FEDERAL MAGISTRATES COURT OF AUSTRALIA

FRYER v YOGA TANDOORI HOUSE PTY LIMITED *[2008] FMCA 288*

INDUSTRIAL LAW – Award – breach – civil penalty – consideration of matters relevant to penalty – breaches of several award terms contained in Notional Agreement Preserving State Award – employee paid nothing during employment lasting nearly seven weeks – totality principle – eight breaches – early admission of breach and appropriate reduction of penalty – absence of contrition.

Workplace Relations Act 1996, ss.167, 717, 718, 719, sch.8
Annual Holidays Act 1944 (NSW)

Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Pty Limited [2007] FMCA 7
CPSU, Community and Public Sector Union v Telstra Corporation Limited [2001] FCA 1364
Financial Sector Union v Commonwealth Bank of Australia [2005] FCA 1847
Trade Practices Commission v CSR Limited (1991) ATPR 41-076
Gibbs v Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8

Applicant:	JANELLE FRYER
Respondent:	YOGA TANDOORI HOUSE PTY LIMITED
File Number:	SYG 2014 of 2007
Judgment of:	Cameron FM
Hearing date:	27 February 2008
Date of Last Submission:	27 February 2008
Delivered at:	Sydney
Delivered on:	13 March 2008

REPRESENTATION

Solicitors for the Applicant: Baker & McKenzie

Solicitors for the Respondents: Otto Stichter & Associates

ORDERS

(1) The respondent pay a penalty of $6,500 for breach of cl.9 and Table 1 of Part B of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(2) The respondent pay a penalty of $1,300 for breach of cls.11.1.1, 11.1.2 and 11.1.3 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(3) The respondent pay a penalty of $1,300 for breach of cls.11.1.4 and 11.1.5 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(4) The respondent pay a penalty of $650 for breach of cls.11.1.6 and 12.2 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(5) The respondent pay a penalty of $6,500 for breach of cls.15.1 and 15.3 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(6) The respondent pay a penalty of $325 for breach of cl.5.3.1 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(7) The respondent pay a penalty of $325 for breach of cls.23.1 and 23.2 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(8) The respondent pay a penalty of $1,300 for breach of cls.17 and 26 of the Restaurants, Employees (State) Award (NSW) provisions contained in a Notional Agreement Preserving State Award.

(9) Each penalty be paid to the Commonwealth.

(10) The respondent have leave to apply within 14 days for time to pay the penalties.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2014 of 2007

JANELLE FRYER
Applicant

And

YOGA TANDOORI HOUSE PTY LIMITED
Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant is a workplace inspector appointed under s.167(2) of the *Workplace Relations Act 1996* ("Act"). On 11 August 2006 the New South Wales State Office of the Office of Workplace Services ("OWS"), as the Workplace Ombudsman was called at the relevant time, commenced an investigation into the conduct of the respondent and its principal concerning whether an employee had been paid his lawful entitlements under the Act when working at one or more of the respondent's restaurants at Faulconbridge, Glenbrook and Katoomba in the Blue Mountains and at Richmond, west of Sydney.

2. The applicant has brought these proceedings against the respondent because, as is now agreed between the parties, the respondent breached provisions of a Notional Agreement Preserving State Award ("NAPSA") which contained provisions of the Restaurants, Employees (State) Award (NSW) ("Award"), the *Annual Holidays Act 1944* (NSW) and preserved Australian Pay and Classification Scales containing rate provisions and casual loadings derived from the Award.

3. It is agreed that the respondent:

a) failed to pay the employee in accordance with that NAPSA; and

b) failed to display a roster in accordance with that NAPSA.

Background

4. The respondent's principal, Mr Rasalingam, is the sole director and shareholder of the respondent which, over time, apparently prospered and developed to a stage where it operated four restaurants of which Mr Rasalingam was the principal chef, spending his time on a rotating basis through each of those restaurants. The respondent now operates only one restaurant.

5. While on a visit to India in April 2006 Mr Rasalingam made enquiries as to the availability of Indian chefs to travel to Australia to work in his restaurants and his driver in India recommended his own son for consideration. Mr Rasalingam agreed to the employment of his driver's son, Anabalagan Rajendran.

Relevant legislation

6. Clause 31 of sch.8 to the Act provides for the preservation of state awards as terms of NAPSAs. The relevant provisions of the Award in question are referred to below at [9]. Clause 43 of sch.8 provides that a NAPSA may be enforced as if it were a collective agreement and that a workplace inspector has the same functions and powers in relation to a NAPSA as he or she has in relation to a collective agreement. Section 718(1) provides that a workplace inspector may apply for a penalty in respect of a breach of a term of a collective agreement.

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

Section 719 Imposition and recovery of penalties

(1) An eligible court may impose a penalty in accordance with this Division on a person if:

(a) the person is bound by an applicable provision; and

(b) the person breaches the provision.

(2) Subject to subsection (3), where:

(a) 2 or more breaches of an applicable provision are committed by the same person; and

(b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

(3) …

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

(a) 60 penalty units for an individual; or

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

8. Section 717 provides:

In this Part:

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

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

(i) …

(ii) …

(iii) …

(iv) a collective agreement.

Statement of agreed facts

9. An amended statement of agreed facts was filed at the hearing. The respondent admits that it breached the following provisions of the Award:

a) cl.9 and Table 1 of Part B (wages for ordinary hours of work performed by the employee);

b) cls.11.1.1, 11.1.2 and 11.1.3 (wages for overtime hours of work performed by the employee);

c) cls.11.1.4 and 11.1.5 (wages for work performed on Saturdays and Sundays);

d) cls.11.1.6 and 12.2 (wages for public holidays);

e) cls.15.1 and 15.3 (payment of wages within the required time);

f) cl.5.3.1 (display a roster);

g) cl.5.3.1 [sic: should be cls.23.1 and 23.2] (laundry allowance); and

h) cls.17 and 26 (payment in lieu of accrued leave on the termination of employment).

10. Additional facts which were agreed included:

a) Mr Rajendran was employed by the respondent as a cook from 2 June 2006 to 13 July 2006;

b) Mr Rajendran was brought to Australia by Mr Rasalingam in the following circumstances:

i) with none of his own money;

ii) with virtually no English language skills;

iii) with no appreciation of his legal entitlements;

iv) through his father Ravendra Anabalagan having recommended him to Mr Rasalingam when the former was engaged as the latter's driver in India in April 2006;

v) with his mother being the housekeeper at the residence where Mr Rasalingam's family lived in India; and

vi) being in a position of dependence in relation to Mr Rasalingam in respect of food, money, accommodation and transportation;

c) Mr Rajendran was not paid for any of his work until after the "commencement of the investigation" and underpayments were not fully rectified until after the commencement of these proceedings. Mr Rasalingam did provide some financial and other support to Mr Rajendran in the period prior to the investigation and did attempt rectification of the underpayments prior to the commencement of these proceedings by a payment of $3,322.35 (net) in respect of employment from 2 June 2006 to 13 July 2006;

d) by letter dated 25 July 2007 the respondent's solicitors confirmed their instructions that the respondent admitted the contraventions alleged in the application, as supported by the applicant's affidavit affirmed 29 June 2007, and the quantum of that payment remaining to be made, namely $8,237.96 (gross). That amount was subsequently paid by the respondent.

The evidence

The applicant

11. In her affidavit affirmed 29 June 2007 the applicant deposes to aspects of the investigation together with details of the NAPSA and, in particular, the applicable rates of pay pursuant to the NAPSA's provisions relevant to these proceedings. The applicant's affidavit also summarizes other NAPSA provisions now admitted to have been breached.

12. In his affidavit sworn or affirmed 9 July 2007 Mr Rajendran said, amongst other things:

> *6. My duties were, boiling, chopping, making beef curry, korma sauce, gravy, samosa, pastries and Naan bread. Yoga would leave me with a list of recipes to prepare. The cooking here in Australia is a very different style to home, certain dishes are different but I prepared each one as he told me. Yoga and I would do the basic sauce and then I would do the rest of the cooking. On some days instead of cooking, Yoga and I would do the basic sauce together and I did not go to Glenbrook on those days.*
>
> *7. There was no roster provided by Yoga, I was just taken from home and then driven to the restaurants to work.*

8. Yoga drove me to and from work every day. I worked at three of his restaurants, Richmond, Faulconbridge and Glenbrook. He drove me everywhere.

9. Yoga supplied me with chefs coat. I wore the uniform every day, I also washed the uniform myself. Yoga did not wash the uniform for me. I did not receive any money or allowances for washing my uniform.

10. Every Monday to Thursday I would arrive at the Faulconbridge restaurant at 9am. I would stay until 10am. My day started with getting things from the storeroom, lifting and moving heavy boxes.

11. After working at Faulconbridge, I was then driven directly to the Glenbrook restaurant were [sic] *I started work as soon as I arrived and worked through until 3pm. My duties involved all aspects of food preparation. The people I worked with at the Glenbrook restaurant included the Manager Joy also a Sri Lankan man by the name of Marthia and Mr Singh. Mr Singh worked up until 11am and then went to the Richmond restaurant. The other staff arrived at 11am.*

12. At 3:00pm after working at the Glenbrook restaurant I was then driven straight back to the Faulconbridge restaurant. I started work as soon as I arrived. I worked up until 11:30pm to 12:00am. I would then be driven back to Yoga's house, where I stayed.

13. My hours of work every Friday, Saturday and Sunday were 9am to 10am at Faulconbridge restaurant. My duties involved getting things from the storeroom, lifting and moving heavy boxes.

14. I was then driven directly to the Glenbrook restaurant where my duties involved chopping food, preparation and cooking. I started work as soon as I arrived and worked until 3pm. The people I worked with at the Glenbrook restaurant included the Manager Joy also a Sri Lankan man by the name of Martia and Mr Singh. Mr Singh worked up until 11am and then he went to the Richmond restaurant. I also worked with Eva on Friday's, she is the Chef from the Faulconbridge restaurant. Before the Richmond restaurant opened I worked with Eva in the evenings at Faulconbridge.

15. *After working at the Glenbrook restaurant, I was then driven straight to the Richmond restaurant where I worked until 11:30pm to 12:00am. I worked with the Manager Mr Singh from New Zealand, a Sri Lankan boy and delivery lady.*

16. *I worked at least 14 hours every day, seven days per week for 40 days straight without a day off, even when I was sick I still worked. My day started at 9am and finished around 12am.*

13. Mr Rajendran also said that he was never paid any wages while in Australia although he was given twenty dollars by Mr Rasalingam for train expenses. He said that he was told that he would not be paid for a year because Mr Rasalingam had paid for his aeroplane ticket.

The respondent

14. In his affidavit affirmed 12 January 2008 Mr Rasalingam said that he arranged for Mr Rajendran to travel to Australia, arriving on 1 June 2006. About this time, Mr Rasalingam's mother became ill, dying on 6 June 2006. As a consequence, and being Hindu, Mr Rasalingam had certain religious and cultural observances to respect which kept him away from the respondent's businesses through much of June. During this time, Mr Rajendran was living at Mr Rasalingam's home and making his own way to work. On 9 July 2006 Mr Rasalingam travelled to India to scatter his mother's ashes on the Ganges. On 13 July 2006 Mr Rajendran's employment ceased and on 17 July 2006, upon returning to Australia, Mr Rasalingam was arrested and charged with exercising control over a slave and deceiving another person about the fact that their entry and any arrangements for their stay in Australia would involve confiscation of travel or identity documents. The Commonwealth DPP withdrew the original charges and substituted them with two other charges. Mr Rasalingam was acquitted of the first charge and convicted on the second which was based on an allegation that he had cut and pasted a sample of Mr Rajendran's signature onto a job offer Mr Rasalingam had supplied in support of Mr Rajendran's visa application and did so in order to deceive immigration officials. Mr Rasalingam was sentenced to a suspended term of 4 months imprisonment. An appeal against that conviction was lodged on 27 November 2007.

15. In his affidavit affirmed 12 January 2008 Mr Rasalingam also said that:

a) although Mr Rajendran had been employed as a cook, upon his arrival in Australia it was determined that his claimed credentials were false and, in fact, he was not a cook or a chef;

b) although it was agreed that no wages were paid to Mr Rajendran between 2 June 2006 and the cessation of his employment on 13 July 2006, Mr Rasalingam had advanced $7,000 to Mr Rajendran's father at the time that Mr Rajendran was engaged as a cook on the basis that this amount would be repaid by Mr Rajendran out of his wages;

c) because Mr Rasalingam was distracted by the obligations falling to him as a result of his mother's death he postponed dealing with issues such as Mr Rajendran's tax file number, leaving such matters to his manager, Joy Edward, and advised Mr Rajendran to see Mr Edward if he needed or wanted anything and if he needed money, he was to take it out of the till, keep a record, and everything would be sorted out when Mr Rasalingam returned from India;

d) the initial $3,322.35 payment made to Mr Rajendran in 2006, which was an underpayment, was calculated on the basis of the employment contract between the parties which provided for an annual salary of $40,000. Subsequently it was determined that the NAPSA's provisions required a larger payment, which was subsequently made;

e) Mr Rasalingam says that Mr Rajendran:

a. resided rent free in my home;

b. was provided free meals at my home and in the restaurants in which he worked;

c. was given clothing by me without charge;

d. was given cash amounts as needed;

e. was told to access the till as needed if any further funds were needed;

f. was usually provided transport to and from work, without charge;

g. was residing within walking distance of the Faulconbridge restaurant;

h. was residing within walking distance of the railway station at Faulconbridge and Glenbrook so that train transport was easily available to the Glenbrook restaurant;

f) although Mr Rajendran has been paid the amounts due to him in accordance with the Award, no credit or offset has been given or claimed in respect of the $7,000 which Mr Rasalingam paid Mr Rajendran's father.

16. In his affidavit affirmed 19 February 2008 Mr Rasalingam addresses the contents of Mr Rajendran's affidavit of 9 July 2007 saying:

a) he did little cooking with Mr Rajendran because he was attending to his dying mother. Mr Rajendran was left in the care of qualified personnel such as Joy Edward but his duties were never more than as a kitchen hand because he had no ability as a cook;

b) as to Mr Rajendran's working hours, he usually started at Glenbrook at 11:30am and then went to the Faulconbridge restaurant, arriving at 4pm, travelling by train or by getting a lift. The Faulconbridge restaurant opened for staff at 5pm. Although he worked mainly at the Faulconbridge and Glenbrook restaurants, on four to five occasions he assisted at the Richmond restaurant;

c) the same laundry service that washed and ironed the restaurants' table cloths and serviettes also washed and ironed staff uniforms;

d) Mr Rajendran was not required to move heavy boxes;

e) Mr Rajendran did not start his day's work at Faulconbridge because it was only the Glenbrook restaurant which opened for lunch;

f) Mr Rajendran worked at the Glenbrook restaurant 5-6 days a week between 11:30am and 3pm and then at Faulconbridge from

5pm to 9:30pm or 10pm. Although he sometimes worked 6 days, according to staff needs, he did not work on Sundays and did not work until 11:30pm or 12am;

g) although Mr Rajendran did not receive any wages:

a. Joy was obtaining a Tax File Number for Anbalagan;

b. I had given Anbalagan funds as and when needed and in anticipation greatly in excess of the $20 he alleges I gave him;

c. Anbalagan agreed that he had nowhere to spend it;

d. Anbalagan was living in my home free of charge;

e. Anbalagan was using my telephone and had the free use of my facilities, including Tamil cable TV stations;

f. Anbalagan was being provided free meals;

g. Anbalagan had been provided with clothing by my wife and myself, without charge;

h. I had paid Anbalagan's father the sum of $7,000 AUD on the basis that Anbalagan would repay me from his earnings;

i. I had paid Anbalagan's travel fares to Australia;

j. I was spending most of my time attending to my dying mother whilst still attending to the restaurant needs as I was able and at the same time ensuring that Anbalagan was looked after;

k. I had told Anbalagan to contact Joy for money if he needed any or to get it out of the till and record it, to which he had agreed.

Considerations as to penalty

Introduction

17. As Tracey J said in *Kelly v Fitzpatrick* [2007] FCA 1080 at [14], in *Mason v Harrington Corporation Pty Limited* [2007] FMCA 7 at [24] Mowbray FM identified "a non-exhaustive range of considerations to

which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Tracey J adopted those considerations and described them as follows:

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

The nature and extent of the conduct

18. It has been admitted that at no point during Mr Rajendran's employment with the respondent was he paid either in accordance with the NAPSA or in accordance with his contract. It is accepted that Mr Rasalingam provided Mr Rajendran with accommodation and board,

subject to a dispute about the detail and quality of this. Mr Rasalingam says that Mr Rajendran had no need for spending money and that, to the extent that he needed money he could withdraw it from the till if he kept a record of what he took. Apart from being implausible, this is hardly a satisfactory or proper arrangement and Mr Rasalingam's perceptions of Mr Rajendran's need for spending money were irrelevant to the respondent's obligation to pay proper wages and entitlements.

19. While I accept that Mr Rasalingam was probably very upset as a result of his mother's death and very distracted as a result of the duties which fell to him as a consequence, he would have known, prior to Mr Rajendran arriving in Australia, that a tax file number would be needed. Indeed, it can be assumed that Mr Rajendran was ignorant of tax file numbers and their significance and, in practical terms, that it would always have been the responsibility of Mr Rasalingam to organise this. This reality is demonstrated by the fact that, on his own evidence, Mr Rasalingam says that he did set this process in train around the time he went to India with his mother's ashes. That being so, it was a process which could and should have been started much earlier than it was and the circumstances advanced in mitigation by the respondent on this issue deserve little weight.

The circumstances in which the conduct took place

20. Mr Rajendran is a young man whose parents were Mr Rasalingam's servants in India. Mr Rajendran came to Australia with little English, no friends and no money of his own. His accommodation was isolating even if Mr Rasalingam's version of events is accepted. Moreover, on the respondent's case, as Mr Rasalingam was occupied by family responsibilities for much of the time when Mr Rajendran was employed by the respondent, Mr Rajendran must also have spent a lot of time alone.

21. Although Mr Rasalingam has been pilloried in the press by reason of charges brought against him alleging that Mr Rajendran was, in effect, his slave, which charges were ultimately withdrawn, it must be concluded that although not a slave, Mr Rajendran was at a considerable disadvantage in his dealings with Mr Rasalingam.

The nature and extent of any loss or damage

22. The amended statement of agreed facts records that the amount of $3,322.35 was paid to Mr Rajendran in 2006 and a further amount of $8,237.96 was paid in 2007. It should be noted that the second figure is the gross amount from which tax was deducted.

23. Although these amounts are not great they nevertheless represent the entirety of Mr Rajendran's pay and entitlements for the period he was employed by the respondent and, to that extent, they are very significant.

24. It was submitted that the respondent was not holding back Mr Rajendran's pay in order to offset the $7,000 paid to his father. It was submitted that the plan always was that Mr Rajendran would repay that amount from his wages, once paid.

25. It is not necessary to reach a conclusion on that submission, simply noting that the agreed loss and damage suffered by Mr Rajendran was 100% of his NAPSA entitlements.

Similar previous conduct

26. The applicant does not submit that the respondent has previously been involved in conduct of this nature.

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

27. There was a single course of conduct which involved the respondent not paying Mr Rajendran his wages and entitlements. In my view, this conduct amounts to a course of conduct as understood by s.719(2) of the Act which manifested itself in several breaches of the NAPSA.

28. The failure to display a roster was not much investigated in these proceedings and will also be treated as a single course of conduct.

Size of the business enterprise involved

29. At the time of the breaches, the respondent operated four restaurants, three in the Blue Mountains and one at Richmond. No evidence has been given as to the administrative structure associated with the respondent's operations at the relevant time or of the extent to which it had office managers or external consultants to assist it with compliance issues such as this. However, whether large or small, the respondent can have been in no doubt that it owed Mr Rajendran his wages.

Whether breaches were deliberate

30. Although the respondent may not have been aware of its obligations under the NAPSA, it nevertheless knew it ostensibly had obligations under the contract entered into in respect of Mr Rajendran's employment. No evidence has been put before the Court by the respondent to explain why it might have thought that the contract displaced the NAPSA or, alternatively, why the NAPSA might not have applied to Mr Rajendran. Consequently, it is not possible to reach a conclusion on whether the respondent intended not to observe the NAPSA. Be that as it may, the failure by the respondent to pay Mr Rajendran anything at all was deliberate enough.

Whether senior management was involved in the breaches

31. Mr Rasalingam was the sole shareholder and sole director of the respondent. He was the directing mind of the company and in charge of all relevant dealings with Mr Rajendran.

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

32. It is to be noted that the OWS investigation and these consequent proceedings occurred after Mr Rasalingam was arrested in the circumstances already described. It is apparent that the respondent has co-operated with OWS and did so before these proceedings were commenced. Moreover, the first payment made to Mr Rajendran, admittedly incorrectly on the basis of his contract, was made before the commencement of these proceedings. I am satisfied that the respondent

has co-operated with the authorities. The respondent has also taken corrective action by way of payments to Mr Rajendran and by the posting of a roster.

33. By admitting the breaches, the respondent thereby saved the Court and the Workplace Ombudsman time and expense and freed resources to be applied to other matters. The relevant concessions were made early and this should be recognised. In the circumstances of this case, I consider that a deduction of 35% gives appropriate recognition to the early admission made by the respondent.

34. However, no contrition has been displayed. The respondent has advanced explanations for its conduct and sought to explain away its shortcomings. Whether these are accepted or not they do not amount to contrition. In submissions it was pointed out that a delivery of an apology to Mr Rajendran was practically very difficult. However, that is not an end to the matter. Nothing has been put before the Court to demonstrate that the respondent expressed contrition to the OWS. Neither did Mr Rasalingam's affidavits filed in these proceedings express regret or contrition. It is not apparent that the respondent really understands its obligations or why it should not have done what it did.

Deterrence

35. In the absence of contrition, particular consideration needs to be given to special deterrence. The circumstances of this matter are unusual and have seen the respondent's business shrink from four restaurants to one as a result of the extremely adverse publicity surrounding Mr Rasalingam's arrest. To this has to be added the undoubted expense incurred because of the criminal proceedings and these proceedings. Nevertheless, and notwithstanding the significant financial consequences already visited upon the respondent as a result of these events, absent expressed contrition on the part of the respondent, some element of special deterrence is appropriate to deter it from repetition of this conduct.

36. Moreover, general deterrence needs also to be considered in order that the law's disapproval of the conduct in question should be marked and a penalty serve as a warning to others not to engage in similar conduct:

CPSU, Community and Public Sector Union v Telstra Corporation Limited [2001] FCA 1364 at [9]. For a penalty to have the desired effect it must be imposed at a meaningful level: *Financial Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 at [41].

37. A price should be put on contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act: *Trade Practices Commission v CSR Limited* (1991) ATPR 41-076 per French J at 52,152.

Further matters

38. As to the respondent's submission that the breaches of the various paragraphs of the NAPSA should be considered as one issue, regard should be had to what Gray J said in *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223:

> *The object of s.178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another. This reasoning leads to the conclusion that each separate obligation found in an award is to be regarded as a "term", for the purposes of s.178 of the Act. The ascertainment of what is a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely the different obligations which can be spelt out.*

39. Consequently, it would be incorrect to accept the respondents' submission that all breaches of all clauses and sub-clauses of the NAPSA, which arise out of a particular course of conduct, amount to one breach only. The breaches should be considered in terms of the individual provisions with the consequence that all breaches of a provision, to the extent that they arise out of a particular course of conduct, amount to a single breach of that provision.

40. In this case I find that each breach of the Award and the Act set out above at [9] arose out of the one course of conduct, with the consequence that there have been eight breaches in respect of which penalites must be considered. In respect of each of those breaches the maximum penalty is 300 penalty units or $33,000. The maximum total penalty is therefore $264,000.

41. Finally, this is a matter in which the totality principle is relevant in determining penalty. Tracey J in *Kelly v Fitzpatrick* described the orthodox position as being:

> … *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 that it is an appropriate response to the conduct which led to the breaches.* (at [30])

42. This view was recently endorsed by the Full Court of the Federal Court in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8.

Penalties

43. Although the applicant did not suggest what quantum of penalty ought to be imposed, she did submit that this was a matter where penalty in the mid to high range would be appropriate. The respondent submitted that this was a matter properly sitting in the lower range which ought to attract a penalty of $500 in total or $500 for each breach.

44. I find that the respondent was in breach of a NAPSA in:

a) failing to pay an employee Anabalagan Rajendran in accordance with that NAPSA; and in

b) failing to display a roster in accordance with that NAPSA.

45. I further find that eight breaches of the NAPSA have occurred.

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

a) $10,000 for breach of cl.9 and Table 1 of Part B of the Award (wages for ordinary hours of work performed by the employee);

b) $2,000 for breach of cls.11.1.1, 11.1.2 and 11.1.3 of the Award (wages for overtime hours of work performed by the employee);

c) $2,000 for breach of cls.11.1.4 and 11.1.5 of the Award (wages for work performed on Saturdays and Sundays);

d) $1,000 for breach of cls.11.1.6 and 12.2 of the Award (wages for public holidays);

e) $10,000 for breach of cls.15.1 and 15.3 of the Award (payment of wages within the required time);

f) $500 for breach of cl.5.3.1 of the Award (display a roster);

g) $500 for breach of cls.23.1 and 23.2 of the Award (laundry allowance); and

h) $2,000 for breach of cls.17 and 26 of the Award (payment in lieu of accrued leave on the termination of employment).

47. The total penalty, before the reduction which will be given for co-operation, is therefore $28,000. I am satisfied that this is a just and appropriate amount as an aggregate figure. After a 35% reduction for co-operation the total penalty is $18,200 and the individual penalties are:

a) $6,500 for breach of cl.9 and Table 1 of Part B of the Award;

b) $1,300 for breach of cls.11.1.1, 11.1.2 and 11.1.3 of the Award;

c) $1,300 for breach of cls.11.1.4 and 11.1.5 of the Award;

d) $650 for breach of cls.11.1.6 and 12.2 of the Award;

e) $6,500 for breach of cls.15.1 and 15.3 of the Award;

f) $325 for breach of cl.5.3.1 of the Award;

g) $325 for breach of cls.23.1 and 23.2 of the Award; and

h) $1,300 for breach of cls.17 and 26 of the Award.

48. The applicant made no submissions as to whom any penalty should be paid. As the proceedings have been brought by the Commonwealth, the penalties are to be paid to the Commonwealth.

49. I grant leave to the respondent to apply within 14 days for time to pay the penalties.

I certify that the preceding forty-nine (49) paragraphs are a true copy of the reasons for judgment of Cameron FM

Associate:

Date: 13 March 2008