IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA
AT SYDNEY

FILE NO: SYG853 of 2007

INSPECTOR ROBERT JARVIS
(OFFICE OF WORKPLACE SERVICES)
Applicant

IMPOSETE PTY LTD
(ACN 002 880 097)
Respondent

ORDER

BEFORE: Federal Magistrate Smith

DATE OF ORDER: 13 February 2008

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. There is imposed on the respondent pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) a penalty in the amount of $10,400 for each of its admitted breaches of subclauses 10.1, 15.1, 20.4, 21.1.4(d), 22.4.1, 25.1, 27.12.1, 28.2 and 32.3.1(c) of the *Federal Meat Industry (Retail and Wholesale) Award 2000* (Cth).
2. Pursuant to s.841, the respondent must pay the amount of $2,000, being part of the penalties, to Byron Mercer.
3. Pursuant to s.841, the respondent must pay the sum of $91,600, being the balance of the penalties, to the Commonwealth.
4. Orders (2) and (3) shall take effect on 13 April 2008.
5. The judgment debts arising under (2) and (3) shall carry interest from that date at the rate prescribed by the Federal Court Rules.
6. Liberty to the applicant to apply for further orders in relation to the payment by the respondent of arrears of superannuation contributions.

FEDERAL MAGISTRATES COURT OF AUSTRALIA

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FEDERAL MAGISTRATE SMITH

Date that entry is stamped: 13 February 2008

FEDERAL MAGISTRATES COURT OF AUSTRALIA

JARVIS v IMPOSETE PTY LTD (No.2) *[2008] FMCA 101*

INDUSTRIAL LAW – Contraventions of award – employee incorrectly paid reduced 'indentured apprentice' rates during six months 'trial' – nine breaches of different terms admitted – senior managers were responsible – large employer – deterrent penalties appropriate – application of totality principle – total penalties of $93,600 ordered.

Federal Magistrates Court Rules 2001 (Cth), r.26.01
Apprenticeship and Traineeship Act 2001 (NSW), ss.7, 13, 22
Crimes Act 1914 (Cth), s.4AA
Federal Magistrates Act 1999 (Cth), s.77
Federal Meat Industry (Retail and Wholesale) Award 2000 (Cth), cll.5.2, 9.2.4, 9.2.4(a), 10.1, 15, 15.1, 15.6, 20.4, 21.1.4(d), 22.4.1, 25.1, 27.12.1, 28.2, 32.3.1(c)
Uniform Civil Procedure Rules 2005 (NSW), Sch.5
Workplace Relations Act 1996 (Cth), ss.3(d), 3(f), 111(1)(e), 178(3)(b), 178(4)(a)(i), 178(4)(a)(ii), 178(4)(b), 719, 719(1), 719(2), 719(4), 719(6), 719(7), 722, 722(1), 723, 841
Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 (Cth), s.2, Sch.3 items 14, 16, 25
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Coles v Elsen Bros Pty Ltd [2007] FMCA 1838
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Dennington v Pee Cee Pty Ltd [2008] FMCA 79
Flattery v The Italian Eatery [2007] FMCA 9
Gibbs v The Mayor, Councillors & Citizens Of The City Of Altona (1992) 37 FCR 216
Jarvis v Imposete Pty Ltd [2007] FMCA 1825
Jordan v Mornington Inn Proprietary Limited [2007] FCA 1384
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Applicant:	INSPECTOR ROBERT JARVIS
Respondent:	IMPOSETE PTY LTD ACN 002 880 097

File Number:	SYG853 of 2007
Judgment of:	Smith FM
Hearing date:	30 January 2008
Delivered at:	Sydney
Delivered on:	13 February 2008

REPRESENTATION

Counsel for the Applicant:	Mr P Newall
Solicitors for the Applicant:	Fisher Cartwright Berriman
Counsel for the First Respondent:	Mr M P Cleary
Solicitors for the Respondent:	Moray & Agnew

ORDERS

(1) There is imposed on the respondent pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) a penalty in the amount of $10,400 for each of its admitted breaches of subclauses 10.1, 15.1, 20.4, 21.1.4(d), 22.4.1, 25.1, 27.12.1, 28.2 and 32.3.1(c) of the *Federal Meat Industry (Retail and Wholesale) Award 2000* (Cth).

(2) Pursuant to s.841, the respondent must pay the amount of $2,000, being part of the penalties, to Byron Mercer.

(3) Pursuant to s.841, the respondent must pay the sum of $91,600, being the balance of the penalties, to the Commonwealth.

(4) The judgment debts arising under (2) and (3) shall carry interest from the date of these orders at the rate prescribed by the Federal Court Rules.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG853 of 2007

INSPECTOR ROBERT JARVIS
Applicant

And

IMPOSETE PTY LTD
ACN 002 880 097
Respondent

REASONS FOR JUDGMENT

1. Mr Byron Mercer was employed by the respondent from 3 May 2005 until 24 November 2005 at its Chatswood "Joe's Meat Market" butcher's shop, at the age of 21. He should have received remuneration at adult rates as a "salesperson (Wage Group – Level 4)" under the *Federal Meat Industry (Retail and Wholesale) Award 2000* (Cth) ("the Award"). However, he was paid at significantly lower rates as an "apprentice butcher", in the belief that this was permissible for an employee "on trial" for six months until the respondent decided whether it would enter into an apprenticeship agreement with him. The respondent now admits that it was in breach of nine different terms of the Award, and I must determine an appropriate penalty under s.719 of the *Workplace Relations Act 1996* (Cth) ("the Act").

2. The application for penalties was filed on 14 March 2007 by an inspector of the Office of Workplace Services. In an interlocutory decision, I held that I had power to impose penalties for the admitted breaches, notwithstanding that they occurred prior to the Court being invested with jurisdiction under the Workplace Relations Act, and prior

to the commencement of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (see *Jarvis v Imposete Pty Ltd* [2007] FMCA 1825).

3. In my earlier judgment, I referred to submissions made by the respondent which assumed that there had been an increase in the maximum penalty for a breach of an award after the dates of the admitted breaches (see [6], [9], [11], and [24]). However, it is now clear, and is conceded by the respondent, that the currently applicable maximum penalty of *"300 penalty units for a body corporate"* under s.719(4) of the Workplace Relations Act (as renumbered), did not alter the maximum penalty which could have been imposed by the Federal Court or an eligible court between May and November 2005 under the old s.178(4)(a)(ii) or s.178(4)(b) respectively. This penalty tripled the previous maximum, and took effect prospectively from 10 August 2004, as a result of amendments made by the *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004* (Cth) (see s.2 and Sch.3 items 14, 16 and 25). It has the consequence in this case that the maximum penalty which I may impose for each of the nine admitted breaches of the Award is $33,000: a total of $297,000.

4. Counsel for both parties are now in agreement as to the other relevant current provisions of the Workplace Relations Act, and the principles which I should follow when applying them. It is therefore not necessary for me to discuss them at length, since they have been identified in other recent decisions of this Court and the Federal Court (see, for example, *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, *Flattery v The Italian Eatery* [2007] FMCA 9, *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140, *Kelly v Fitzpatrick* [2007] FCA 1080, *Jordan v Mornington Inn Proprietary Limited* [2007] FCA 1384, *Coles v Elsen Bros Pty Ltd* [2007] FMCA 1838, and *Dennington v Pee Cee Pty Ltd* [2008] FMCA 79). At a factual level, these cases concerned a wide range of circumstances, and I consider it too early to discern a "tariff" of penalties usually awarded in this Court for underpayment of workers' entitlements. However, I have attempted to be consistent in this case with their approach to the determination of penalties.

5. It is now agreed that the Award did not include a provision under old s.111(1)(e) of the Workplace Relations Act, which would have had the

effect that a separate breach occurred on each day on which non-observing conduct occurred. Penalties do not therefore fall to be considered by reference to old s.178(3)(b) and s.178(4)(a)(i) (cf. my earlier judgment at [7]). Rather, counsel for both parties agreed that new s.719(2) should be applied, so that the repetition of breaches by the respondent of the same term of the Award as part of *"a course of conduct" "shall, for the purposes of this section, be taken to constitute a single breach of the term"*, and should not give rise to separate penalties. The interpretation of Gray J in *Gibbs v The Mayor, Councillors & Citizens Of The City Of Altona* (1992) 37 FCR 216 at 223, requires, however, that breaches of each different term of the Award should be addressed with separate penalties. The parties therefore agreed that nine breaches of the Award should be identified, and should be addressed with separate penalties.

6. They also agreed that the substance of all the respondent's non-complying conduct should also be considered under the *"totality principle"*. The authorities on this were recently summarised by Tracey J in *Kelly v Fitzpatrick* (supra) at [30]:

> *30 Another factor which 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 the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly to 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 Limited *(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 that it is an appropriate response to the conduct which led 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 B & P Caelli Constructions Pty Ltd *[2007] FCAFC 65 at [145] per Jessup J. This approach was recently described, in the criminal context from which the totality principle is derived,*

as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts: see Johnson v R *(2004) 205 ALR 346 at 356[26] per Gummow, Callinan & Heydon JJ.*

The evidence before the Court

7. The evidence presented by both parties was limited, and consisted of an agreed statement of facts supplemented by affidavits, the deponents of which were not subject to cross-examination. This evidence identified the respondent as a constitutional corporation carrying on business under the trading name: "Joe's Meat Market". It is a company *"within the Primo Group"* of companies, which operates abattoirs in Scone and Port Wakefield, a smallgoods factory at Chullora, delicatessens throughout NSW, and 48 butcher stores known as "Joe's Meat Market". It was a member of the National Meat Association of Australia, now known as the Australian Meat Industry Council, which is a respondent to the relevant Award, and was bound by that award.

8. The agreed statement of facts briefly recounted the employment of Mr Mercer, the relevant rates of pay under the Award, and the nine agreed breaches as follows:

> ***Employment of Mr Mercer***
>
> *6. At all material times the Respondent employed Mr Byron Mercer ("**Mr Mercer**").*
>
> *7. Mr Mercer was born on 3 October 1983.*
>
> *8. Prior to May 2005, Mr Mercer had completed approximately 2 years of indentured employment as an Apprentice Butcher, registered with the New South Wales Department of Education and Training ("**DET**") under the* Apprenticeship and Traineeship Act *2001 (NSW) ("**Apprenticeship Act**").*
>
> *9. On or about 3 May 2005, Mr Mercer commenced employment with the Respondent at the Chatswood Store, purportedly as a third year Apprentice Butcher. Mr Mercer worked 5 to 6 days per week based on representations that Mr Mercer would be trialled in order to determine whether the Respondent would offer Mr Mercer an indentured*

apprenticeship. Mr Mercer was initially paid at a rate of pay of a third year Apprentice under the Federal Award.

10. *In or about May 2005, the Respondent made informal email contact with the DET enquiring as to Mr Mercer's apprenticeship status and was informed that Mr Mercer had completed 2 years of an apprenticeship. In addition, DET enquired as to whether the Respondent proposed to register Mr Mercer under the Apprenticeship Act. The Respondent did not formally register Mr Mercer under the Apprenticeship Act, meaning that Mr Mercer was never indentured as an Apprentice with the Respondent pursuant to section 20 of the Apprenticeship Act.*

11. *At all material times, Mr Mercer spent approximately 60% of his duties serving retail customers at the front counter and the other 40% performing duties such as cleaning, pumping, making mince and clearing. At no time during employment with the Respondent did Mr Mercer receive any formal trade training.*

12. *On 23 November 2005, Mr Mercer enquired with the Respondent as to why he was not receiving an adult rate of pay if he was not to be indentured as an Apprentice.*

13. *On 24 November 2005, the Respondent terminated Mr Mercer's employment and Mr Mercer was paid one week's wages in lieu of notice of termination of employment. Those wages were paid at the rate of a second year Apprentice.*

14. *On 7 March 2006, the OWS issued a breach notice to the Respondent with respect to the following breaches of the Award in relation to Mr Mercer:*

    14.1 underpayment of wages;

    14.2 underpayment of penalty rates;

    14.3 underpayment of overtime;

    14.4 underpayment of wages in lieu of notice; and

    14.5 underpayment of pro-rata annual leave ("Breach Notice");

15. *On 13 March 2006, the OWS received a letter from the Respondent denying that Mr Mercer was underpaid the*

amounts outlined in the Breach Notice, or any amounts at all.

Federal Award Rates of Pay

16. *As at 3 May 2005, the minimum weekly rate of pay for a third year Apprentice under the Federal Award was $477.02, being 85% of the Level 6 Tradesman rate of pay (subclause 15.6 of the Federal Award – effective 4 April 2005).*

17. *On 24 May 2005, the Respondent adjusted Mr Mercer's wage to the second year Apprentice rate under the Federal Award. At that time this rate was $364.78 per week, being 65% of the Level 6 Tradesman rate of pay.*

18. *On 5 August 2005, the Federal Award was varied resulting in an increase to the minimum rates of pay ("**Federal Award Variation**"). From August 2005 onwards, the prescribed second year Apprentice rate under the Federal Award was $375.83 per week, being 65% of the Level 6 Tradesman rate of pay (which was $578.20 per week).*

19. *On 10 August 2005, the Respondent made an adjustment to Mr Mercer's rate of pay due to the Federal Award Variation (being the first pay period to commence on or after 5 August 2005 as required pursuant to the order making the Federal Award Variation). Mr Mercer's rate of pay was increased from $364.78 per week to $375.82 per 38 hour week from 10 August 2005 onwards.*

20. *At all material times Mr Mercer performed duties equivalent to the duties performed by a Salesperson (Wage Group Level 4) under the Federal Award and was entitled to be paid as such.*

Underpayment Calculations

21. *Mr Mercer has been underpaid a total of $9,437.78. This underpayment is due to:*

    21.1 Mr Mercer being paid as third year apprentice butcher between 3 May 2005 and 23 May 2005;

    21.2 Mr Mercer being paid as a second year apprentice butcher between 24 May 2005 and 24 November 2005; and

21.3 Mr Mercer not being paid correct amounts for ordinary time, overtime, penalty rates, sick leave, work performed on public holidays, payment in lieu of notice, annual leave on termination and any amount for meal allowance.

22. The Respondent has underpaid the Applicant pursuant to the following clauses of the Federal Award, in the following amounts:

22.1 subclause 10.1 – Notice of termination by employer - $151.18;

22.2 subclause 15.1 – Weekly wage rates - $3,652.01;

22.3 subclause 20.4 – Meal allowance - $1,351.24;

22.4 subclause 21.1.4(d) – Superannuation contributions - $512.44;

22.5 subclause 22.4.1 – Saturday ordinary hours rate - $225.19;

22.6 subclause 25.1 – Overtime - $2,740.59;

22.7 subclause 27.12.1 – Annual leave on termination - $339.63;

22.8 subclause 28.2 – Sick leave - $31.82; and

22.9 subclause 32.3.1(c) – Work on public holidays - $433.68.

9. The respondent was notified of Mr Mercer's complaint to the Commonwealth Department of Employment and Workplace Relations by letter dated 20 January 2006. It forwarded its employment records on 7 February 2006. In his covering letter, Mr Steve Bertram, Human Resources Manager for "Joe's Meat Market Group", asserted that *"Mr Mercer's employment was terminated at the initiative of the employer for poor work performance"*. It also said:

> *Mr Mercer was employed as an Apprentice Butcher however he was never indentured by this company. He was offered employment on a trial basis, in order to provide sufficient time for the company to determine wether (sic) an indentured apprenticeship would be offered. Please find enclosed a copy of an email from Robert MacMaster from the Department of*

Education and Training in which he advises us of the correct rate by which to pay Mr Mercer.

10. The cited email is not in evidence, and the respondent now does not seek to justify or explain its remuneration of Mr Mercer upon the basis of erroneous advice from any government official. As I shall indicate below, the Award, in fact, provided no support for the reduced wage which was paid to Mr Mercer for a "trial" period.

11. Mr Bertram in his letter of 13 March 2006, which denied any breaches of the award, maintained that Mr Mercer was not entitled to payment at the Level 4 rate of pay, and said *"at all times he carried out the duties of a 2nd year Apprentice and was paid accordingly"*.

12. The present application was then filed on 14 March 2007. As amended, it seeks the imposition of penalties under s.719(1) in relation to the nine breaches of the Award listed above; an order under s.719(6) that Mr Mercer be paid his unpaid entitlements, with interest under s.722(1); and an order under s.719(7) that the respondent pay the unpaid superannuation contribution to a relevant fund.

13. The respondent's response filed on 28 June 2007 was supported by an affidavit by a new Human Resources Manager, Mr Russell Vance, which admitted that the amount of $9,437.78 was owed to Mr Mercer, but gave no explanation for his being underpaid. The respondent then accepted an agreed statement of facts which was filed on 13 July 2007, admitting the alleged nine breaches of the Award. Its solicitor on 3 August 2007 suggested to the applicant's solicitor that Mr Mercer would be sent a cheque. However, he was not paid the arrears until 10 January 2008, at the initiative of another newly appointed Human Resources Manager, Mr Daniel Labour. Meanwhile, the respondent had denied any penalties could be imposed in the present proceeding, and had sought the summary dismissal of the application. I refused to do this in my judgment of 22 October 2007, and again listed the matter for a hearing on penalty.

14. The respondent relied in mitigation of penalty, upon an affidavit first sworn on 29 October 2007 by the then Human Resources Manager for the Primo Group, Mr Greg Rehn. This contained the following evidence:

9. *Mr Mercer was employed with the retail butcher stores known as 'Joe's Meat Market'.*

10. *All butcher stores are operated as separate profit centres. The responsibility of hiring staff is delegate[d] to store managers to varying degrees, depending on the seniority of the store manager. Furthermore, the managers are required to prepare reports on the profitability of the store for management on a weekly basis.*

SIZE OF THE RESPONDENT COMPANY

11. *The Primo Group employs approximately 3000 employees. These employees include all categories of workers in the abattoirs, smallgoods workers and retail shop workers. The Respondent employs approximately 600 employees in its retail butcher stores.*

12. *As part of the Primo Group's commitment to training, the Respondent employs in excess of 30 apprentices and 350 trainees. These apprentices are indentured in accordance with the requirements of the* Apprenticeship and Traineeship Act *2001 (NSW) and registered with the Department of Education and Training in accordance with this legislation.*

13. *When a person commences employment with the Primo Group with the intention of becoming an apprentice a number of steps are undertaken which include: undergoing the induction, being placed under the supervision of a qualified butcher, being allocated to the relevant store and then execution of the training contract as required by the Department of Education and Training ('the Department').*

14. *To the best of my knowledge and belief, the employer has 28 days to lodge the training contract with the Department but the training contracts will be accepted up to 3 months after the commencement of employment. Assuming that there are no performance issues, the employee becomes indentured and there is no issue with respect to completion of the probationary period. Payments are made from the commencement of employment on the basis that the employee is an apprentice, thereby complying with all the necessary obligations.*

BYRON MERCER

15. *To the best of my knowledge and belief, Byron Mercer commenced employment with the Respondent on*

3 May 2005. He was employed on the basis that he would be an apprentice butcher at the Joe's Meat Market Chatswood store.

16. *At the time of his employment Mr Mercer advised us that he was a third year apprentice Butcher.*

17. *Unfortunately Mr Mercer was not indentured as per the requirements of the* Apprenticeship and Traineeship Act *2001 (NSW). Essentially, if the Respondent had lodged a training contract with the Department in time, the amounts paid to Mr Mercer would have been in accordance with the Award, with the exception of the meal allowance payments.*

18. *As Mr Bertram is no longer employed by the Primo Group it is difficult to determine the reason why a training contract was not lodged with the Department. Unfortunately, it appears that there was confusion as to the process to be adopted and complicated by the structure of the Primo Group in respect of the authority provided to the store managers. I am informed by Col Cameron and verily believe that there was a misunderstanding as to the timing of the lodgement of the training contract with the Department. That is, it appears that the position that was adopted was that the training contract need only be lodged at the satisfactory conclusion of the probationary period.*

19. *I am informed by Col Cameron and verily believe that when Mr Mercer commenced employment he was advised that he would [be] subject to a 3 month trial period following which a determination would be made as to whether he would be indentured as a 3rd year apprentice. The 3 month trial period was extended to 6 months, at the discretion of Col Cameron, as a result of poor performance of Mr Mercer. This was based upon the comments made by Col Cameron the General Manager of Joe's Meat Markets.*

20. *The extension of the trial period was to enable Mr Mercer to improve his performance. In this matter, because the probationary period was extended from 3 months to 6 months, the assumption was made that the training contract was not required to be lodged until the conclusion of the probationary period.*

21. *Mr Mercer was initially paid as a third year apprentice, with his pay later dropped to that of a second year apprentice, at the direction of Col Cameron, because*

Mr Mercer was unable to provide proof that he was a 3rd year apprentice and upon commencing duties with the Respondent it became evident to the store manager that Mr Mercer's skills were only comparable to that of a second year apprentice.

22. *During his employment with the Respondent, Mr Mercer performed the duties of a second year apprentice butcher. These duties include basic butchery tasks appropriate to his level of training and customer service, product presentation and cleaning and hygiene tasks.*

23. *Despite the failure to lodge the training contract with the Department, I am informed by Col Cameron and verily believe that Mr Mercer received 'on-the-job' training as required of a normal apprentice. I note that at paragraph 11 of the Agreed Statement of Facts it is stated that Mr Mercer did not receive any formal training whilst employed with the Respondent. By this it is meant that Mr Mercer did not attend any TAFE course or training whilst in the employ of the Respondent.*

24. *Mr Mercer's weekly roster was prepared by the store manager who has total discretion of all rostering within the store. Annexed hereto and marked **'A'** is a true copy of the staff roster for the Chatswood Store.*

25. *Once the roster has been completed it is posted in the store and at the end of each week the individual store manager will forward to the payroll office the timesheets for the workers via facsimile. As I stated above, this is then processed by the payroll officer based upon the completed time sheets. This is a process driven undertaking. Annexed hereto and marked **'B'** is a true copy of a timesheet faxed through from a store to payroll.*

26. *Mr Mercer was paid at a rate instructed by Col Cameron and based on timesheets supplied by the Chatswood Store Manager. It is not the role of the payroll to inquire into the basis of the payments.*

27. *Mr Mercer was at all times paid overtime, public holidays annual leave, sick leave, superannuation and notice upon the termination of his employment. The breaches of the award were largely due to paying Mr Mercer at the rate applicable to an apprentice when he was not indentured. The Respondent only failed to pay Mr Mercer at the*

appropriate rate due to its mistaken belief that Mr Mercer was entitled to be paid as an apprentice under the Federal Award and that the Respondent was not required to lodge a training contract until he was [sic: had] satisfactorily completed the probationary period.

28. *Although Mr Mercer was not paid a meal allowance, the Chatswood store employees, including Mr Mercer, were provided with food for their own consumption whilst at work.*

29. *The Respondent's failure to pay Mr Mercer as a Level 4 Salesperson under the Federal Award was not deliberate and arose out of the said misunderstanding. Having said that, the Respondent accepts full responsibility for the mistake and apologises to Mr Mercer for the failure to pay the correct rates of pay.*

30. *The Respondent admits that it owes Mr Mercer the amounts pleaded in the Applicant's application, filed a reply at the earliest opportunity (28 June 2007) that admitted the amounts as being payable and on offered to repay the monies to Mr Mercer.*

STEPS TAKEN TO PREVENT RECURRENCE

31. *The respondent has taken significant steps to ensure that the misunderstanding resulting in Mr Mercer's underpayment does not occur again. The Human Resources Manager during the time of Mr Mercer's employment is no longer employed by the Primo Group. When I commenced employment with the Primo Group I became aware of this matter and I have undertaken the following steps to ensure that this incident does not occur again:*

    (a) when new apprentices commence employment the payroll officer Kathy Davenport, diarises the date upon which the training contract must be lodged with the Department;

    (b) ensure that all apprentices are paid the correct rate of pay for all relevant periods;

    (c) conduct random audits of the timesheets, payroll records and the status of the employees;

    (d) close liaison between the Human Resources Department and the store managers;

(e) *Kathy Davenport has received training on payment of award conditions such as penalty calculations.*

32. The Respondent is a good corporate citizen and is regularly involved in charitable works such as donations to Westpac Careflight, the Sri Lankan Association and other small local charities such as schools and churches.

33. As far as I am aware, this is the first time that the Respondent specifically and the Primo Group generally has been prosecuted for breaches of the Federal Award. As the Human Resources Manager, and speaking on behalf of the Primo Group, we are embarrassed that this error has occurred.

15. The *Federal Meat Industry (Retail and Wholesale) Award 2000* (Cth) is expressed in terms which should be comprehensible to an educated lay person. Its terms are available on the internet, and the industrial organisations which are party to it are, presumably, readily available to advise their members on its effect. It applies *"in respect of all employees employed in retail meat establishments ..."* (cl.5.2). It identifies an employment category of *"apprentices"* in cl.9.2.4, which makes clear that the category includes only those employees who are indentured apprentices:

> *Subject to 9.2.4(a) and the wage percentages set out in clause 15.6 apprentices indentured will be employed in accordance with arrangements approved by State or Territory accredited training authorities.*

16. Clause 9.2.4(a) relates to apprentices in Queensland. The reference to *"the wage percentages set out in clause 15.6"* makes clear that the Award governs the wage rates of apprentices, to the exclusion of State laws regulating the employment of apprentices in retail meat establishments.

17. Clause 15 of the Award establishes 7 employee classification levels and the award rate per week for each level. It makes clear that a tradesman is entitled to be paid at Level 6, and that a non-tradesman employee *"who performs the tasks of salesperson ..."* is entitled to be paid at Level 4, being 90% of the tradesman wage. Clause 15.6 sets a special wage rate for *"indentured apprentices"* as a percentage of the

tradesperson's rate, under which a second year apprentice is paid 65% of that rate, and a third year apprentice is paid 85%.

18. The Award therefore makes clear, in my opinion, that a person employed on "trial" before becoming an "indentured apprentice" must be paid at Level 4 if he is substantially engaged in salesperson duties. It provides no justification for the position taken by the respondent in relation to Mr Mercer's entitlements between May and November 2005. The respondent did not seek to identify any ambiguity in relation to this, as an explanation for its breaches of the Award.

19. A significant rationale for a reduction in normal wages for an "indentured apprentice" is to be found in the obligations incurred by an employer under State legislation when employing an indentured apprentice, and the career benefits obtained by the apprentice from his apprenticeship. Under the *Apprenticeship and Traineeship Act 2001* (NSW), such employment is supervised by a Commissioner for Vocational Training. The employer is obliged to apply to the Commissioner for the establishment of the apprenticeship *"within 28 days after the date on which an employer employs a person as an apprentice"*, and the application must be accompanied by an executed training contract and must identify the proposed dates and award covering the employment (see s.7). Once approved, the training contract binds the employer, including to provide agreed work-based training components, and to release the employee for attendance at external training (see s.13). The employer has duties to notify the Commissioner of various events, and the apprenticeship can only be suspended or cancelled with the approval of the Commissioner, even where there is consent (see s.22).

The considerations relevant to penalty

20. I shall determine the appropriate penalties for the respondent's admitted breaches, after addressing the list of considerations which was distilled by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* (supra), as summarised by Tracey J in *Kelly v Fitzpatrick* (supra) at [14]. This may guide, but not be treated as a substitute for, *"the unrestrained statutory discretion"* (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]).

The nature and extent of the conduct leading to the breaches

21. This has been recounted above. In short, Mr Mercer was paid about $11,000 over the period of his six months' employment, and was underpaid $9,437.78. This was mostly the result of the erroneous opinion taken and maintained by the respondent that he could be paid wages at a reduced "indentured apprentice" rate. This opinion resulted in underpayments relating to every payment made to him by way of weekly wages, overtime, weekend and public holidays' allowances. It also substantially reduced his termination entitlements in relation to pay in lieu of notice, annual leave and sick leave. It also resulted in ongoing underpayment of the employer's superannuation contributions.

22. The applicant's review of Mr Mercer's remuneration also discovered unrelated failures by the respondent to pay required meal allowances over the period of his employment, and an erroneous multiplier being adopted for the calculation of the public holiday allowances.

The circumstances in which that conduct took place

23. The significant circumstance in which Mr Mercer was underpaid was the mistaken opinion of responsible managers of the respondent that the Award permitted his employment at apprentice rates of pay in a butcher's store for a "trial" period of six months before entering an apprenticeship agreement. Mr Rehn's affidavit leaves obscure how and when this opinion was arrived at, and the extent to which it was given effect in the employment of other persons in "Joe's Meat Market" stores and in other workplaces of the Primo Group of companies. The opinion was held by the then Human Resources Manager for that Group. I understand Mr Rehn's affidavit also to state that it was endorsed or encouraged by the General Manager of Joe's Meat Markets, Mr Col Cameron, and that the approach taken to Mr Mercer's remuneration was at his direction.

24. The erroneous opinion was then given effect on a repeated basis by the company's wages staff, and was apparently not reviewed when there were changes in award rates. Indeed, it was maintained adversely to Mr Mercer, when someone decided that he should be paid as the equivalent of a second year indentured apprentice, rather than as a third year apprentice.

25. Because of the ambiguity in the respondent's evidence, I would not approach sentencing on the basis of a finding that other employees have probably also been underpaid by the respondent in the manner of Mr Mercer. However, the evidence raises a concern that the managers' erroneous general opinion, about the permissible remuneration of prospective apprentices on "trial", might be given effect beyond this particular employment. I propose to take this concern into account under the consideration of "deterrence" below.

26. Other, less significant errors of the respondent led it to underpay meal allowances and public holiday allowances. These are said to have been the result of "oversight" by the local supervisors of Mr Mercer's employment or wages clerks. However, the circumstances in which this occurred, and the persons responsible, are left obscure on the evidence. At least, the evidence suggests that in respect of these terms of the Award, there was a significant and ongoing failure to be properly informed as to the effect of the Award.

The nature and extent of any loss or damage sustained as a result of the breaches

27. The direct consequence of the erroneous basis on which Mr Mercer's remuneration was calculated was the substantial underpayment which I have identified above. In the context of his level of remuneration, age, and career, the breaches should be regarded as producing substantial financial damage to a young employee for a significant period between May and November 2005. The damage to Mr Mercer has been accentuated by reason of the failure of the respondent to rectify its breaches until January 2008, notwithstanding its admission of fault in June 2007. Mr Mercer has still not received any compensation by way of interest on the unpaid arrears.

28. In broader terms, as well as disadvantaging Mr Mercer financially, the respondent's conduct had the potential to disrupt his career by reason of the falsely premised basis of his "trial" employment, which gave him none of the immediate or long-term benefits and protections of being an indentured apprentice while receiving his reduced wages, and induced him to accept abnormally low wages. On its part, the respondent incurred none of the responsibilities of an employer of an

indentured apprentice, yet took the benefit for six months of the underpaid services of a person performing Level 4 duties.

Whether there had been similar previous conduct by the respondent

29. There is no evidence establishing any similar previous conduct, and I accept that I should determine penalties on the basis that this is the first time that the respondent has been found to have been in breach of an Award governing the rates of remuneration required to be paid to its employees.

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

30. As I have noted above, it is agreed that the repeated non-compliance with each particular term of the Award concerning wages, allowances, contributions, leave entitlements, etc should be regarded as occurring *"out of a course of conduct"* within s.719(2), so as to be dealt with as one breach. The parties have therefore, correctly in my opinion, agreed that penalties should be imposed for nine breaches of the Award, relating to nine different terms of the Award. However, of course, the repeated and protracted nature of the conduct involved in most of those breaches may, and should, be taken into account when determining the appropriate penalty for each breach.

31. It is also agreed that eight of the breaches arise directly out of the one circumstance prevailing for the whole of Mr Mercer's employment, being the responsible managers' erroneous opinion that they were entitled to pay him a reduced wage as a prospective apprentice "on trial". It was submitted, and I accept, that this aspect requires that I should assess under the "totality principle" the appropriateness of the total of the penalties which I impose for these breaches.

32. One of these breaches, and the breach of the meal allowance entitlements, involved non-compliances with the Award which were unrelated to that erroneous opinion.

33. Ultimately, I have concluded that all nine breaches are appropriately answered by penalties which are fixed at the same amount, but which are arrived at after taking into account the elements of repetition and overlapping causation which are present in the circumstances of most

of the nine breaches. I do not consider in this case that it is necessary to arrive at nicely differentiated penalties in relation to each of the breaches, by reference to the different monetary consequences to Mr Mercer. All of the terms of the Award which were disregarded by the respondent were, in my opinion, of equivalent importance and, in the circumstances in which they were committed, their breaches all deserve response by way of the same penalties. Considerations under the "totality principle" relating to the aggregate penalties should, in my opinion, be applied uniformly for all penalties in this case.

The size of the business enterprise involved

34. The respondent's evidence shows that it is a significant employer under the Award, and that its business is probably an important participant in the industry in which it operates. There is no evidence suggesting that the imposition of even the maximum penalties in this case could result in any disproportionate oppression or injury to its business or financial position. No discounting of penalties on this basis is, therefore, appropriate.

35. I do not consider that this element, of itself, should result in its breaches being regarded more seriously than non-compliance with the same award conditions by a smaller or more financially vulnerable enterprise (but compare Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [15]). There are, however, elements in the circumstances of the breaches relating to the respondent's business structure and position in the industry, which require me to treat the breaches as serious and inexcusable, and which support the imposition of a substantial penalty. I shall point to these below.

Whether or not the breaches were deliberate

36. I accept the respondent's submission that there is no evidence which would satisfy me that any of the relevant managers of the respondent had actual knowledge that the Award did not permit Mr Mercer to be paid reduced wages during a "trial" period of employment before it was decided whether to offer him an apprenticeship. In that sense, I therefore accept that the breaches should be regarded as "innocent" and not "deliberate". I also accept that I should not find that there was a conscious exploitation of a young worker which motivated the

disregard of Award conditions. These findings require me to accept that penalties should not be fixed at the highest end of the range.

37. However, the admitted "mental element" underlying the breaches reveals, in my opinion, a significant element of fault. As I have noted above, there was a consciously adopted opinion by the respondent's managers that Mr Mercer could be employed to perform sales duties in one of its butchers stores at significantly reduced wages, upon a promise that it might enter an apprenticeship agreement with him in the future. That consciously adopted approach to remunerating Mr Mercer was plainly inconsistent with the terms of the Award. It also was inconsistent with important public policies and standards of remuneration, which are reflected in the structure of the Award provisions concerning the wages of indentured apprentices. No clear explanation for the failure of the respondent's managers to appreciate this has been put forward, other than that it involved a "misunderstanding".

38. I do not accept that the failure of the responsible officers to discover and appreciate these inconsistencies is excusable. I also do not accept that the respondent should be given credit for giving Mr Mercer underpaid employment in a "trial" apprenticeship. The terms of the Award, and the Australian scheme of indentured apprenticeship which it reflects, are plainly directed against permitting such employment. The failure of the relevant managers to appreciate this, in my opinion, reflects seriously upon their conduct in directing or authorising the underpayments which amounted to breaches of the Award. If, as I am invited to find, this was the result merely of their failure to read and take advice upon the contents of the Award, then there was gross carelessness in the performance of the responsibilities of the relevant managers of a major employer under the Award.

Whether senior management was involved in the breaches

39. The respondent's evidence is that most of the breaches occurred by direction or approval of a former Human Resources Manager for "Joe's Meat Market Group", Mr Bertram, and of "Col Cameron the General Manager of Joe's Meat Markets". The managers involved were, therefore, at the highest level in the company, and not just local managers of one of its outlets. The disregard of the contents of the

Award by Mr Bertram, who held a position which should be expected to be properly informed, and whose opinion was maintained in his subsequent letter to the Department, is particularly a matter of concern.

Whether the party committing the breach had exhibited contrition

40. Mr Bertram's successor, Mr Vance, gave no excuses and expressed no contrition, in his affidavit sworn on 21 June 2007, which admitted that $9,437.78 was owing to Mr Mercer. The next holder of the respondent's position of National Human Resources & Occupational Health & Safety Manager for the Primo Group, Mr Rehn, did state in his affidavit first sworn on 29 October 2007: *"speaking on behalf of the Primo Group, we are embarrassed that this error has occurred"*. However, he ceased to be employed soon after this, and Mr Daniel Labour took the position. He recently took the practical step of arranging for the arrears to be paid to Mr Mercer.

41. I accept that there is some regret within the respondent company at being found to be in breach of the Award. However, the evidence before me suggests that there has been slowness in demonstrating this to Mr Mercer. There is no evidence that he has been given an apology, and the belated payment of arrears was not accompanied by interest. There was little indication in any of the respondent's evidence or submissions that it appreciates the extent of the inconsistency with the Award and the apprenticeship legislation, which was represented by its approach to employing and remunerating Mr Mercer.

Whether the party committing the breach had taken corrective action

42. Clearly, prior to the breaches the respondent must have taken inadequate steps to ensure that its Human Resources Manager and other staff were aware of the contents of the Award in so far as they related to employees such as Mr Mercer. Mr Rehn's evidence set out above suggests that the respondent's pay clerk has now been properly informed as to the contents of the Award in relation to apprentices and prospective apprentices.

Whether the party committing the breach had cooperated with the enforcement authorities

43. The respondent co-operated with the Department's inquiries, to the extent of providing the relevant records to enable its conduct to be examined against the provisions of the Award. It otherwise denied all liability, before the commencement of this proceeding.

The need to ensure compliance with minimum standards by provision of an effective means of investigation and enforcement of employee entitlements

44. This consideration arises from dicta in recent Federal Court judgments, which have discussed the significance of the major increase in civil penalties which was enacted by Parliament in 2004, particularly for corporate employers. In conjunction with other legislative changes in industrial law in recent times, the increase in penalties should be understood as conveying a message to employers that their compliance with legislated minimum wage standards is a matter of corporate public responsibility. Among the stated objects of the legislation are *"ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level"* (s.3(d)), and *"ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of: (i) employee entitlements ..."* (s.3(f)). The substantial penalties provided by Parliament, and their imposition by the Court according to the degree of seriousness of any breach, are intended to provide a real sanction to enforce observance of wage standards by all employers.

45. I consider that these general considerations should be treated as important elements in the determination of penalties in the present case, which concerns a young employee who was not accorded the benefits of such observance by a significant employer in his industry.

The need for specific and general deterrents

46. My conclusions in relation to many of the above considerations explain why I am not persuaded by the submissions of the respondent that

nominal penalties should be determined in this case. I do not accept that there is no need to effect deterrence of a repetition of the non-compliances revealed in the present case, either "specially" in relation to the respondent's future conduct, or "generally" for other employers within the respondent's industry and beyond. In my opinion, the level of disregard for the terms of the Award, the length of time it was persisted with, the slowness of the respondent to acknowledge its breaches, the obscurity of its explanations, and the high managerial level of the persons responsible for the breaches, all point to a need for the imposition of penalties which, in their substantial content, will carry a message which will not be disregarded by the respondent and other employers in its industry in the future.

47. The unexplained but significant turnover of the holders of the responsible managerial position, underlines in my mind the need for the penalties to carry an impact on the corporate memory of the respondent, and not just a few individuals who have been involved in this litigation. I am far from satisfied that, without a significant deterrent component, the respondent's senior management will give the attention which is required to ensure, by proper instruction and education of their subordinate managers and pay staff, that all current and future employees of the respondent, particularly the young and vulnerable, will receive the remuneration which the law requires to be paid.

The appropriate penalties

48. Based upon my above consideration of relevant factors, and taking into account all the evidence and submissions presented by the respondent in mitigation, I have concluded that the breaches which have been admitted all require a substantial penalty to be imposed. I reject the respondent's submission that nominal penalties would suffice.

49. The applicant submitted that the seriousness of the breaches called for penalties of about two-thirds of the maximum in respect of each breach. It submitted:

> *53. Before the Court is a large and well-resourced employer operating in several States, having the expertise of its peak industry body, and a Human Resources Manager available*

> *to it, which underpaid significant sums, and even more significant to the employee given his relatively low rate of pay, to a young and inexperienced employee over the whole period of his employment, and did nothing to correct that underpayment even when the employee raised questions about his rate of pay. It has still not paid the sums it has for several months conceded that it owes the employee. It is an employer which employs a significant number of young people. Senior management was aware of the circumstances.*

50. There is much force in this submission. However, I am not persuaded that the evidence before me in the present case reveals conduct which should attract the higher levels of penalty. I am able confidently to find only that the respondent's management were reprehensibly mistaken in their opinions which governed the rates of remuneration paid to Mr Mercer. I cannot find a conscious disregard for the Award in his case, nor any general failure to observe the provisions of the Award affecting other employees of the respondent. I would give the respondent the benefit of the doubt whether there was deliberate exploitation of a vulnerable entrant to the workforce.

51. I must also determine penalty on the basis that this is a "first time" civil offence, and that while a significant element of deterrence is required, there is no basis for disbelieving the expressions of regret and reform which have been made to the Court on behalf of the respondent.

52. Taking into account the factors calling for an overall assessment of appropriate penalties for these nine breaches, in relation to what was essentially a single, but serious and protracted, episode of non-compliance with the Award in relation to one employee, I have concluded that each breach would appropriately be answered by a penalty of $13,000, with total penalties of $117,000.

53. I also accept that these penalties should be discounted as a result of the respondent's decision not to dispute that there were breaches of the Award. The concession that Mr Mercer was underpaid was not made immediately when the non-compliances were brought to the respondent's attention. They were made some months after the commencement of the present proceeding, and were not accompanied by an admission of liability to penalties. An interlocutory contest was

required to determine this. Moreover, Mr Mercer was only paid his arrears shortly before the appointed hearing on penalty. However, the public purse was spared some added expenses which would have been incurred if a full hearing had been required to determine issues of non-compliance. I have decided that a discount of 20% on penalty is appropriate in this case to recognise the respondent's concessions as to its non-complying conduct.

54. I shall therefore order that a penalty of $10,400 is imposed under s.719(1) of the Act in respect of each of the admitted nine breaches of the Award. This totals $93,600. I do not consider that this total is excessive or inappropriate in all the circumstances.

55. Although the applicant sought an order for the payment of interest to Mr Mercer under s.722 of the Act, this power is available only where an award of interest can be *"included in the sum for which an order is made"* under s.719(6) for the payment of an underpayment to an employee or his superannuation fund. As a result of the respondent's belated payment to Mr Mercer, the applicant's counsel raised doubt whether the Court would now have power under s.722 to make an award of interest on the amount of arrears. He did, however, submit that there would be power under s.841 of the Act to order that an appropriate part of the penalty which I have imposed should be paid to Mr Mercer as compensation for his lost interest on his arrears. This course was not contested by counsel for the respondent.

56. I am satisfied that this is an appropriate order in this case, and shall therefore order that $2,000 of the penalty is to be paid to Mr Mercer. This is an amount roughly equivalent to simple interest on the amount paid to him in January 2008 for the period since his underpayments, according to the rate of interest which would be applied in Federal Courts by reference to the NSW *Uniform Civil Procedure Rules 2005* Sch.5. I shall also order that this should carry interest after judgment until it is paid (cf. s.723 of the Act, s.77 of the *Federal Magistrates Act 1999* (Cth), and r.26.01 of the *Federal Magistrates Court Rules 2001* (Cth)).

57. It is appropriate that the balance of the penalties should be payable to the Commonwealth, which has funded this application.

I certify that the preceding fifty-seven (57) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Lilian Khaw

Date: 13 February 2008