

# FEDERAL COURT OF AUSTRALIA

## Hills v Sutton [2007] FCA 2033

**WORKPLACE RELATIONS** – Conduct of Employer – Where Employees told if they signed Australian Workplace Agreement there would be no change to their terms and conditions of employment – Where Australian Workplace Agreements reduced the quantum of redundancy payments to which the employees were entitled under certified agreement – Where multiple breaches of *Workplace Relations Act 1996* (Cth) arose out of single course of conduct – Where respondents admitted liability before serious expense was incurred by the applicant – Relevant considerations in determining level of penalty – Penalty imposed

**WORDS AND PHRASES** – ‘permissible range’

*Workplace Relations Act 1996* (Cth) ss 167(2), 337(1), 337(2), 337(8), 337(9), 340(1)(b), 341, s 401(1), 407, 841.

*Kelly v Fitzpatrick* [2007] FCA 1080 referred to

*McIlwain v Lamsay Food Packaging Pty Ltd* (2006) 158 IR 181 referred to

*NW Frozen Foods Pty Ltd v Australian Consumer and Competition Commission* (1996) 71 FCR 285 not followed

*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 followed

**SAMUEL HILLS v JAMES SUTTON AND ADAM SUTTON**  
**VID 79 OF 2007**

**TRACEY J**  
**18 DECEMBER 2007**  
**MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

**VID 79 OF 2007**

**BETWEEN:           SAMUEL HILLS  
                          Applicant**

**AND:                 JAMES SUTTON  
                          First Respondent**

**ADAM SUTTON  
                          Second Respondent**

**JUDGE:             TRACEY J**

**DATE OF ORDER:   18 DECEMBER 2007**

**WHERE MADE:      MELBOURNE**

**BY CONSENT THE COURT DECLARES THAT:**

1           On 5 April 2006 the first respondent contravened s 401(1) of the *Workplace Relations Act 1996* (Cth) (“the Act”) in respect of Rajmund Rajko Lah.

2           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of Emmanuel Portelli.

3           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of Mohamed Abdi.

4           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of Aaron Renfrey.

5           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of Adam Harding.

6           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of Bruno Battaglini.

7           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of  
Josip Novakovic.

8           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of  
Rodney Bradley.

9           On 5 April 2006 the first respondent contravened s 401(1) of the Act in respect of  
Russell Harding.

10          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Rajmund Rajko Lah.

11          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Emmanuel Portelli.

12          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Mohamed Abdi.

13          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Aaron Renfrey.

14          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Adam Harding.

15          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Bruno Battaglini.

16          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Josip Novakovic.

17          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of  
Rodney Bradley.

18          On 18 April 2006 the first respondent contravened s 341(1) of the Act in respect of

Russell Harding.

19           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Rajmund Rajko Lah.

20           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Emmanuel Portelli.

21           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Mohamed Abdi.

22           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Aaron Renfrey.

23           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Adam Harding.

24           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Bruno Battaglini.

25           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Josip Novakovic.

26           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Rodney Bradley.

27           On 18 April 2006 the second respondent contravened s 341(1) of the Act in respect of  
Russell Harding.

28           On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Rajmund Rajko Lah.

29           On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Emmanuel Portelli.

30 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Mohamed Abdi.

31 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Aaron Renfrey.

32 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Adam Harding.

33 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Bruno Battaglini.

34 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Josip Novakovic.

35 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Rodney Bradley.

36 On 18 April 2006 the first respondent contravened s 337(8) of the Act in respect of  
Russell Harding.

37 On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Rajmund Rajko Lah.

38 On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Emmanuel Portelli.

39 On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Mohamed Abdi.

40 On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Aaron Renfrey.

41 On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of

Adam Harding.

42           On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Bruno Battaglini.

43           On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Josip Novakovic.

44           On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Rodney Bradley.

45           On 18 April 2006 the second respondent contravened s 337(8) of the Act in respect of  
Russell Harding.

46           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Rajmund Rajko Lah.

47           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Emmanuel Portelli.

48           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Mohamed Abdi.

49           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Aaron Renfrey.

50           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Adam Harding.

51           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Bruno Battaglini.

52           On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Josip Novakovic.

53 On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Rodney Bradley

54 On 18 April 2006 the first respondent contravened s 337(9) of the Act in respect of  
Russell Harding.

55 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Rajmund Rajko Lah.

56 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Emmanuel Portelli.

57 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Mohamed Abdi.

58 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Aaron Renfrey.

59 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Adam Harding.

60 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Bruno Battaglini.

61 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Josip Novakovic.

62 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Rodney Bradley.

63 On 18 April 2006 the second respondent contravened s 337(9) of the Act in respect of  
Russell Harding.

**THE COURT ORDERS BY CONSENT THAT:**

1           A total penalty of \$20,000 be imposed on the first respondent for the contraventions referred to in Declarations 1 to 9 set out above.

2           A total penalty of \$6,000 be imposed on the first respondent for the contraventions referred to in Declarations 28 to 36 set out above.

3           A total penalty of \$6,000 be imposed on the second respondent for the contraventions referred to in Declarations 37 to 45 set out above.

4           A total penalty of \$6,000 be imposed on the first respondent for the contraventions referred to in Declarations 46 to 54 set out above.

5           A total penalty of \$6,000 be imposed on the second respondent for the contraventions referred to in Declarations 55 to 63 set out above.

6           The penalties are to be paid to the following persons and the Commonwealth Consolidated Revenue Fund in the following amounts by the first respondent paying 72.72727% of those amounts and the second respondent paying 27.27273% of those amounts:

- 6.1   Rajmund Rajko Lah, \$1,646.21;
- 6.2   Mohamed Abdi, \$564.95;
- 6.3   Aaron Renfrey, \$846.39;
- 6.4   Adam Harding, \$408.01;
- 6.5   Bruno Battaglini, \$2,514.42;
- 6.6   Josip Novakovic, \$5,109.52;
- 6.7   Rodney Bradley, \$4,314.40;
- 6.8   Russell Harding, \$3,414.22; and
- 6.9   the Commonwealth Consolidated Revenue Fund, \$25,181.88.

7           Each of the payments provided for in paragraph 6 be made within 28 days of the date on which these orders are made.



8 The application otherwise be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

**VID 79 OF 2007**

**BETWEEN:**           **SAMUEL HILLS**  
                                  **Applicant**

**AND:**                 **JAMES SUTTON**  
                                  **First Respondent**

**ADAM SUTTON**  
                                  **Second Respondent**

**JUDGE:**             **TRACEY J**

**DATE:**             **18 DECEMBER 2007**

**PLACE:**            **MELBOURNE**

**REASONS FOR JUDGMENT**

1           In the early part of 2006 Finlay Engineering Pty Ltd (“Finlay Engineering”) was experiencing economic difficulty. Mr James Sutton was the manager and owner of Finlay Engineering. Mr Adam Sutton was a director and the secretary of the company. The company had nine employees whose employment was regulated by the *Metal, Engineering and Associated Industries Award 1998* and by successive certified agreements.

2           On 5 April 2006 Mr James Sutton presented these employees with Australian Workplace Agreements (“AWAs”). He told them that, if they signed the agreements, there would be no change to their terms and conditions of employment. Each employee signed an AWA on that day. None would have done so had he known that the AWA contained a term which reduced the quantum of redundancy payments to which the employees were entitled under the certified agreements. Had the employees been aware of this and the misstatement made to them by Mr James Sutton, they would not have entered into the AWAs.

3           The employees were not provided with the AWAs for the seven day period prescribed by s 337(1) of the *Workplace Relations Act 1996* (Cth) (“the Act”). Nor were they provided with an information statement as required by s 337(2) of the Act. Both respondents were responsible for these contraventions of s 337(8) and (9) of the Act. These contraventions

deprived the employees of the opportunity to ascertain the true position relating to their respective redundancy payment entitlements under the AWAs.

4           None of the AWAs was witnessed as required by the Act: see ss 340(1)(b) and 341. Mr Adam Sutton later signed the AWAs on behalf of the company. Mr James Sutton was aware that he had done this. These contraventions did not contribute to the decision of any employee to enter into an AWA.

5           Not long after the AWAs were signed the company appointed administrators. On 27 June 2006 it went into liquidation. This resulted in all the employees being made redundant. Most of them were long serving employees who would have been entitled to much higher severance payments under the certified agreement which had regulated their employment prior to them signing the AWAs. This was because the certified agreement provided for an entitlement to three weeks pay for each year of service. The AWAs provided for a less generous entitlement for each year of service and the amount payable was capped at 12 weeks.

6           The applicant is a Workplace Inspector appointed under s 167(2) of the Act. An investigation was conducted into the conduct of the respondents. They were initially disposed to deny liability but, at a point before serious expense was incurred by the applicant in preparing for trial, they admitted their liability. Agreement was reached between the applicant and the respondents as to the penalties which they considered it would be appropriate for the Court to impose in respect of the various contraventions.

7           The Court is not bound to accept and impose these proposed penalties but will do so if persuaded that, in all the circumstances, they fall within the permissible range: cf *NW Frozen Foods Pty Ltd v Australian Consumer and Competition Commission* (1996) 71 FCR 285 at 290-1. In *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 565 Jessup J expressed the view, with which I respectfully agree, that the phrase “permissible range” in this context “refers to a range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor manifestly excessive.”

8           The maximum penalties, prescribed by s 407 of the Act, for each of the contraventions in respect of which a penalty is sought (as at 5 April 2006) were as follows:

- Contravention of s 401(1) - \$6,288.60;
- Contravention of s 337(8) - \$3,144.30;
- Contravention of s 337(9) - \$3,144.30.

9           It is proposed that a penalty of \$20,000 should be imposed on Mr James Sutton in respect of the nine contraventions by him of s 401(1) of the Act.

10           It is proposed that a penalty of \$6,000 be imposed on each respondent in respect of their respective contraventions of ss 337(8) and 337(9) of the Act.

11           It is proposed that no penalties should be imposed in respect of the contraventions of s 341.

12           I have concluded that it is appropriate to impose the proposed penalties. In doing so I have had regard to the following matters:

- Although there were multiple contraventions by the respondents of the relevant sections of the Act, those contraventions formed part of a single course of conduct which was intended to persuade each of the nine employees to become a party to an AWA.
- The monetary penalties imposed distinguish between the contraventions of s 401(1) of the Act on the one hand and the contraventions of ss 337(8) and 337(9) on the other having regard to the higher maximum penalty applicable for contraventions of s 401(1) and the fact that the contravention of s 401(1) of the Act, was, in each case, the major contributing factor to the employees becoming parties to AWAs.
- The consequences for each of the employees were serious. The longer serving members of the group suffered the most. As a group they were deprived of an amount in the order of \$149,000 which represented the difference between what would have been payable had their redundancy entitlements been calculated under the certified agreement and the amount to which they were collectively entitled under the AWAs.
- There is a strong need for general deterrence of the type of conduct engaged in by the respondents in the present case.

- The conduct complained of undermines the legislative objective that AWAs should be the product of free bargaining between the parties.
- The totality principle which I explained in greater detail in *Kelly v Fitzpatrick* [2007] FCA 1080 at [30] and the appropriateness of fixing a total penalty for a course of conduct: as to which see *McIlwain v Lamsay Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181 at 216-7.

13 I have also taken into account, in the respondents' favour, the following matters:

- Neither respondent has previously been found to have contravened the Act.
- Their early admission of liability has saved a considerable amount of time and money which would otherwise have had to be expended in the preparation for and the conduct of a trial.

14 There remains the question of to whom the penalties should be paid. Under s 841 of the Act the penalties can be paid to the Commonwealth or to organisations or persons nominated by the Court.

15 The parties had, initially, proposed that the \$44,000 in penalties should be paid to Consolidated Revenue. I raised with the parties the prospect of paying part of the total penalty sum to each of the employees such as to make good, in each case, the shortfall in their redundancy payments, that shortfall being calculated by deducting from each employee's redundancy entitlement under the certified agreement the amount to be paid to him by the liquidator by way of redundancy entitlements under the AWAs both figures calculated on a pro-rata basis by reference to the sum available to the liquidator for distribution. The parties agreed that this would be an appropriate order and the necessary calculations were undertaken and agreed upon. There was a surplus after provision was made for these payments.

16 The respondents have admitted that, but for the contraventions of the Act in which they engaged the employees would not have entered into the AWAs and, as a result, been deprived of the more beneficial level of redundancy payment provided for in the certified agreement. That being so I consider that it is appropriate that part of the penalties imposed on the respondents should be used to compensate partially the individual employees for their

losses. The balance should be paid to the Commonwealth.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice TRACEY.

Associate:

Dated: 18 December 2007

Counsel for the Applicant: Mr R Dalton

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: Ms J Oakley and Mr J Krins

Solicitor for the Respondent: Rigby Cooke

Date of Hearing: 18 December 2007

Date of Judgment: 18 December 2007