FEDERAL MAGISTRATES COURT OF AUSTRALIA

SALLY DENNINGTON v PEE CEE PTY LTD *[2008] FMCA 79*

INDUSTRIAL LAW – Application for civil penalty – breach of applicable provisions – breaches admitted – considerations as to penalty.

Workplace Relations Act 1996 (Cth) ss.167, 718, 719, 814

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
CPSU v Telstra Corporation (2001)108 IR 228
Flattery v Zeffirelli's Pizza Restaurant [2007] FMCA 9
Gibbs v Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Josephson v Walker [1914] 18 CLR 691
Jordan v Mornington Inn Pty Ltd [*2007*] *FCA 1384*
Kelly v Fitzpatrick [2007] FCA 1080
Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Ponzio v BP Caelli Constructions Pty Ltd [2007] FCAFC 65
Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd (1994) 127 ALR 673
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Ware v O'Donnell Griffin [1971] AR (NSW) 18

Applicant:	SALLY DENNINGTON
Respondent:	PEE CEE PTY LTD
File Number:	LNG 20 of 2007
Judgment of:	O'Sullivan FM
Hearing date:	9 January 2008 in Hobart
Date of Last Submission:	9 January 2008
Delivered at:	Melbourne by telephone link to Hobart
Delivered on:	6 February 2008

REPRESENTATION

Counsel for the Applicant:	Mr J. Zeeman
Solicitors for the Applicant:	Zeeman & Zeeman
Counsel for the Respondent:	Mr C. Green
Solicitors for the Respondent:	Page Seager

ORDERS

(1) That the respondent pay the Commonwealth the following penalties:

(a) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to pay basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $13,921.00;

(b) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to calculate Ms Durkin's annual leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award,* the sum of $2,000.00;

(c) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to calculate Ms Durkin's personal leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award,* the sum of $2,000.00;

(d) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for work performed during evenings based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award,* the sum of $2,500.00;

(e) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for work performed on Saturdays based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived

from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $3,422.75;

(f) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for overtime worked based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Award*, the sum of $3,000.00;

(g) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's public holiday leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $1,000.00.

(2) Failing agreement within 7 days on a plan for the payment of the penalties in order (1) the applicant have leave to request the matter be listed for telephone mention for the purposes of fixing a timetable for submissions on the payment of the penalties ordered.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT HOBART

LNG 20 of 2007

SALLY DENNINGTON
Applicant

And

PEE CEE PTY LTD
Respondent

REASONS FOR JUDGMENT

Background

1. Ms Tiffany Durkin was employed by Pee Cee Pty Ltd ("the respondent") at premises located at Shop U18, Eastlands Shopping Centre, Rosny Park, Hobart Tasmania from 18 April 2006 until 31 July 2006.

2. The respondent, a body corporate subject to *Workplace Relations Act 1996* ("the Act"), operated a business providing hairdressing and beauty services, including nail services, body piercing, solarium, spray tanning, professional retail sales and an advisory service.

3. After her employment with the respondent ended Ms Durkin made a claim of underpayment to the Office of Workplace Services (now the Workplace Ombudsman[1]) who investigated the matter and wrote to the respondent.[2]

[1] On 1 July 2007, the Office of the Workplace Ombudsman was created by virtue of the *Workplace Relations Amendment (A Stronger Safety Net*) *Act 2007* (Cth). On that same day, the Office of the Workplace Ombudsman took over the work and services previously undertaken by the Office of Workplace Services ("OWS"); SAF at 26.
[2] CB:145

4. Following upon unsuccessful negotiations with Mr John Langridge (a director of the respondent) Sally Dennington ("the applicant") a workplace inspector employed by the Workplace Ombudsman, and appointed as such under s.167 of the Act, brought proceedings against the respondent pursuant to ss.718 & 719 of the Act.

5. The application as filed had sought penalties and orders that the respondent pay Ms Durkin's outstanding entitlements. By the time of the hearing the respondent had remedied the underpayments and admitted seven breaches of applicable provisions under the Act. Accordingly, the Court was required to determine the appropriate penalty to be imposed on the respondent.

6. The applicant sought penalties for breaches of the Act, the Australian Fair Pay and Conditions Standard and the applicable provisions in the Tasmanian Hairdressing and Beauty Industry Award (now a Notional Agreement Preserving State Award (NAPSA)) that governed Ms Durkin's employment.

7. The hearing proceeded on the basis of a statement of agreed facts ("SAF"), a copy of which is annexed to these reasons for judgment. It is not necessary to reproduce all those agreed facts in this judgment save that for the purposes of background and in order to properly understand the submissions made in relation to penalty, the following should be noted:

> *"9. Ms Durkin wished to be trained as a Nail Technician.*
>
> *10. The Respondent and Ms Durkin entered into a Training Agreement pursuant to the* Vocational Education and Training Act 1994 *(Tas) on 18 April 2006.*
>
> *11. The words 'Nail Technician' do not appear in the* Tasmanian Hairdressing, Health and Beauty Industry Award.
>
> *12. It is Mr Langridge's understanding that it is common practice in the Hair and Beauty industry to use the rate of pay from the Beauty Therapy sections of the* Tasmanian Hairdressing, Health and Beauty Industry Award *for a Nail Technician.*

The cancellation of the Training Agreement

13. An Application to cancel the Training Agreement was completed by Ms Durkin and Mr Langridge on 5 July 2006.

14. Ms Durkin resigned from the Respondent on 31 July 2006.

The Underpayments

15. During the course of Ms Durkin's employment with the Respondent, the Respondent paid Ms Durkin in accordance with the classification of "Trainee Beauty Therapist" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.

16. The Respondent calculated Ms Durkin's annual leave, personal leave, public holiday leave, overtime and work performed in the evening and on Saturday in accordance with the basic hourly rate for the classification of "Trainee Beauty Therapist" as contained in the preserved Australian Pay and Classification Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.

17. The correct classification of Ms Durkin's employment with the Respondent was that of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.*"*

The legislative framework

8. Counsel for the applicant provided submissions in relation to penalty which *inter alia* set out the relevant provisions of the Act. I accept those submissions accurately summarise those matters and incorporate the relevant paragraphs into these reasons for decision:

> *"6. Section 719(1) of the WR Act empowers an eligible Court (which includes the Federal Magistrates Court of Australia ("**the Court**") pursuant to section 717 of the WR Act) to impose a penalty on a person bound by the WR Act for a breach of an applicable provision.*
>
> *7. The respondent is a person for the purposes of section 719 of the WR Act.*

8. *An "applicable provision" for the purposes of section 719 of the WR Act is defined in section 717 of the WR Act, and relevantly states that this term means:*

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

(ii) the Australian Fair Pay and Conditions Standard...

(iv) a collective agreement..."

9. *A notional agreement preserving State awards is enforced as a collective agreement (item 43 of Schedule 8 to the WR Act).*

…

12. *The industrial instruments governing Ms Durkin's employment with the respondent were:*

*The Australian Fair Pay and Conditions Standard ("**the Standard**"), which includes the preserved Australian Pay and Conditions Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award ("**the preserved APCS**"); and*

*The notional agreement preserving State awards derived from the Tasmanian Hairdressing, Health and Beauty Industry Award ('**the Hairdressing NAPSA**").*

13. *The respondent was bound by both the preserved APCS and the Hairdressing NAPSA by virtue of being bound by the* Tasmanian Hairdressing, Health and Beauty Industry Award *("**the Hairdressing Award**") immediately prior to the commencement of the* Workplace Relations Amendment (Work Choices) Act 2005 *(Cth) ("**WorkChoices**").*

14. *By operation of section 208 of the WR Act, the classifications and wage rates contained in the Hairdressing Award became the preserved APCS on and from 27 March 2006.*

15. *By operation of item 31 of Schedule 8 to the WR Act, the Hairdressing Award became the Hairdressing NAPSA on and from 27 March 2006."*

The proceedings

12. The application was filed on 13 June 2007. There was a response filed on 28 June 2007. The proceedings were the subject of a directions hearing on 20 July 2007. A Notice to Admit was filed on 19 July 2007 and there was a response to this on 2 August 2007. There was a further directions hearing on 15 August 2007 and the matter was listed for hearing on 9 January 2008. At the hearing the applicant was represented by Mr Zeeman of Counsel and the respondent by Mr Green of Counsel.

13. As well as the SAF there was before the Court by way of evidence a summary of the underpayments to Ms Durkin[3] as well as affidavits filed by the applicant Sally Dennington, along with Phillipa Anne Salewicz, Beverley Challenger, Jacqueline Crane, Tiffany Jane Durkin and Glenn Jordan and for the respondent from John Langridge. [4]

14. The applicant prepared a casebook that was taken into evidence and outlines of submissions on penalty were also tendered by both parties.[5] These were all referred to in submissions before the Court.

15. The respondent did not require any of the applicant's witnesses for cross-examination and accordingly the affidavits referred to in paragraph 13 above were taken into evidence. The respondent relied on the affidavit of Mr John Langridge filed 6 July 2007. The respondent also sought leave to lead further oral evidence from Mr Langridge who did not spend long in the witness box. Mr Langridge's oral evidence went only to matters relevant to penalty considerations.

Admitted breaches

16. The following breaches were admitted by the respondent at paragraphs 19-25 in the SAF:

> *"19. The failure of the Respondent to pay Ms Durkin the basic hourly rate for the classification of "Beautician" as*

[3] Exhibit A1
[4] Exhibits A2-A7 and R1 respectively
[5] Applicant's Outline was Exhibit A8 and the Respondent's Outline was Exhibit R2

contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted breaches of the Australian Fair Pay and Conditions Standard.

20. *The failure of the Respondent to calculate Ms Durkin's annual leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted a breach of the Australian Fair Pay and Conditions Standard.*

21. *The failure of the Respondent to calculate Ms Durkin's personal leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted a breach of the Australian Fair Pay and Conditions Standard.*

22. *The failure of the Respondent to calculate Ms Durkin's hourly rate for work performed during evenings based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted breaches of the notional agreement preserving State awards derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.*

23. *The failure of the Respondent to calculate Ms Durkin's hourly rate for work performed on Saturdays based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted breaches of the notional agreement preserving State awards derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.*

24. *The failure of the Respondent to calculate Ms Durkin's hourly rate for overtime worked based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and*

Beauty Award constituted breaches of the notional agreement preserving State awards derived from the Tasmanian Hairdressing, Health and Beauty Industry Award.

25. The failure of the Respondent to calculate Ms Durkin's public holiday leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian Hairdressing, Health and Beauty Industry Award constituted a breach of the notional agreement preserving State awards derived from the Tasmanian Hairdressing, Health and Beauty Industry Award."

17. The Act provides for a penalty for the breach of an applicable provision and in the particular circumstances of this case it is set at $33,000.00.[6] In this matter, seven applicable provisions have been breached at $33,000.00 each, with a maximum total of $231,000.00.[7]

Approach to penalty proceedings

18. In *Kelly v Fitzpatrick* [2007] FCA 1080 ("*Kelly*") Tracey J at 14 said:

> *"In* Mason v Harrington Corporation Pty Ltd *[2007] FMCA 7 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".
>
> *Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:*
>
> - *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.*

[6] The penalties under the Act were increased and the necessary amendments made by the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* the relevant provisions of which came into operation on 10 August 2004

[7] SAF at 19-25

- *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."*

19. The parties accepted that these considerations should guide the exercise of the Court's discretion in these proceedings and made submissions as to penalty on that basis. Before turning to consider those submissions I note the comments made by Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 ("*Sharpe*") at [11] that:

> *"…although it is convenient to refer to the headings, the discretion as to the imposition of a penalty is quite unrestrained by the statute. There are no mandatory matters to be taken into account. I would not agree to substituting a judge's checklist for the unrestrained statutory discretion."*

The nature and extent of the conduct

20. The applicant's submissions on this issue were:

> *"29. The entitlements to which the breaches of the Standard and the Hairdressing NAPSA related are important entitlements* (Smith v Australian Ophthalmic Supplies Pty Ltd

T02953710 20 April 2007 (Magistrates' Court of Victoria Industrial Division) at [8]).

30. The breaches occurred for the entire period of Ms Durkin's employment. This was a total of 104 days.

31. There is no evidence that the respondent had decided to cease the ongoing breaches of the applicable provisions at the date of Ms Durkin's resignation.

*32. The non-payment of entitlements was not remedied until 18 June 2007 (**affidavit of John Langridge at paragraph 60, CB 197**), and the balance on 29 June 2007 (**affidavit of John Langridge at paragraph 66, CB 198**), almost eleven months from Ms Durkin ceasing employment with the respondent.*

*33. The payment of outstanding entitlements, therefore, did not occur until after legal proceedings were commenced and served on the respondent on 14 June 2007 (**affidavit of service of Philippa Anne Salewicz, CB 151**).*

*34. Further, the respondent through John Langridge, was aware of Ms Durkin potentially making a claim on 31 October 2006 (**affidavit of Sally Dennington at paragraph 18, CB 28**)."*

21. The respondent's submissions on this issue were:

"16. The employee affected is a young employee employed on a Training Agreement (Annexure B of Affidavit of Tiffany Durkin).

17. The purpose of this training agreement was to facilitate Ms Durkin gaining a qualification of Certificate II in Nail Technology (paragraph 14 of Affidavit of Tiffany Durkin).

18. The words "Nail Technician" do not appear in the Tasmanian Hairdressing, Health and Beauty Award (paragraph 11 Statement of Agreed Facts). As a result for the purposes of setting Ms Durkin's rate of pay Mr Langridge classified Ms Durkin as a Trainee Beauty Therapist (paragraph 15 of Statement of Agreed Facts).

19. Ms Durkin was not in a weak bargaining position when accepting the offer of employment. She wished to be trained as a Nail Technician (paragraph 11 of Affidavit of John

Langridge) and the offer of employment under a training agreement would provide for that to occur.

20. *The Respondent utilized the services of a training company, TASNAC Your Apprenticeship Centre (TASNAC) to sign up Ms Durkin into a training agreement.*

21. *Mr Langridge took advice from TASNAC before employing Ms Durkin.*

22. *TASNAC were responsible for assisting Ms Durkin in completing the training agreement with Jacqueline Crane attending the Respondent's premises to complete the paperwork for the training agreement (paragraphs 7 and 8 of Affidavit of Jacqueline Crane).*

23. *It is acknowledged that the period of employment was very brief, being 13 weeks and the underpayment was significant but there is no suggestion made by the Applicant that the Respondent applied any pressure to Ms Durkin to sign the training agreement and the Respondent submits that each of the breaches outlined above flow from the decision to place Ms Durkin on a training contract, which then lead to Ms Durkin being classified as a Trainee Beauty Therapist.*

24. *The Respondent notes that Ms Crane states that her role is not to provide industrial relations advice and importantly, that Apprenticeship Centres are not able to refuse to sign up parties to a training agreement where both parties wish to enter into a training agreement."*

22. Exhibit A1 summarised the agreed underpayments to Ms Durkin as follows:

	Wages Paid	Wages Entitlement	Total Underpayment
Ordinary hours	2,569.55	6,224.69	-$ 3,655.15
Evening hours	102.08	279.86	-$ 177.78
Overtime hours	105.27	376.45	-$ 271.18
Saturday hours	923.51	2,201.65	-$ 1,278.14
Annual leave	242.44	577.98	-$ 335.54
Personal leave	47.85	122.44	-$ 74.59
Public holiday	95.70	231.19	-$ 135.49
Total	**$ 4,086.39**	**$ 10,014.26**	**-$ 5,927.87**
Less rounding error	$ 0.08		-$ 5,927.95

23. Out of a gross underpayment of $5,927.87 the most significant breach, which accounted for $3,655.15 of the total, was that to do with the failure to pay the correct hourly rate.

24. As will be seen from paragraph 17 of the SAF (extracted at paragraph 16 above) the parties have applied the "*major and substantial principle*" to determine whether the work Ms Durkin did was covered by a particular award classification.[8] Whilst for the reasons referred to earlier she was paid as a Trainee Beauty Therapist it is now agreed that that correct classification and rate of pay for Ms Durkin was that of Beautician.

25. The applicant submitted that the underpayments spanned 104 days and resulted in Ms Dunkin receiving less than 50% of her lawful entitlements for that period. In the context of the period of employment that is a significant matter.

Circumstances in which the conduct took place

26. The applicant's submissions on this issue were:

> "*35. The respondent has previously employed approximately 32 apprentices (**SAF at paragraph 6, CB 6**).*
>
> *36. The respondent is a member of the Tasmanian Chamber of Commerce and Industry ("**TCCI**") (**SAF at paragraph 4, CB 6**).*
>
> *37. Ms Durkin was employed by an experienced employer who had many years of experience in employing apprentices. It ought to have reasonably known that an employee performing predominantly beautician work was required to be paid, at a minimum, the entitlements applicable to the classification of "Beautician", as set out in the preserved APCS and the Hairdressing NAPSA.*
>
> *38. The circumstances surrounding Ms Durkin's engagement by the respondent are set out in the affidavit of Beverly Anne Challenger (**at paragraphs 1 – 6, CB 160**) and the affidavit of Tiffany Jane Durkin (**at paragraphs 6 – 12, CB 161**).*

[8] *Ware v O'Donnell Griffin* [1971] AR (NSW) 18

> *39. The respondent was aware that Ms Durkin would be required to perform (at least in part) duties of a Beautician during her employment.*
>
> *40. The evidence is that the respondent's salon was very busy at the time that Ms Challenger attended (**affidavit of Beverly Challenger at paragraph 3, CB 160**).*
>
> *41. Further, the evidence of Ms Durkin is that in her pre-employment discussions with Mr Langridge she was told by Mr Langridge that she would be required to do beauty work, as well as doing nail training (**affidavit of Tiffany Jane Durkin at paragraph 9, CB 161**).*
>
> *42. During the course of Ms Durkin's employment, she spent most of her time doing beautician work (**affidavit of Tiffany Jane Durkin at paragraph 18, CB 162**), and there is no evidence that at any stage of her employment that the respondent sought to pay her in accordance with the classification of "Beautician"."*

27. The respondent's submissions on this issue were essentially those set out at paragraph 21 above. Ms Durkin was only 20 years old at the relevant time. Notwithstanding this, the respondent in submissions took the position that Ms Durkin was not in a weak bargaining position. At that time Ms Durkin was looking for employment and an opportunity to further her skills. The respondent provided her with that opportunity and saw it as a mutually beneficial arrangement.

28. However, Ms Durkin's evidence, which was not contradicted, was to the effect that she was not in a position to take issue with what she was told by the respondent. Ms Durkin had completed a Diploma of Beauty Therapy before starting work with the respondent. She deposed that she spent most of her time doing beautician work and was not aware of trainee rates of pay. During the period of employment Ms Durkin was paid around $6.00 per hour and was entitled to around $15.00 per hour.

29. In *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 at 82 Lloyd-Jones FM said:

> *"The employees at the relevant time were either children or young adults, some of whom were working in their first job. As a vulnerable group of employees, they were clearly persons who would not have been experienced in workplace matters or their*

rights under the law, and persons who were potentially capable of being taken advantage of. This is to be contrasted with a workforce who might have been employed for many years, possibly belong to a union and who would have fair knowledge of their rights and be able to stand up for themselves."

30. An issue that was not addressed by the respondent and which makes its explanation of events difficult to understand is that Ms Durkin's rate of pay did not change after the traineeship was cancelled.

31. In this matter the age of Ms Durkin and her position which I accept was to an extent as a vulnerable worker dependent on the respondent is a significant factor in determining the quantum of penalty.[9]

Nature and extent of loss or damage

32. The applicant's submissions on this issue were:

> *"43. Ms Durkin's total lawful entitlement during her employment with the respondent was $10,014.26. She was paid $4,086.31.*
>
> *44. The underpayment of $5,927.95 represented 59% of her lawful entitlement."*

33. The respondent in submissions acknowledged that the underpayments were significant. The conduct of the respondent led to underpayments to Ms Durkin which totalled $5,927.95.

34. Whilst the respondent remedied the underpayments that in and of itself does not lessen the need for sanction and deterrence.[10]

Similar previous conduct

35. Both parties were *ad idem* on this issue and submitted that the only similar previous conduct involved an underpayment to another former employee of the respondent (referred to at paragraph 27 of Affidavit of Sally Dennington) that had been remedied voluntarily and without the need for legal proceedings to be commenced.

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[9] see *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 at 82
[10] see *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at 16

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

36. In submissions the applicant acknowledged that whilst there were seven applicable provisions that had been breached, the breaches could be classified into three separate groups. These were said to be:

> *(a) Breaches flowing from the decision to classify Ms Durkin as a Trainee Beauty Therapist:*
>
> *(i) Basic rate of pay;*
>
> *(ii) Annual leave;*
>
> *(iii) Personal leave;*
>
> *(iv) Public holidays; and*
>
> *(v) Work performed on a Saturday.*
>
> *(b) Breaches flowing from the decision to classify Ms Durkin as a Trainee Beauty Therapist and failure to pay correct loading for work performed during evenings:*
>
> *(i) Work performed on evenings.*
>
> *(c) Breaches flowing from the decision to classify Ms Durkin as a Trainee Beauty Therapist and failure to pay correct loading for overtime hours worked:*
>
> *(i) Overtime.*

37. In relation to each of those groups, the applicant accepted that whilst they were breaches of distinct provisions, the circumstances giving rise to their breach were closely related (*Flattery v Zeffirelli's Pizza Restaurant* [2007] FMCA 9 at [39], *Kelly* at [20]) and therefore this should be taken into account in determining penalty.

Size of respondents' business

38. The applicant's submissions on this issue were:

> "*48. At the time of employing Ms Durkin, the respondent employed 22 employees (**CB 190**).*

> *49. Even though the respondent is not a large corporate employer, it is under the same obligations to meet minimum employment standards:*
>
> > "No less than large corporate employers, small business 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. (*Kelly v Fitzpatrick* at [28])"

39. The respondent's submissions on this issue, consistent with Mr Langridge's oral evidence, went to the length of time the respondent had operated in the industry and the number of apprentices it had engaged in that time as well as the number of current employees. Mr Langridge's evidence was the respondent only employed 14 employees.

40. A separate but related issue that occupied a large part of the penalty hearing, at least by way of submissions, was the impact of any penalty ordered on the respondent's business. Whilst there was no affidavit material on this issue from Mr Langridge what supplementary oral evidence he did give went to his understanding of the financial viability of the business.

41. The respondent submitted that the Court is entitled to take into account the respondent's financial circumstances and capacity to pay in assessing the penalty. Whilst acknowledging this the applicant submitted that difficulty in paying penalties should not prevent the Court from imposing penalties which are otherwise appropriate.

42. Mr Langridge's evidence was equivocal on the financial circumstances of the respondent. Counsel for the respondent submitted in support of the need to lead oral evidence from Mr Langridge at the hearing that he had not seen the applicant's submission on penalty beforehand.

43. I accept the respondent now has fewer employees and competition is fierce in a volatile industry. However I am not prepared to accept, in the absence of acceptable evidence by way of financial records of the business, that its finances are as dire as he implied.

44. The applicant's submission on this issue is consistent with the authorities such as *Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd* (1994) 127 ALR 673 per Wilcox CJ. This case also considered the imposition of a penalty for breach of the Act (albeit a previous iteration of the Act). His Honour said at 686.10:

> *"Mr McNamee's claim that Vista was unable to find the funds necessary to reinstate the dismissed employees as from 10 July 1991 requires consideration. I should say that Mr Rothman objected to the admission of evidence about Vista's (or Mr McNamee's) financial position. He said it was irrelevant. But I ruled that it was relevant, at least in relation to the quantum of any penalty to be imposed on the respondents. In determining what monetary penalty to impose on an offender it is usual for a court to take into account the offender's capacity to pay. A monetary sum that would constitute a reasonable penalty to a person of average income might be unduly oppressive if imposed on an impecunious person."*

45. Although noting the financial circumstances of the respondent are relevant to the imposition of penalty, His Honour made the following important qualification at 688.3:

> *"In fixing the amount of the daily penalties, I have not overlooked the evidence given by Mr McNamee that suggests both he and Vista are now in a parlous financial position. Mr McNamee said a meeting of his creditors had been called to consider a deed of arrangement, under Part X of the* Bankruptcy Act 1966. *His counsel, Mr Newlinds, tendered the Statement of Affairs prepared for that meeting. It shows a substantial excess of liabilities over assets. Most of the liabilities are for moneys said to be due under guarantees given by Mr McNamee. After the hearing, while judgment was reserved, Mr Newlinds informed me by letter that Mr McNamee had presented a debtor's petition in bankruptcy. Presumably the creditors' meeting rejected his proposal and he is now bankrupt.*
>
> *While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate. It is too early to say what will be the final position in relation to either the company or Mr McNamee. If the company is successful in its challenge to the validity of the security, it seems there is every prospect of its meeting its obligations. As to Mr McNamee, much will depend on the ability*

of the principal debtors, whose debts he has guaranteed, to meet their obligations. Mr McNamee's affairs have not yet been independently investigated, so far as I know. It is sometimes a mistake to take a Statement of Affairs at face value. If the situation of either respondent proves as bad as suggested, relief is available under the relevant legislation."

46. Therefore, and consistent with the authorities, if the circumstances require a substantial penalty to be imposed the financial difficulty this may occasion should not deter the imposition of a penalty.

47. A second case which supports this approach and one which was referred to in submissions by the applicant, is *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 where at 508 Keely J said:

> *"In respect of each of those four breaches the maximum penalty that can be imposed is $1,000. As to the amount of the penalties to be imposed I take into account, in mitigation of penalty, the fact that there is no evidence that the respondent has ever previously breached this award or any other award. I also have borne in mind the evidence as to the financial difficulty of the respondent at the material times. Mr Strahan submitted that in assessing penalty the court should take into account that the breach was not contumelious and that the managing director of the respondent had a bona fide belief that, by reason of the arrangements made on 22 March 1983, the respondent was not obliged to comply with the terms of the award in relation to the workers. It should be noted that Mr John Buckley did not expressly state in his evidence that he had such a bona fide belief although he did say in evidence that on 22 March 1983 he had "in mind that we had to keep within the guidelines of the law". Furthermore, there is no evidence before the Court that the respondent sought or obtained legal advice before acting as it did on 22 March 1983. In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of an award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed."*

48. In the context of the asserted impact on the respondent of any penalty and the evidence of Mr Langridge I adopt the comments of Driver FM in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 ("*Rajagopalan*") at 29 as particularly apt for this matter:

> *"The effect the imposition of a penalty may or may not have on the respondent's business should not be taken into account when imposing the penalty. This is particularly the case where the respondent has failed to adduce any proper evidence of such an effect."*

Whether the breaches were deliberate

49. The applicant's submissions on this issue were:

> *"50. The respondent ought to have known the correct employee entitlements that were to be paid to Ms Durkin. Ignorance of an employer's lawful obligations is not a mitigating factor.*
>
> *51. As a member of the TCCI, the respondent should have consulted this organisation in relation to the employment of Ms Durkin and not relied on Mr Langridge's experience in dealing with apprentices (**SAF at paragraph 5, CB 6**).*
>
> *52. To the extent that any reliance is had on Mr Langridge's discussions with Jacqueline Crane of the Tasmanian New Apprenticeships Centre ("**TASNAC**"), Ms Crane's uncontested evidence is that she has not given any employer advice regarding wage rates (**affidavit of Jacqueline Crane at paragraph 21, CB1 88**). Further, Ms Crane's evidence is that she did not provide industrial relations advice in her role at TASNAC (**affidavit of Jacqueline Crane at paragraph 21, CB 188**).*
>
> Mason v Harrington Corporation *at [45]:*
>
> *"It is to be expected in the circumstances that [the respondent] would seek professional advice from its industry association. This was quite a reasonable thing to do, but [the respondent] cannot hide behind the advice received from such an association."*
>
> *53. An experienced employer such as the respondent ought to have known that an employee performing beautician work should have been paid the rate of a beautician.*

> *54. It is not the case that the respondent got caught by changes created by the* Workplace Relations Amendment (Work Choices) Act 2005 *(C'th) ("**WorkChoices**"). Whilst it is true that WorkChoices saw it now governed by the WR Act, the rates of pay and appropriateness of classifications in a practical sense remain unchanged.*
>
> *55. The provisions to which the breaches related were clear.*
>
> *56. Any suggestion that the existence of the training agreement led the respondent into error cannot be sustained as a mitigating factor given the evidence that after that cancellation of the training agreement, the respondent continued to employ Ms Durkin and pay her the same hourly rate prior to the cancellation of the agreement (**affidavit of Tiffany Jane Durkin at paragraph 27, CB162**)."*

50. The respondent's submissions on this issue were:

> *"28. The breaches were not wilful, but occurred in circumstances where the Respondent sought advice concerning the appropriateness of entering into a training agreement and then relied upon that advice to enter into a training agreement with Ms Durkin (paragraph 14 of Affidavit of John Langridge). Mr Langridge also relied upon his understanding of the industry practice to set Ms Durkin's rate of pay (paragraph 12 of Statement of Agreed Facts)."*

51. The respondent's submissions set out immediately above were elaborated on, repeatedly, in submissions before the Court. The submissions sought to excuse the respondent's conduct by implying, (though it was not put as such) that given the respondent had not been told of any difficulties before or at the signing of the training agreement by the state training authorities that this was a significant factor in mitigation of any penalty.

52. The difficulty with this submission can be found in the terms of the training agreement where the respondent (as a party to that agreement) agreed to ensure Ms Durkin received her correct entitlements under the Act. Under the training agreement, which was Annexure F of the Affidavit of Ms Dennington, the respondent agreed it would:

> *"meet all legal requirements regarding the apprentice/trainee, including occupational health and safety requirements and*

payment of wages and conditions ***under the relevant employment arrangements."(emphasis added)***

53. As the parties have now agreed Ms Durkin was not paid correctly. In light of the obligations in the training agreement the following comments made by Griffiths CJ in *Josephson v Walker* [1914] 18 CLR 611 at 696 are to the point:

> *"The obligation created by* [the award] *does not depend upon any agreement of the parties express or implied and may arise without their knowledge. If by the award it is determined that journeymen plumbers shall receive not less than a certain rate of wages, each journeymen plumber is entitled to those wages; and although the employer and the employee have gone on for a long time the one paying and the other receiving what each honestly believes to be the proper rate of wages, nevertheless if it is afterward found that the wages paid are less than those fixed by the award, the right of the employee to receive the wages so fixed has accrued."*

54. Ms Durkin's entitlements were determined by virtue of the relevant provisions of the Act. In the circumstances and cognisant of the submissions made on behalf of the respondent that Mr Langridge's experience *"led him into error"* it was open to the Court to infer that his behaviour, on behalf of the respondent, was at best ignorant and at worst reckless. In any event ignorance is no excuse and the failure by an experienced employer to comply with the Act should be taken into account in determining any penalty.

Involvement of senior management

55. The applicant's submissions on this issue were:

> *"57. Mr Langridge is, and was during the course of Ms Durkin's employment, a director of the respondent (**SAF at paragraph 2, CB 6**).*
>
> *58. Mr Langridge was responsible for the engagement and setting the rate of Ms Durkin's pay (**SAF at paragraph 7, CB 7**)."*

56. The respondent made no specific submission in writing on this issue. However the SAF makes clear that Mr Langridge as the director of the respondent, with the day to day responsibility for decision making was

involved in all the decisions that led to the breaches identified at paragraph 16 above and the actions to remedy same. As the applicant pointed out in submissions before the Court the mistakes that led to the breaches in this matter were not the fault of anyone but the respondent.

Contrition, corrective action and co-operation

57. The applicant's submissions on this issue were:

> *"59. The Office of Workplace Services ("**OWS**") received the original claim from Ms Durkin on 31 October 2006 (**affidavit of Sally Dennington at paragraph 3, CB 27**).*
>
> *60. The respondent cooperated in the investigation of Ms Durkin's claim by speaking with and meeting with the OWS (**SAF 27, CB 13**).*
>
> *61. On 24 January 2007, Mr Langridge attended a meeting at the Office of Workplace Services (**affidavit of Glenn Jordan at paragraphs 4 and 5, CB 153**).*
>
> *62. Rebecca Bain of the OWS said that it would consider accepting a payment plan in respect to Ms Durkin if the underpayment was fully rectified within eight weeks. Further, Ms Bain told Mr Langridge that he should come back to the OWS with a short term payment plan proposal by 7 February 2007, and that he would need to make the first payment in respect to this plan by this date (**affidavit of Glenn Jordan at paragraph 10 and 11, CB 153**).*
>
> *63. During the course of the meeting on 24 January 2007, Mr Langridge was told that the OWS considered that the matter was very serious (**affidavit of Glenn Jordan at paragraph 12, CB 153**).*
>
> *64. Mr Langridge, on behalf of the respondent, did not revert back to the OWS with a payment plan (**affidavit of Sally Dennington at paragraph 26, CB 28**).*
>
> *65. By notice dated 19 July 2007, the applicant sought admissions in respect to the seven breaches which are contained in the SAF (**CB 24**). In its response to the applicant's notice to admit facts, the respondent disputed the breaches (**CB 26**).*

66. *The SAF of agreed facts containing the breaches is dated 8 January 2007 (**CB 2**). The failure to agree the breaches has led to the incursion of further costs for the applicant; for example, the provision of an affidavit from Tiffany Durkin, which goes to the issue of liability.*

67. *The failure to cooperate with enforcement authorities and agree to facts ultimately agreed at trial is an aggravating factor in respect to penalty (*Smith v Australian Ophthalmic Supplies *at [17]).”*

58. The respondent’s submissions on this issue were:

“*29. The Respondent co-operated with the investigation (*sic*) the Office of the Workplace Ombudsman (now Office of Workplace Services (OWS)(*sic*)). Mr Langridge met with the inspectors to discuss Ms Durkin’s claim on two occasions.*

30. There is some dispute as to the date of meetings between Mr Langridge and the officers of OWS but it is agreed that the Respondent has made two payments which resulted in the total amounts owing to Ms Derkin (sic) being paid (paragraph 35 of Statement of Agreed Facts).

31. It is submitted that there was a degree of confusion as to who would take steps with respect to Mr Langridge’s offer to make payments by instalments (paragraph 52 of Affidavit of John Langridge and paragraph 8 of Affidavit of Glenn Jordan). There is no evidence of OWS taking steps to confirm any agreement with Mr Langridge about when any payments would be made.

32. The Respondent has paid Ms Durkin the amount calculated to be owing to her (paragraphs 30-33 of Statement of Agreed Facts).

59. At the hearing there was some dispute between the parties as to upon whom the blame lay for the delay in the respondent remedying the underpayments following a meeting between the parties in January 2007.

60. In submissions before the Court, Counsel for the respondent made clear he was instructed to indicate that his client regretted the circumstances surrounding the matter but could not assist in explaining why such sentiments had not been expressed before or been found in the respondent’s affidavit material.

61. The applicant's submissions on this issue were in effect that the respondent's cooperation and contrition were all forthcoming very late in the proceedings. The respondent's submissions were *inter alia* that the matter had not been *"scruffed"* early enough and this accounted for the delay.

62. In *Sharpe* at [17] Gyles J said;

> *"There has been some cooperation with the enforcement authorities although, as I have indicated, it was belated and, is effect, forced by the imminence and existence of this proceeding. Nonetheless, cooperation both as to the acceptance of liability and as to the agreement as to facts, is a matter to be taken into account in favour of the respondent."*

63. As appears from the SAF the respondent cooperated with both the enforcement authorities and in the context of these proceedings, and by virtue of the admissions made, that cooperation has confined the scope of the matter to penalty but only late in the proceedings and this should be weighed along with the other matters in determining any penalty.

Enforcing compliance with minimum standards

64. One of the principal objects of the Act is the maintenance of a safety net of minimum terms and conditions of employment and effective enforcement of the obligations imposed by Awards and other industrial instruments.[11]

65. The applicant in submissions before the Court made the point it was not seeking to make life difficult for the respondent but simply enforcing the statutory regime. In this matter, the underpayment involved was almost $6,000.00 and concerned a young and vulnerable worker. Give that the breaches amounted to around a 50% underpayment in wages to Ms Durkin, this is a very serious matter.

66. The respondent's submissions that Ms Durkin was not particularly vulnerable or the breaches arose out of ignorance should be looked at in the light of the importance placed on compliance with the Act. In *Kelly* Tracey J said at 27:

[11] *Kelly v Fitzpatrick* at [27]

"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."

Deterrence

67. The applicant's submissions on this issue were:

> "*70. The facts of this case give rise for need of both specific and general deterrence.*
>
> *71. In respect to a specific deterrent penalty, the following factors suggest that such a deterrent is necessary:*
>
> *a. The delay in the respondent making payments to Ms Durkin;*
>
> *b. The breaches involved a young person, and the respondent historically has engaged a large number of apprentices (*Cotis v Pow Juice *[2007] FMCA 140 at [82]);*
>
> *c. There is no evidence that the respondent expresses contrition for the breaches.*
>
> *72. In respect to a general deterrent penalty, the following factors suggest that such a deterrent is necessary:*
>
> *a. The importance of ensuring compliance with minimum terms of employment in the health and beauty industry;*
>
> *b. The importance of showing young workers that they will not be exploited in the workplace.*
>
> *73. The payment of the outstanding moneys and acceptance of breach does not lessen the need for a deterrence (*Hortle v Aprint (Aust) *at [67]).*"

68. The respondent's submissions on this issue were:

> "*33. It is submitted that there is no need for specific deterrence in this case. The circumstances that led to the breaches arose from a unique set of circumstances. The conduct occurred in unusual circumstances. The evidence is that Mr Langridge spoke to Jackie Crane at TASNAC before he employed Ms Durkin and before she was signed up to a training*

agreement. Mr Langridge believed that it was appropriate and lawful for him to employ Ms Durkin as a trainee.

34. The Respondent submits that the breaches did not arise from an ignorance of the law or negligence on the part of Mr Langridge. It is submitted that the circumstances of this case provide that a general deterrence is not warranted and a penalty that is disproportionately increased out of consideration of general deterrence is unnecessary."

69. In *Sharpe*, Gyles J at [19] said:

> *"I take into account the need for specific and general deterrence. I appreciate that the penalty should not be oppressive and that it is not a criminal sanction. There is some evidence that a substantial penalty could have an impact on the viability of the respondent. However that may be, the non-adherence to the Award and the nature and scale of the underpayment here indicates that is the law is breached the business community should not get the idea that they can take the risk of underpaying and then buy their way out of it with a modest penalty. The penalty must be imposed at a meaningful level and, in a sense, the respondent must begin to actually hurt."*

70. Given the submissions made on behalf of the respondent in this matter and having regard to the SAF His Honour's comments are also applicable to this matter. The failure of the respondent to comply with the Act should be marked by imposing an appropriate monetary sanction.[12]

Additional considerations

71. The applicant submitted the starting point was the maximum penalty.[13] In this case the maximum total penalty is $231,000.00 for the seven breaches.

72. The applicant acknowledged that the Court should take into account the totality principle. In *Kelly* at 30 Tracey J said:

> *"Another factor that must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that*

[12] *Kelly* at 28
[13] *Jordan v Mornington Inn Propriety Limited* [2007] FCA 1384 at 123

the aggregate of the penalties is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see CPSU v Telstra Corporation *(2001) 108 IR 228 at 230 [7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring it is an appropriate response to the conduct which lead to the breaches: see* Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36 at 53. See also* Ponzio v BP Caelli Constructions Pty Ltd *[2007] FCAFC 65 at [145] per Jessup J."*

73. In written submissions the applicant's position on penalty was:

> *"74. Some discount for the acknowledgement of the breaches and the payment of the underpayments, but discount should be significantly reduced because of the lateness of the acknowledgement and payment (and the motive for doing so). A discount of 10-15% would be appropriate* (Jordan v Mornington Inn)*."*
>
> *75. Specifically in respect to the seven breaches, the applicant says that the penalty should be in the following range:*
>
> *a. Basic rate of pay: mid range.*
>
> *b. Annual leave: low range.*
>
> *c. Personal leave: low range.*
>
> *d. Public holidays: low range.*
>
> *e. Work performed on a Saturday: low range.*
>
> *f. Work performed on evenings: midrange (which included not only the use of the wrong pay rate, but the failure to apply the appropriate loading).*
>
> *g. Overtime: midrange (which included not only the use of the wrong pay rate, but the failure to apply the appropriate loading)."*

74. In written submissions the respondent referred to the decision of *Flattery v Zeffirellis Pizza Restaurant* [2007] FMCA 9 at [39]:

> *"Although separate and distinct breaches for the purposes of penalty under the Act, the circumstances giving rise to some of the breaches are closely connected, for example the argentine and penalty rate breaches. This close connection between the breaches, although of separate teams of the Award, is however relevant to the penalty imposed for each (*Gibbs v Mayor, Councillors and Citizens of the City of Altona *(1992) 37 FCR 216 at 223)."*

75. In submissions before the Court the respondent's position was because of its cooperation, remedying the underpayment and the close connection between the breaches (which it was submitted was almost tantamount to one breach) the appropriate discount would be 75-90% resulting in only a nominal penalty.

76. In *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at 45 Mowbray FM set out the range of factors that he had regard to in reaching a conclusion after applying the totality principle that there should be a reduction of 25% of the aggregate penalty. As will be clear from the above many of those factors are also present in this case.

77. In *Rajogopalan* Driver FM compared penalties imposed in similar cases at [38] to [40] and ultimately ordered a total penalty of $16,500.00. In *Sharpe* which involved an underpayment of $9,954.00 and six breaches of applicable provision a total penalty of $25,000.00 was ordered by Gyles J.

78. The circumstances of this case do call for the application of the totality principle. There is some force in the submission made on behalf of the respondent that the initial decision to incorrectly classify Ms Durkin under the NAPSA led to most of the breaches of the applicable provisions. There is also the matter of the partial overlap between the various breaches and the issue of proportionality (in a case where the total maximum penalty is $231,000.00) which would warrant the application of that principle.

79. As set out earlier the most significant of the breaches in terms of quantum is the failure to pay the correct hourly rate. In relation to the breach regarding the correct public holiday rate of pay only a nominal

penalty is called for and the applicant acknowledged as much in submissions before the Court. In relation to the breaches regarding evenings, overtime and Saturdays the latter of these is the most significant, at least in terms of quantum. In relation to the breaches regarding annual leave and personal leave, it could also be said the breaches followed from the failure to pay the correct hourly rate. In *Sharpe* at 21 Gyles J said:

> *"…I have also in mind that, although technically all breaches do not arise out of the one set of circumstances, in a broad sense they do. … I think a sense of proportion for the overall conduct should be borne in mind."*

80. The submissions of the applicant at paragraph 73 above would result in a total penalty of around $70,000.00.

81. The decision in *Sharpe* is in my view an analogous case to the matter before the Court and warrants a similar penalty having regard to the matters essayed above.

Penalties

82. Having regard to the foregoing principles and submissions of the parties I consider the total penalty should be $37,125.00. This should be discounted by 25%, leading to a total penalty of $27,843.75. This is to be apportioned:

a) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to pay basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $13,921.00;

b) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to calculate Ms Durkin's annual leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $2,000.00;

c) in respect of the breach of the Australian Fair Pay and Conditions Standard by failing to calculate Ms Durkin's personal leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $2,000.00;

d) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for work performed during evenings based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $2,500.00;

e) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for work performed on Saturdays based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $3,422.75;

f) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's hourly rate for overtime worked based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Award*, the sum of $3,000.00;

g) in respect of the breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* by failing to calculate Ms Durkin's public holiday leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the

Tasmanian *Hairdressing, Health and Beauty Industry Award*, the sum of $1,000.00.

83. This results in a total penalty which is just and appropriate in the circumstances. It will be noted that the total penalty is neither the nominal amount sought by the respondent nor the aggregate amount contended for by the applicant.

84. The applicant sought an order that any penalties imposed by the Court should be payable to the Commonwealth (see: section 841(a) of the Act). The respondents did not suggest the making of any alternative order. In the circumstances such an order is appropriate.

85. The applicant did not oppose giving the respondent time to pay the penalties and consistent with the agreed position of the parties' there will be an order that the parties confer on the terms of a payment plan by the respondent for the above penalties.

86. Failing agreement on such a plan within 7 days the applicant will have leave to seek that the matter be listed for telephone mention to set a timetable for submissions on the payment of the penalties ordered.

I certify that the preceding eighty-six (86) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM

Associate: Rachelle Lombardo

Date: 6 February 2008

Annexure A

FEDERAL MAGISTRATES COURT OF AUSTRALIA
HOBART REGISTRY No. LNG20 of 2007

BETWEEN

SALLY DENNINGTON Applicant

- and -

PEE CEE PTY LTD
(ACN 069 374 572) Respondent

STATEMENT OF AGREED FACTS

1. The Respondent is a company registered under the *Corporations Act 2001* (C'th).

2. The directors of the Respondent are John Langridge and Marilyn Langridge, both being appointed directors on 22 May 1995.

3. The Respondent provides hairdressing and beauty services, including nail services, body piercing, solarium, spray tanning, professional retail sales and a professional advisory service.

4. The Respondent is a member of the Tasmanian Chamber of Commerce and Industry ("**TCCI**").

5. Mr Langridge did not consult the TCCI in relation to the employment of apprentices. Rather, he relied upon his experience in dealing with apprentices.

6. Over the past twenty years the Respondent has employed approximately 32 apprentices. Of these apprentices over eighty percent completed their qualifications whilst in the Respondent's employ.

Ms Durkin's employment

7. Mr Langridge made the decisions with respect to the commencement of Ms Tiffany Durkin's employment and her rate of pay during the term of her employment. Mrs Langridge did not play an active role in decisions relating to Ms Durkin's rate of pay.

8. Between 18 April 2006 and 31 July 2006, the Respondent engaged Tiffany Durkin as a full time employee at its premises at Shop Unit 18, Eastlands Shopping Centre, Rosny Park in Tasmania.

9. Ms Durkin wished to be trained as a Nail Technician.

10. The Respondent and Ms Durkin entered into a Training Agreement pursuant to the *Vocational Education and Training Act* 1994 (Tas) on 18 April 2006.

11. The words 'Nail Technician' do not appear in the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

12. It is Mr Langridge's understanding that it is common practice in the Hair and Beauty industry to use the rate of pay from the Beauty Therapy sections of the Tasmanian *Hairdressing, Health and Beauty Industry Award* for a Nail Technician.

The cancellation of the Training Agreement

13. An Application to cancel the Training Agreement was completed by Ms Durkin and Mr Langridge on 5 July 2006.

14. Ms Durkin resigned from the Respondent on 31 July 2006.

The Underpayments

15. During the course of Ms Durkin's employment with the Respondent, the Respondent paid Ms Durkin in accordance with the classification of "Trainee Beauty Therapist" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

16. The Respondent calculated Ms Durkin's annual leave, personal leave, public holiday leave, overtime and work performed in the evening and on Saturday in accordance with the basic hourly rate for the classification of "Trainee Beauty Therapist" as contained in the preserved Australian Pay and Classification Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

17. The correct classification of Ms Durkin's employment with the Respondent was that of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

18. The parties agree that for the purposes of assessing penalty there are seven applicable provisions that have been breached by the Respondent for the purposes of subsection 719(1) of the *Workplace Relations Act* 1996 (C'th) as set out in paragraphs 19 to 25.

19. The failure of the Respondent to pay Ms Durkin the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted breaches of the Australian Fair Pay and Conditions Standard.

Particulars

Date	Hours worked	Wage entitlement
Tuesday, 18 April 2006	8.00	$ 121.68
Thursday, 20 April 2006	7.50	$ 114.08
Friday, 21 April 2006	8.00	$ 121.68
Monday, 24 April 2006	8.00	$ 121.68
Wednesday, 26 April 2006	6.50	$ 98.87
Friday, 28 April 2006	6.50	$ 98.87
Monday, 1 May 2006	8.00	$ 121.68
Tuesday, 2 May 2006	7.50	$ 114.08
Wednesday, 3 May 2006	7.00	$ 106.47
Friday, 5 May 2006	8.00	$ 121.68
Monday, 8 May 2006	7.00	$ 106.47
Tuesday, 9 May 2006	7.50	$ 114.08
Wednesday, 10 May 2006	7.50	$ 114.08
Friday, 12 May 2006	4.50	$ 68.45
Monday, 15 May 2006	8.00	$ 121.68
Tuesday, 16 May 2006	8.00	$ 121.68
Wednesday, 17 May 2006	6.00	$ 91.26
Friday, 19 May 2006	8.00	$ 121.68
Monday, 22 May 2006	7.50	$ 114.08
Tuesday, 23 May 2006	8.00	$ 121.68
Wednesday, 24 May 2006	7.00	$ 106.47
Monday, 29 May 2006	8.00	$ 121.68
Tuesday, 30 May 2006	8.00	$ 121.68
Wednesday, 31 May 2006	6.25	$ 95.06
Friday, 2 June 2006	8.00	$ 121.68
Monday, 5 June 2006	8.00	$ 121.68
Tuesday, 6 June 2006	8.00	$ 121.68
Wednesday, 7 June 2006	7.00	$ 106.47
Friday, 9 June 2006	4.50	$ 68.45
Tuesday, 13 June 2006	8.00	$ 121.68

Wednesday, 14 June 2006	7.00	$	106.47
Friday, 16 June 2006	8.00	$	121.68
Monday, 19 June 2006	8.00	$	121.68
Tuesday, 20 June 2006	7.50	$	114.08
Wednesday, 21 June 2006	6.50	$	98.87
Friday, 23 June 2006	5.00	$	76.05
Monday, 26 June 2006	8.00	$	121.68
Tuesday, 27 June 2006	8.00	$	121.68
Wednesday, 28 June 2006	7.00	$	106.47
Friday, 30 June 2006	8.00	$	121.68
Monday, 3 July 2006	8.00	$	121.68
Tuesday, 4 July 2006	8.00	$	121.68
Wednesday, 5 July 2006	5.00	$	76.05
Friday, 7 July 2006	5.50	$	83.66
Monday, 10 July 2006	8.00	$	121.68
Tuesday, 11 July 2006	8.00	$	121.68
Wednesday, 12 July 2006	7.00	$	106.47
Friday, 14 July 2006	7.50	$	114.08
Monday, 17 July 2006	8.00	$	121.68
Tuesday, 18 July 2006	8.00	$	121.68
Wednesday, 19 July 2006	7.00	$	106.47
Friday, 21 July 2006	5.50	$	83.66
Monday, 24 July 2006	8.00	$	121.68
Tuesday, 25 July 2006	8.00	$	121.68
Wednesday, 26 July 2006	7.00	$	106.47
Friday, 28 July 2006	8.00	$	121.68

20. The failure of the Respondent to calculate Ms Durkin's annual leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted a breach of the Australian Fair Pay and Conditions Standard.

Particulars

	Hours	Wage entitlement	
Accrued leave	38.00	$	577.98

21. The failure of the Respondent to calculate Ms Durkin's personal leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted a breach of the Australian Fair Pay and Conditions Standard.

Particulars

Date	Hours	Wage entitlement	
Friday, 26 May 2006	7.60	$	122.44

22. The failure of the Respondent to calculate Ms Durkin's hourly rate for work performed during evenings based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted breaches of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

Particulars

Date	Hours worked	Wage entitlement	
Friday, 28 April 2006	1.50	$	26.24
Friday, 12 May 2006	3.00	$	52.47
Friday, 9 June 2006	3.00	$	52.47
Friday, 23 June 2006	3.00	$	52.47
Friday, 7 July 2006	2.50	$	43.73
Friday, 14 July 2006	0.50	$	8.75
Friday, 21 July 2006	2.50	$	43.73

23. The failure of the Respondent to calculate Ms Durkin's hourly rate for work performed on Saturdays based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted breaches of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

Particulars

Date	Hours worked	Wage entitlement	
Saturday, 20 May 2006	5.50	$	125.48
Saturday, 22 April 2006	6.50	$	148.30
Saturday, 29 April 2006	6.50	$	148.30
Saturday, 6 May 2006	6.50	$	148.30
Saturday, 13 May 2006	6.50	$	148.30
Saturday, 27 May 2006	6.50	$	148.30
Saturday, 3 June 2006	6.50	$	148.30
Saturday, 10 June 2006	6.50	$	148.30
Saturday, 17 June 2006	6.50	$	148.30
Saturday, 24 June 2006	6.50	$	148.30
Saturday, 1 July 2006	6.50	$	148.30
Saturday, 8 July 2006	6.50	$	148.30
Saturday, 15 July 2006	6.50	$	148.30
Saturday, 22 July 2006	6.50	$	148.30
Saturday, 29 July 2006	6.50	$	148.30

24. The failure of the Respondent to calculate Ms Durkin's hourly rate for overtime worked based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Award* constituted breaches of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

Particulars

Date	Hours worked		Wage entitlement
Monday, 24 April 2006	0.50	$	11.41
Tuesday, 4 July 2006	0.50	$	11.41
Friday, 7 July 2006	0.50	$	11.41
Tuesday, 11 July 2006	0.50	$	11.41
Friday, 14 July 2006	0.50	$	11.41
Tuesday, 18 July 2006	0.50	$	11.41
Friday, 21 July 2006	0.50	$	11.41
Tuesday, 25 July 2006	0.50	$	11.41
Friday, 21 April 2006	1.50	$	34.22
Friday, 28 April 2006	1.50	$	34.22
Friday, 5 May 2006	1.50	$	34.22
Friday, 2 June 2006	1.50	$	34.22
Friday, 16 June 2006	1.50	$	34.22
Friday, 30 June 2006	1.50	$	34.22
Friday, 28 July 2006	1.50	$	34.22
Friday, 19 May 2006	2.00	$	45.63

25. The failure of the Respondent to calculate Ms Durkin's public holiday leave based on the basic hourly rate for the classification of "Beautician" as contained in the preserved Australian Pay and Classifications Scale derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award* constituted a breach of the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

Particulars

Date	Hours	Wage entitlement	
Tuesday, 25 April 2006	7.60	$	115.60
Monday, 12 June 2006	7.60	$	115.60

The institution of proceedings

26. On 1 July 2007, the Office of the Workplace Ombudsman was created by virtue of the *Workplace Relations Amendment (A Stronger Safety Net) Act* 2007 (C'th). On that same day, the Office of the Workplace Ombudsman took over the work and services previously undertaken by the Office of Workplace Services ("**OWS**").

27. On or about 10 January 2007 Mr Langridge was interviewed by Ms Bain in the OWS offices in Collins Street, Hobart in relation to a claim for underpayment of entitlements made by Ms Durkin.

28. On 13 June 2007 the Applicant filed an application and accompanying Affidavit in the Federal Magistrates Court seeking the imposition of penalties for breaches of the Australian Fair Pay and Conditions Standard and the notional agreement preserving State awards derived from the Tasmanian *Hairdressing, Health and Beauty Industry Award*.

29. The Application was served at the registered office of the Respondent on 14 June 2007.

30. Mr Langridge made a payment of $3,000.00 by cheque payable to Ms Durkin dated 15 June 2007. The cheque was delivered to the OWS offices on 18 June 2007.

31. Mr Langridge provided that cheque under a cover letter that explained the taxation deducted from the amount owing to Ms Durkin and advised the balance owing would be paid by 30 June 2007.

32. Mr Langridge paid a further amount of $612.00 by cheque dated 29 June 2007 made payable to Ms Durkin which was delivered to the OWS on 29 June 2007.

33. The Respondent's cheque was dishonoured and so a further cheque for $612.00 payable to Ms Durkin was delivered to the OWS on 9 July 2007.

34. The Applicant and Respondent agree that the gross amounts particularised in paragraphs 19 to 25 hereof represent the gross amounts that Ms Durkin was entitled to from the Respondent arising from her employment with the Respondent.

35. Further, the Applicant and Respondent agree that the amount of $3,612.00 was the net sum owed and paid by the Respondent to Ms Durkin in respect to the amounts particularised in paragraphs 19 to 25 hereof.

DATED this 7th day of January 2008

Zeeman & Zeeman Solicitors for the Applicant	Page Seager Solicitors for the Respondent