

**CHIEF INDUSTRIAL MAGISTRATE'S COURT**  
**New South Wales**

**Jurisdiction:** Civil

**Parties:** **Prosecutor:** Mandy Polgar  
Office of Workplace Services

**Defendant:** Raxigi Pty Ltd

**Case Number:** 103819/06/4 & 103803/06/4 (Newcastle)

**Hearing Dates:** 4 May 2007; 7 June 2007.

**Date of Decision:** 25<sup>th</sup> July 2007

**Legislation:** Workplace Relations Act 1996 (Cmwlth)  
Ss 718 & 719.  
Motels, Accommodation and Resorts Award  
1998 (the award).

**Magistrate:** G A Miller

**Representation:** Prosecutor: Mr A Hatcher of Counsel  
Respondent: Mr Z Hovanessian, Sole Director

**Result**

**Breaches established. The proceedings are adjourned to 31 July 2007 at 10am to the Chief Industrial Magistrate's Court, Level 11, John Maddison Tower, cnr Goulburn and Castlereagh Sts, Sydney for Sentencing and Orders.**

### **Reasons for Decision**

Raxigi Pty Limited formerly trading as the Molly Morgan Motor Inn, New England Highway, East Maitland NSW is charged by Court Attendance Notice by the Office of Workplace Services with breaches in respect of the observance of the Motels, Accommodation and Resorts Award 1998 (the award), under former section 178(1) and (as of 27 March 2006) the current s719 (1) of the Workplace Relations Act in regard to the employment of Donna Maria Wondergem and Sandra Davies. The defendant has entered pleas of not guilty to each of the charges.

The charges are further particularised as follows:

In regard to Donna Wondergem-

1. Failure to comply with Clause 13. Types of Employment, Sub-Clause 13.2 Casual Employment of the award, regarding rates of pay and including the award increase due from the pay period commencing on or after 24 June 2005.
2. Failure to comply with Clause 13. Types of Employment, Sub-Clause 13.2 Casual Employment of the award, regarding work performed on holidays.

In regard to Sandra Davies-

1. Failure to comply with Clause 15. Redundancy of the award
2. Failure to comply with Clause 16. Notice of Termination of the award.
3. Failure to comply with Clause 20. Payment of Wages, Time and Wages Records of the award
4. Failure to comply with Clause 23. Hours of Work, Sub-Clause 23.8 Work Outside Daily Hours of the award.
5. Failure to comply with Clause 23. Hours of Work, Sub-Clause 23.10 Work on Rostered Days Off of the award.
6. Failure to comply with Clause 25. Overtime of the award.
7. Failure to comply with Clause 28. Annual Leave, Sub-Clause 28.7 Pro-rata Leave

In addition to seeking the imposition of a penalty under s719 (1) and 719(4) of the Act for the alleged breaches an order is sought under the current subsection 719(6) of the

Act for payment of outstanding award entitlements to Donna Wondergem in the amount of \$252.57 and to Sandra Davies in the amended amount of \$13,796.66.

At the hearing Mr Hovanessian, the sole director of the defendant company appeared legally unrepresented. There was no issue as to formal matters such as responsiveness, the employment of the two women and the authority of the prosecutor. Indeed at the conclusion of the hearing three matters were in issue, all in regard to Sandra Davies. They are the entitlement to waiting time, notice of termination and severance pay.

Beside these three issues, I gained the clear impression that Mr Hovanessian's main concern was the reputation of the defendant and establishing that any breaches found were not intentionally or deliberately made but purely arose from either a misinterpretation or misapplication of the award and its provisions.

A number of witnesses gave evidence and a substantial number of documents tendered. Called by the prosecutor were Inspector John Christie and Sandra Davies. Called by the defendant were Deborah Blaze, former live in joint manager of the motel, Mr Hovanessian and an affidavit tendered by Natalie Fox, office administrator/wages clerk for the defendant.

In regard to Donna Wondergem the defendant admitted it underpaid her for the period alleged from June 2005 as it failed to pay her an award increase. A cash payment was made of \$252.57 prior to the commencement of the hearing in recognition of that underpayment of which Mr Hovanessian said it was not a deliberate underpayment but an error.

In regard to Sandra Davies although there was some doubt in final submissions as to whether two or three items were admitted, therefore, leaving three or four items in issue, my notes show three issues in dispute, they are waiting time, notice of termination and severance pay.

## **Waiting time**

The evidence was quite clear that annual leave to Ms Davies was not paid on termination that is 19 January 2006 and was not paid to her until 14 March 2006, the day the cheque to her for the annual leave to Ms Davies was written. A period of some seven full weeks plus three days. The fact there was a late payment is indisputable on the evidence.

Clause 20.1.8 is from my experience an unusual clause as waiting time is defined to include in the event of an employee not being paid on the date of termination of employment, such employee shall be paid at the rate of time and a half until payment is effected with a minimum payment of 2 hours and a maximum of eight hours per day. It may be seen as draconian by the defendant but its terms are unambiguous and therefore to be enforced by this court.

I have some difficulty in accepting the defendant's evidence that it thought the annual leave payment would be carried over or the liability transmitted to the purchaser of the motel where by Ms Davies would be paid her entitlement when she next took physically the annual leave. There was no legal substance to the issue. There was no agreement with the purchaser Bittini Pty Ltd (Bittini) that employment of Ms Davies would continue. In fact the Contract of Sale expressly provided it would not. Annual leave was not paid, and was payable, on termination. Accordingly waiting time is payable as claimed.

## **Notice of Termination**

The motel had been for sale for some months. The defendant case was that Ms Blaze gave early notice to Ms Davies in November 2005 that her employment would end after settlement of the Sale expected on 18 January 2006. (Para 18 of her affidavit)., However in the witness box Ms Blaze did not adhere to that evidence. Ms Blaze giving a statement that was consistent with Ms Wondergem's statement that in November 2005 she told the employees that the motel had been sold but not giving a date as to their termination (TAB 38). Furthermore it was clear from Ms Blaze's cross-examination that the written statement given by Ms Blaze to the Court was

contaminated by the way it was made with the direct input of Mr Hovanessian in its preparation.

I am satisfied that notice of termination of employment was first given on 4 January 2006 by the incoming purchaser Bittini; with the defendant advising Ms Davies on 10 January 2006 of her termination. Ms Davies employment ceased with the defendant on 19 January 2006, a day later than advised. Accordingly, a maximum of 15 days notice was given, leaving a 13-day period for which pay in lieu of notice under cl 16 is outstanding.

### **Severance Pay**

It was clear on the evidence that Ms Davies was employed from 22 February 1999 to the 19 January 2006. Furthermore it is clear that Ms Davies was made redundant as a result of her termination of employment. It was clear that the motel was sold. The defendant no longer required her services. The defendant relies on Cl 15.7.1 (a) where the employee accepts employment with the transmittee, which recognises the period of continuous service that the employee had with the transmittor and any prior transmittor to be continuous service of the employee with the transmittee as taking the defendant outside redundancy provision.

However, it is clear that the work being offered by Bittini to Ms Davies was employment on a totally different basis to her permanent employment with the defendant (tab 30. Ex 3). What does concern me is the defendant's reliance on this clause in light of the contract of sale between the defendant and Bittini (Cl 59 C of S) whereby as a condition of the contract of sale the employment of all employees of the defendant were to be terminated prior to settlement. The defendant's argument here was most disingenuous.

There is the requirement for the prosecutor to establish under the Act for the operation of the Redundancy/severance pay clause in the award that the employer at the relevant time had 15 or more employees. Although Mr Hovanessian stated this was not an issue during the hearing he did raise it in final submissions. The 15 employees

requirement includes both permanent and casual employees who have worked more than 12 months.

The defendant failed to produce as required on subpoena documents relevant to this issue apart from a prepared document at the end of Ex 3. This document identifies a number of employees where if casual are excluded leaves 13 employees. However, evidence from Ms Wondergem; Mr Hovanessian evidence re two employees at the Victoria and Albert Guesthouse; and Kay Condon an employee not listed at the motel not listed in prepared document; plus the list provided by Bittini satisfies me that at the relevant time the defendant had in its employ more than 15 qualifying employees. This leaving aside any inference that may be made against the defendant for its failure to produce the subpoenaed documents.

### **In conclusion**

I am satisfied the breaches are made out to the required standard (See *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87).

I am also satisfied on the evidence and extensive calculations that are before the Court that on checking against the award the amount of \$13, 796.66 is outstanding to Ms Davies.

**I will adjourn the proceedings to 31 July 2007 at 10am to the Chief Industrial Magistrate's Court, Level 11, John Maddison Tower, cnr Goulburn and Castlereagh Sts, Sydney for Sentencing and Orders.**

G A MILLER

Acting Industrial Magistrate