IN THE MAGISTRATES' COURT OF VICTORIA

AT MELBOURNE

INDUSTRIAL DIVISION

No. T02953710

BETWEEN

LYNDA McLARY SMITH (An inspector pursuant to s.84 of the *Workplace Relations Act 1996)*

Plaintiff

AND

AUSTRALIAN OPHTHALMIC SUPPLIES PTY LTD (ACN 005 419 107)

Defendant

ORDERS

1. Pursuant to s.178 of the *Workplace Relations Act 1996* penalties totalling $88,000 be imposed upon the Defendant for a total of 22 breaches of the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping In No. 1) Award 2003* **("Roping In Award");** *the Shop, Distributive and Allied Employees' Association – Victorian Shops Interim Award 2000* **("Shops Award")**; and the *National Training Wage Award 2000* **("Training Wage Award")**.

2. Payments of the penalties in order one to be made within ~~28~~ 60 days to Consolidated Revenue.

REASONS FOR DECISION

1. The Defendant, Australian Ophthalmic Supplies, trading under the name "Merringtons" is a major player in the provision of retail optometric and ophthalmic services throughout Australia. It is a national organisation with over 50 stores and has been in operation for 107 years.

2. On 16 October 2006, the Defendant informed the Court that it would not oppose the finding of the various breaches of the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping In No. 1) Award 2003* **("Roping In Award"),** *the Shop, Distributive and Allied Employees' Association – Victorian Shops Interim Award 2000* **("Shops Award")**, and the *National Training Wage Award 2000* **("Training Wage Award")**. Accordingly the Court made findings of 22 breaches of the above Awards and consequential orders which resulted in the recovery of underpayments to six now former employees of the Defendant in the total sum of $17,564.86 and the payment of interest in the total sum of $5,353.65.

3. The Plaintiff, an Inspector pursuant to s.84 of the *Workplace Relations Act 1*996, seeks the imposition upon the Defendant of penalties in respect of the following breaches:

- (b) – five contraventions of clause 4 of the Roping In Award and clause 14 of the Shops Award (ordinary week day hours);
- (d) – one contravention of clause 4 of the Roping In Award and clause 11.14 of the Training Wage Award (ordinary weekday hours);
- (f) – two contraventions of clause 4 of the Roping In Award and clause 11.4 of the Training Wage Award (ordinary weekday trainee hours);

- (h) – five contraventions of clause 4 of the Roping In Award and clauses 14 and 18.1.1 of the Shops Award (evening weekday hours);
- (j) – one contravention of clause 4 of the Roping In Award, cluse 18.1.1 of the Shops Award and clause 11.14 of the Training Wage Award (evening weekday hours);
- (l) – two contraventions of clause 4 of the Roping In Award. Clause 18.1.1 of the Shops Award and clause 11.4 of the Training Wage Award (evening weekday trainee hours);
- (n) – five contraventions of clauses 4 and 6(g) of the Roping In Award and clause 14 of the Shops Award (Saturday hours);
- (p) – one contravention of clauses 4 and 6(g) of the Roping In Award and clause 11.14 of the Training Wage Award (Saturday hours);
- (r) – two contraventions of clauses 4 and 6(g) of the Roping In Award and clause 11.4 of the Training Wage Award (Saturday trainee hours);
- (t) – four contraventions of clauses 4 and 6(I) of the Roping In Award and clause 14 of the Shops Award (Sunday hours);
- (v) – one contravention of clauses 4 and 6(I) of the Roping In Award and clause 11.4 of the Training Wage Award (Sunday trainee hours);
- (x) – six contraventions of clause 4 of the Roping In Award and clause 29.2 of the Shops Award (overtime hours);
- (z) – six contraventions of clause 4 of the Roping In Award and clause 29.2 of the Shops Award (double overtime hours);
- (bb) – five contraventions of clauses 4 and 6(i)(ii) of the Roping In Award (double overtime hours);
- (dd) – one contravention of clauses 4 and 6(i) (iv) of the Roping In Award (double overtime hours);
- (ff) – three contraventions of clause 4 of the Roping In Award and clause 38 of the Shops Award (public holiday hours);

- (hh) – two contraventions of clause 4 of the Roping In Award and clause 33.1 of the Shops Award (sick leave);
- (jj) – three contraventions of clause 4 of the Roping In Award and clause 32.4.1 of the shops Award (annual leave);
- (ll) – three contraventions of clause 4 of the Roping In Award and clause 32.6 of the Shops Award (annual leave loading);
- (nn) – two contraventions of clause 4 of the Roping In Award and clause 32.4.12 of the Shops Award (payment out of accrued annual leave on termination);
- (pp) – four contraventions of clause 4 of the Roping In Award and clause 32.4.13 of the Shops Award (payment out of pro rata annual leave on termination);
- (rr) – one contravention of clause 4 of the Roping In Award and clause 12.1.3 of the Shops Award (payment in lieu of notice on termination).

4. Having regard to evidence before the Court in respect of those contraventions I have previously found the above breaches proven.

Considerations applicable to penalty

5. The principal objects of the WR Act[1] emphasis the importance of minimum standards, including wages and the enforcement of those standards. The workers, upon whom these claims are made, are reliant on the 'safety-net' of a minimum rate of pay.

6. It is also relevant to note that the maximum penalty was increased in August 2004 from $10,000 to $33,000 per breach. Failure to pay Award rates of pay, and conditions such as annual leave are not trifling matters. These breaches occurred before the maximum penalty was increased.

[1] See s. 3 and s.88A of the pre-reform WR Act.

7. The Federal Court has in a number of decisions set out 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 that penalty.[2] Two recent decisions of Mowbray FM nicely set out these relevant considerations.[3] I am also assisted, and will draw from, the written submissions prepared by the Plaintiff.

Nature and Extent of the Conduct

8. The contraventions in this case are broad ranging and reveal a disregard for the Defendant's award obligations. They include a failure to afford important entitlements such as ordinary rates of pay; overtime penalty rates; evening work penalty rates; Saturday and Sunday penalty rates; public holiday penalty rates; appropriate rates for sick leave; appropriate rates for annual leave and annual leave loading; payment out of accrued and pro rata annual leave on termination; and payment in lieu of notice on termination.

9. The underpayments are significant. For this matter to reach the point of judgement in a Court, it has a long history. Attempts at voluntary compliance over a period of 18 months were unsuccessful. Legal proceedings are a last resort.

10. The Defendant failed to make good the underpayment until orders were made by the Court (albeit without opposition). The underpayments have now been remedied.

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[2] See for example *TPC v.CSR lt [1991]ATPR52,135 at 52152-52,153; NW Frozen Foods Pty Ltd v ACCC (1996) 71 FCR 285 at 291-29; CFMEU v Coal & Allied Operations Pty Ltd (No 2) [1999] FCA 1714 at [7-8]; TCFUA v Lotus Cove Pty Ltd [2004] FCA 43 at [46 – 47].*

[3] *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant [2007] FMCA 9 and Mason v Harrington Corporation Pty Ltd [2007]FMCA 7.*

11. The former employees were required to make affidavit material in conjunction with the Plaintiff in preparation for trial. The Plaintiff filed additional extensive affidavit material. I accept that due to the late notice given by the Defendant advising of its lack of opposition to the orders in respect of the underpayment and interest, the former employees incurred the emotional burden of witness conferences and the expectation of being called upon to give evidence at the trial.

12. The contraventions occurred over a range of stores over the period from 27 February 2003 to 6 May 2004. The Department of Employment and Workplace Relations gave notice to the Defendant concerning its award obligations as early as September 2003. The contraventions continued throughout the period of employment of the respective employees.

Size of the company

13. The Defendant is a large, national retail operation with a long history.

Similar previous conduct

14. No similar previous conduct is alleged.

Deliberateness of the breaches

15. The Plaintiff has played an active role in attempting to obtain voluntary compliance through education; the provision of all relevant award information; discussions and correspondence directly with the Defendant and their legal advisors. The Defendant has strenuously resisted these efforts and disputed liability and award coverage. Their defence was based on an argument that the employees were covered by

another manufacturing award, which provided for far less generous wages and conditions. Having regard to the affidavit material filed by the Plaintiff, and noting that the Defendant chose not to file any answering material, I conclude that their industrial strategy was a deliberate attempt to avoid their award obligations.

Involvement of senior management

16. Solicitors have acted for the Defendant from an early stage in this matter. Correspondence from the Plaintiff has been directed to senior management. I draw the reasonable inference that the contraventions occurred with the knowledge of senior management.

Cooperation with the enforcement authorities

17. The Defendant has demonstrated a profound failure to cooperate with authorities. It failed to comply with my directions concerning the filing of affidavit material prior to trial. They refused to agree facts prior to trial to avoid the need for witnesses to give evidence. It was not until the 'door of the court' loomed large that they communicated their intention not to oppose the findings of breach. It is pertinent to note that on the first day listed for trial Counsel for the Defendant indicated to the Court that it was not prepared to consent to the payments and the interest, but it would not oppose the making of those orders.

Corporate contrition and corrective action

18. The Defendant has refused to acknowledge any contravening conduct. It has filed no material to confirm that they are now meeting all award obligations. Furthermore the Defendant has resisted attempts on the part of the Office of Workplace Services to monitor the extent of its compliance with its industrial obligations since the orders were made on 16 October 2006. The Defendant demonstrates no evidence of remorse or contrition for its actions.

Deterrence

19. Having regard to the matters outlined above, the need for specific deterrence in this case is high. The affidavit of Lynda McAlary-Smith sworn 31 January 2007 outlines that the level of non-compliance by employers with minimum wages and conditions within the retail trade in this case, and accordingly the need for general deterrence is also high.

20. The following comments of Merkel J in *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 at [72] about the view of the legislature to industrial disputes is relevant to the question of deterrence.

> *"It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of the industrial laws should no longer be applicable."*

Discretion and total penalty

21. At the time of these contraventions, the maximum penalty to be imposed for a breach of a term of an award by a body corporate was $10,000[4].

[4] Section 178(4) (b) of the Workplace Relations Act 1996 (Cth).

22. Each separate obligation found in an award is regarded as a term for the purposes of the imposition of such a penalty[5]. However regard must be had to breaches arising out of a course of conduct, and in respect of multiple employees. There are 22 contraventions in total as set out above.

23. The Plaintiff concedes that whilst each of the above imposes separate obligations there is some degree of overlap in respect of the following paragraphs:

- (d) and (f) – ordinary weekday hours
- (h), (j) and (l) – evening weekday hours
- (n), (p) and (r) – Saturday hours
- (t) and (v) – Sunday hours
- (x) – overtime hours
- (z), (bb), and (dd) – double overtime hours
- (ff) – public holiday hours
- (hh) – sick leave
- (jj) and (ll) – annual leave and annual leave loading
- (nn) and (pp) – Payment out of annual leave and pro rata annual leave on termination
- (rr) – payment in lieu of notice on termination.

There are 11 categories of breaches grouped above.

24. The totality principle requires a consideration of the overall conduct of the Defendant rather than a focus on the specific number of breaches[6].

[5] *Lotus Cove at [40]*
[6] *Lotus Cove at [44] – [45], Pangea Restaurant at [23]*

What is the applicable jurisdictional limit to this Court?

25. The Plaintiff submits that the maximum penalty applicable in this case is $220,000. The Defendant argues that the Court's jurisdiction is confined to the 'jurisdictional limit' of $100,000. I invited the parties to return to Court and make submissions on this point. I have also had regard to the facsimile forwarded by the Defendant this afternoon by way of confirmation of their earlier submissions.

26. From 1 January 2005, the 'jurisdictional limit' of this Court in a civil proceeding was increased from $40,000 to $100,000.[7] Subsection 100(1) of the *Magistrates' Court Act 1989* (Vic) relevantly provides:

> ***"PART 5—CIVIL PROCEEDINGS***
>
> ***Division 1—Jurisdiction***
>
> ***100. Extent of jurisdiction***
>
> *(1) The Court has jurisdiction, subject to sub-section (2)—*
>
> *(a) to hear and determine any cause of action for damages or a debt or a liquidated demand if the amount claimed is within the jurisdictional limit; and*
>
> *(b) to hear and determine any claim for equitable relief if the value of the relief sought is within the jurisdictional limit; and*
>
> *(c) to hear and determine, with the consent in writing of the parties—*
>
> *(i) any cause of action for damages or a debt or a liquidated demand, irrespective of the amount claimed; and*
>
> *(ii) any claim for equitable relief, irrespective of the value of the relief sought; and*
>
> *(d) to hear and determine any other cause of action if the Court is given jurisdiction to do so by or under any Act other than this Act."*

27. The Plaintiff submits that the jurisdictional limit does not apply to these proceedings. They involve an application by the Plaintiff for the imposition of penalties by the Court upon the Defendant pursuant to

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[7] *Magistrates' Court Act s.3(1)* as amended by the *Magistrates' Court (Increased Civil Jurisdiction) Act 2004*

subsection 178(1) of the *Workplace Relations Act 1996* (as it existed prior to amendment made by the *Workplace Relations Amendment (Work Choices) Act 2005)* in respect of breaches by the Defendant of an award or awards.

28. The Defendant argues that the cause of action in the present case is a "cause of action for damages or a debt or liquidated demand" for the purposes of section 100(1) (a) of the *Magistrates' Court Act*, and therefore that the Court may not exceed the jurisdictional limit of $100,000. It is also said on behalf of the Defendant that prayer for relief seeks various declarations, and accordingly the Court's jurisdiction is conferred by s. 100(1) (b) of the *Magistrates' Act.*

29. A complainant in an action brought under section 178 must prove breach of a relevant award, certified agreement or order. Upon making this finding of fact, the Court is conferred jurisdiction to "*impose a penalty*". The breach need not relate to an underpayment of wages or any monetary issue. The power to impose a penalty does not arise from any declaration the Court may made in respect of the particular breach found. (i.e. such as a declaration in regard to the precise underpayment involved). Accordingly a compliant of this type is not properly characterised as a *"cause of action for damages or a debt or a liquidated demand"* for the purposes of s.100 (1) (a). Nor do I accept that it is a *"claim for equitable relief"* as submitted by the Defendant.

30. The Magistrates' Court of Victoria, being a *"court of competent jurisdiction"* as defined by s.177A of the *Workplace Relations Act 1996* is conferred jurisdiction to hear and determine this case under s.100(1)(d) of the *Magistrates' Court Act 1989* and s.178 of the *Workplace Relations Act 1996.* Accordingly the Court is not constrained by the jurisdictional limit of $100,000.

31. I note that this conclusion is said to differ from comments made by me in my decision in *Shacklock v Artistcare (Vic) Pty Ltd* unreported 21

February 2007. This point was not argued before me in that case, and arose from a statement made by Counsel for the Plaintiff in regard to jurisdiction. I expressed on that occasion that I was not satisfied that the point had been previously determined. Accordingly I sought in this case to be specifically addressed on the question of jurisdiction. It is now desirable that I express a view on this issue regardless of the specific quantum of penalty in this case.

Conclusion

32. Taking in account the factors above I consider that a penalty of 80% of the maximum for each category of breach is warranted in all the circumstances. The total aggregate penalty will therefore be $88,000.

33. I will order that this pecuniary penalty be paid into Consolidated Revenue.

Kate Hawkins
Magistrate
19 April 2007