Honour of it earlier but I'll leave that for you.

Her Honour 50. Right, okay. I accept and find that the Defendant underpaid Ms Diamataris by a total of $6,225.78 and underpaid Ms Dessent by a total of $1,820.62.

51. I conclude that the Defendant also breached the Minimum Wage Order, the Roping-In Award and the Award as set out in the complaint. There are six categories of breaches in relation to the employees. Those are:

    a. underpaying each employee in respect of the minimum wage rates in contravention of clause 5.3 of the Minimum Wage Order;

    b. underpaying each employee in respect of minimum wage rates in contravention of clause 14 of the Award;

    c. underpaying each employee in respect of casual loading rates in contravention of clause 10.4.2 (b) of the Award;

    d. underpaying the employee in respect of overtime and penalty rates in contravention of clause 6, (3) of the Roping-In Award;

    e. underpaying each employee in respect of penalty rates in contravention of clause 6 (d) (iii) of the Roping-In Award; and

    f. not paying each employee pro rata annual leave on the termination of employment in breach of clause 32.4 of the Award.

52. Those are six categories in respect of both of the employees.

53. The consequences of these breaches… the total underpayment collectively, is $8,046.40.

54. This is a prosecution brought under the *Workplace Relations Act* 1996 in relation to breaches which occurred at a time prior to the reform of the *Workplace Relations Act 1996*. Brought by an inspector appointed under that Act, who is able to bring such prosecutions. The court is enabled by section 178 (1) of the pre-reform Act to impose penalties in respect of breaches of a term of an award or order of the Commission.

55. I have reference to section 178 (2) of the pre-reform Act which provides that where two or more breaches of a term of an order or an award are committed by the same person and they arise out of a course of conduct, they should be taken to constitute a single breach of that term. This is clearly a situation where that section applies.

56. The maximum penalty prescribed under the Act for an individual as is

the case here, is 60 penalty units, or amounting to $6,600 per breach. I treat these breaches as arising in a course of conduct in respect of each of the categories of breaches. Each of those six categories are properly distinct, however, and ought attract a penalty to be levied in respect of each of those six categories. I will not treat the two employees separately as they are the same categories of breaches and accordingly, will treat the total… determine the total maximum penalty by reference of six breaches at $6,600 per breach.

57. Having regard to the factors relevant to the imposition of penalty, they were well enunciated in the *Mason v Harrington corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 case. That case, and subsequent cases, has been affirmed by, in particular, His Honour Justice Tracey in the *Kelly v Fitzpatrick* [2007] 166 IR 14 decision in the Federal Court, provide a convenient check list but do not prescribe or restrict the matters that might be taken into account in a proper exercise of the court's discretion.

58. The approach taken has been subsequently considered and affirmed by the Full Federal Court in the recent case of *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 and I have reference to those factors and those decisions in particular in considering the appropriate penalty in this case.

59. I start by observing that this is a most remarkable set of facts. By express agreement and on the facts of the case, it was clearly an employment relationship that existed between Ms Harvey and these workers. Despite the express contracts that Ms Harvey drafted and concessions made at an early stage on her instructions by her solicitor, she maintained and required judgment by this court, that the arrangement was one of an employment relationship. This can only be concluded to be a deliberate construct.

60. Ms Harvey gave evidence that, prior to engaging these workers, she contacted the relevant government authority and determined that the appropriate rate of pay was $15.92 per hour. Yet she reached… she somehow rationalised that to conclude that she could lawfully pay $15.00 per hour and that that was better for the employees.

61. I conclude that the Defendant did know and should have known that these workers were not truly independent contractors and her conduct demonstrates a deliberate disregard for her legal obligations. Furthermore, she engaged legal advice at an early opportunity who purported to the workers concerned that it was an employment relationship as early as June 2006, yet she maintained, up until yesterday, the artifice of an independent contractor relationship. This demonstrates a deliberate and wilful disregard for her legal obligations.

62. The Defendant paid the employees below the minimum rate prescribed by the Awards. She deliberately chose not to pay annual leave prescribed by the Award. She chose not to pay a casual loading, and she chose not to pay out these entitlements upon the

termination of their employment. The breaches continued during the whole of the employees' employment. She sought to, post-termination, to recover what she alleged were overpayments during the employment. She sought to claim for notice not given, even after I had delivered judgment, or through her counsel, in submissions today.

63. The underpayments existed in the case of Ms Diamataris for a period of 15 months and Ms Dessent for a period of 10 months. These are most significant underpayments for workers on minimum wages. Clearly these workers do speak English well. They are not dependent on this employer for their livelihood in the same way that the workers in the *Textile, Clothing and Footwear Union of Australian v Givoni Pty Ltd* [2002] FCA 1406 case were, however, they are workers in the more vulnerable sectors of employment. They rely on the protections guaranteed to them by the *Workplace Relations Act 1996* of the minimum safety net wage structure. The underpayment in relation to both workers constitutes nearly 18% of their entitlements. The objects set out in the *Workplace Relations Act 1996* point to the need to ensure an effective safety net for workers in these conditions. The office of Workplace… or the Workplace Ombudsman, as it's now known, has been promulgated with the job of protecting those obligations. They have done so in this case.

64. I take note that there is no similar previous conduct alleged against this Defendant and that the Defendant is a sole trader. I've heard that she also operates, or has operated in the past, a wholesale warehouse internet type business. It's not clear whether that business still operates, however the retail homewares store, that both these employees worked in, does not.

65. The Defendant was a sole trader, as senior management she was clearly directly responsible for these breaches. She has been aware of the claimed underpayment since May 2006. At all times she has denied these claims and the matter ran to judgment in this court. She has had numerous opportunities to remedy the breaches, but in the face of clear evidence to the contrary, consistently and steadfastly maintained that these workers were in fact independent contractors. She also threatened one of the workers in response to her claim with legal action and a demand for money, by virtue of leaving her employment without giving adequate notice.

66. Clearly in this case, the Defendant has demonstrated an unwillingness to acknowledge what are her legal obligations in this case. She demonstrates no contrition whatsoever, has not taken any corrective action and has not cooperated with authorities. She has necessitated 3 days of the court's time being dedicated to this case. On the first day that this matter was listed for hearing, an adjournment was required because I was told she was too busy to prepare for hearing. She did attend yesterday and the matter ran all day. I'm told that she does not appear today to hear my reasons for decision and to appear in relation to this penalty matter on advice from her counsel. I consider that an unwise choice, as it's important

that she, and there's a genuine need for her to, hear the reasons for decision and to perhaps understand those as an aspect of specific deterrence, but given the concession from counsel that it was on his advice that she didn't attend I will not, on this occasion, penalise her for her non-attendance.

67. Specific deterrence in this case looms very large. General deterrence in the area of small… deterring small business operators from avoiding their legal obligations also looms large. I cannot be certain that this Defendant no longer operates a business of any sort. I've heard that she works as an IT contractor but I do not have any evidence before the court as to whether or not she still operates a business, employs or engages any workers or intends to do so in the future.

68. It is important to impose a penalty of sufficient quantum to send the clear message to this Defendant and also to others that there is no benefit to be gained by trying to cheat the system and avoid their lawful obligations. It's also important that the community and small business operators in particular understand, by virtue of this penalty, the need to distinguish between employment relationships and legitimate true independent contract relationships, and that an employer cannot avoid his or her obligations under awards by attempting to characterise or maintain that his or her employees are independent contractors.

69. It's important to consider the totality principle and have regard to it in determining penalty. The maximum penalty that the court could impose in this case is $39,600. That's assessed by having regard to the six categories of breaches, multiplied by $6,600 per breach. That penalty needs to be an appropriate response to what the Defendant did.

70. The Plaintiff urges that this penalty be imposed at the higher range. I conclude that these breaches were serious, ongoing and not rectified at any stage. Furthermore, the Defendant has defended the complaint to judgment and hasn't shown any contrition about breaching those obligations. There is force in the submission by the Plaintiff.

71. Counsel for the Defendant submits that a lower penalty in the order of $2,000 is more appropriate. I'm told that the business doesn't operate, as a sole trader anymore, her tax return for the 2004 financial year has been tendered to the court showing a loss for that year, however, there is no information before the court about her present financial circumstances, other than she owns a home in partnership with the bank. Counsel has no instructions about her present financial position. I'm told, but don't accept, that she felt that she had done the right thing and felt frustrated by this process.

72. I do take into account the submissions made on behalf of counsel, but on balance, there is an overwhelming body of evidence in support of the Plaintiff's submissions in relation to penalty.

73. Last, but not least, I must determine total penalty and impose it at a level that should not be harsh or oppressive in all of the circumstances. That is a very difficult exercise to do in circumstances where I really have no satisfactory evidence as to what this individual's current financial circumstances are. There is no current financial information about her state of affairs. I can only conclude that that is a conscious act or assessment on her behalf and can only draw the inference from the material before the court as she hasn't put any evidence by way of mitigation of penalty, that she is in a financial position to be able to pay any penalty that I impose.

74. So I do have regard to that limb, if it might be called that, of the totality principle, with reference to the first limb of aggregating the total maximum penalty.

75. In all the circumstances I make the judgment about what is harsh and oppressive in all the circumstances by a very general notion of what might be harsh and oppressive to an ordinary person, whatever that is. So there is very little for the court to go on to make that assessment.

76. I do consider, or in all of the circumstances I consider, that an appropriate aggregate or total penalty be imposed which is in the order of three quarters of the total maximum penalty. That will be a sum of $30,000. I also request that orders be drafted to…

77. Have you got a minute of order of the underpayments and the interest?

Ms Ryan: 78. We can do one up very quickly.

Her Honour: 79. Alright. Well that needs to be done too.

80. And I will make orders accordingly. Do we have… we don't have that at the moment. Is there anything…

81. I will further direct that pursuant to section 356 (a) of the pre-reform Act that the penalty imposed be paid to the Commonwealth and that the underpayments, together with interest, be paid to the Plaintiff to be then reimbursed to each of the workers concerned.

82. The issue I haven't addressed is that of interest. The Defendant refers me to the comments in relation to the penalty… what interest rate is applicable in relation to these underpayments. The appropriate… the *Workplace Relations Act 1996* decrees that interest ought me made in relation to underpayments. Now it is the pre-reform Act, am I right, section 179 (4)…I don't have a copy…

Ms Ryan: 83. Section 179 (a) (i) of the pre-reform Act your Honour.

Her Honour: 84. Says that interest is payable back to a date of decree?

Ms Ryan: 85. I'll just…

Her Honour: 86. That's not being claimed anyway. What's claimed is the date of termination.

Ms Ryan: 87. Yes, your Honour.

Her Honour: 88. Alright, so both pre and post-reform *Workplace Relations Act 1996* clearly provide for interest to be determined at the rate set by a court of competent jurisdiction, I think. Is that…

Ms Ryan: 89. That's right, yes.

Her Honour: 90. …the decree penalty interest. I think penalty interest is running at the rate of 12 or 13% at the moment or thereabouts and it's been consistently over the last few years, certainly above 10%. I'm urged by counsel for the Defendant to adopt the 6% rate which was the rate used in *Givoni*, I think, which is a decision from 2002.

Mr Pollak: 91. Sorry. It was actually in *Harrington*, your Honour, which was a decision from 2007.

Her Honour: 92. Harrington was it? Alright. 2007? Perhaps His Honour was having reference to the interest at that time being around 5%. He certainly makes the observation that the penalty interest rate is much higher than … and a penalty shouldn't be imposed. There is certainly great force in that submission because the aim of the interest is to compensate for not having the money at the time, and, in this case, a separate penalty has been ordered in respect, taking account of the factors under the Act, so I think it would be double dipping to impose interest at the penalty interest rate.

93. The interest rates have gone up significantly in recent times. As a fair reflection of, perhaps a cash interest rate over the period since the date of termination to date, I will direct that an interest rate of 7% from the date of termination to today's date be applied to the underpayments and direct that the Defendant pay that sum. I think that perhaps the parties better sit down and do their sums on all of that and agree on those and supply the court with a minute of orders reflecting those underpayments, the interest and the penalty.

94. Alright, is there anything further?

Mr Pollak: 95. No, your Honour.

Her Honour: 96. Alright. I will stand the matter down for you to draft those minutes. If you can agree them and sign them you need not appear

Ms Ryan: 97. Thank you, your Honour.

[Matter stood down for the parties to draft minutes of orders.]

Her Honour:

98. In the matter of Bill Boin and Kathryn Harvey I order that the Defendant pay Ms Diamataris an amount of $6,225.78 gross, plus $881.00 in interest.

99. Furthermore, that the Defendant pay Ms Dessent an amount of $1,820.62 gross plus $294.00 in interest.

100. And further that the Defendant… I find proven the alleged breaches of the Award and order that the Defendant pay into Consolidated Revenue the amount of $30,000 as an aggregate penalty.

Hearing adjourned.