FEDERAL MAGISTRATES COURT OF AUSTRALIA

RAJAGOPALAN V BRINKER AUSTRALIA PTY LTD [2008] FMCA 311

INDUSTRIAL LAW – Application of penalty – breach of *Workplace Relations Act 1996* – contravention of ss.337(8), 337(9), 342(1) – two breaches of the company's own Australian Workplace Agreement – consideration of penalty – payment of damages to ex-employee.

Uniform Civil Procedure Rules 2005
Crimes Act 1914 (Cth) s.4AA
Workplace Relations Act 1996 (Cth) ss. 6, 167, 324, 326, 337, 340, 341, 342, 347, 407, 718, 719, 826.
Workplace Relations (Workchoices) Act 2005 Amendments

Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd [2001] FCA 383
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Construction, Forestry, Mining and Energy Union v Hamberger (2003) 127 FCR 309
Cotis v Pow Juice [2007] FMCA 140
CPSU (Community and Public Service Union) v Telstra Corporation [2001] FCA 1364
Finance Sector Union v Commonwealth Bank of Australia [2005] FCA 1847
Hodgkiss v Sunland Construction (Qld) Pty Ltd [2006] FCA 1566
Kelly v Fitzpatrick [2007] FCA 1080
Markarian v R (2005) 228 CLR 357
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Wong v R [2001] HCA 64

Applicant:	SUNDAR RAJAGOPALAN
Respondent:	BRINKER AUSTRALIA PTY LTD
File number:	SYG 2339 of 2007
Judgment of:	Lloyd-Jones FM
Hearing date:	7 March 2008
Delivered at:	Sydney
Delivered on:	14 March 2008

REPRESENTATION

Counsel for the Applicant:	Mr G Farmer
Solicitors for the Applicant:	Ms A Peters of Freehills
Respondent:	No appearance

DECLARATIONS

1. A declaration that, by s.826 of the Act the respondent contravened s.337(8) of the Act.

2. A declaration that, by s.826 of the Act the respondent contravened s.337(9) of the Act.

3. A declaration that, by s.826 of the Act the respondent contravened s.342(1) of the Act.

4. A declaration that the respondent breached clause 5(c) of the Chilli's Texas Grill Australian Workplace Agreement (AWA) in respect of two separate breaches.

ORDERS

(1) In respect of the contravention of s.337(8), failure to provide prior access by AWA, of the *Workplace Relations Act 1996* (Cth) the respondent pay a penalty of $6,000.

(2) In respect of the contravention of s.337(9), failure to provide an information statement of the *Workplace Relations Act 1996* (Cth) the respondent pay the penalty of $6,000.

(3) In breach of s.342(1), failure to lodge an AWA within fourteen days, of the *Workplace Relations Act 1996* (Cth) the respondent pay the penalty of $3,000.

(4) In respect of the beach of clause 5(c) of the Chilli's Texas Grill AWA in that it failed to advise the employee of her core hours of employment the respondent pay the penalty of $12,000.

(5) In respect of the breach of clause 5(c) of the Chilli's Texas Grill AWA in that the respondent did not provide the employee with a minimum 20 hours paid employment each fortnight from 13 October 2006 until 21 December 2006 and that the respondent pay the penalty of $12,000.

(6) Pursuant to s.841 of the Act, the respondent shall pay the penalties in orders one to five to be made within 28 days to consolidated revenue to the Commonwealth.

(7) As a result of the breaches of clause 5(c) of the Chilli's Texas Grill AWA the respondent pay Kirrily Joy Piper the amount of $720.25 plus interest from 21 December 2006 until the date of this decision calculated at a rate in accordance with the *Uniform Civil Procedure Rules 2005*. This amount to be paid to Ms Piper within 28 days.

(8) No order as to costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2339 of 2007

SUNDAR RAJAGOPALAN
Applicant

And

BRINKER AUSTRALIA PTY LTD
Respondent

REASONS FOR JUDGMENT

The proceedings

5. This is an application seeking declarations and the award of penalties under the *Workplace Relations Act 1996* (Cth) ("WR Act"). The proceedings began with an application filed on 27 July 2007, although the applicant, an inspector under the Act, now relies upon a further amended application filed on 27 August 2007. The application seeks declarations and penalties for the following:

   a) contravention of s.337(8)-failure to provide prior access to AWA;

   b) contravention of s.337(9) – failure to provide an information statement;

   c) contravention of s.342(1) – failure to lodge AWA within fourteen days;

   d) breach of the company's AWA provisions and the payment of consequential damages.

6. At the first court date directions hearing on 24 August 2007, both parties were represented and orders setting out a timetable were made

with the matter listed for further directions at 9.30am on 30 November 2007. The matter was then listed for final hearing at 10am on 18, 19 and 20 December 2007.

7. At the directions hearing on 30 November 2007, both parties were represented and orders were made requiring the parties to file and serve outlines of their submissions and any list of authorities that were relied upon at a date fixed prior to the final hearing.

8. At the scheduled commencement of the final hearing on 18 December 2007, a director of the respondent company appeared and indicated to the Court that due to severe financial difficulties being experienced by the corporation, the services of the legal advisors were terminated as the company could not meet payment for further representation. The director indicated that it was hoped that the Christmas trading period would provide the organisation with sufficient funds to be able to continue trading and to retain further legal representation. The director indicated that he was not legally qualified and incapable of representing the organisation in the proceedings. I granted an adjournment until the 7 March 2008 for further hearing.

9. The Court was advised in writing on 5 March 2008 by a representative of the respondent company that they did not intend to appear at the final hearing scheduled for 7 March 2008 and would submit to any orders made by the Court in respect to penalty.

10. At the commencement of the final hearing, Mr Palmer tendered an affidavit of John Anthony Fleming sworn 6 March 2008 stating that he was a workplace inspector and a legal practitioner employed by the Workplace Ombudsman. Mr Fleming stated that on or about 11 February 2008 he became aware that wind up proceedings had commenced in the Equity Division of the Supreme Court of NSW against Brinker Australia Pty Ltd and that those proceedings would be first before the Supreme Court on 3 March 2008. At that time both parties were represented and the matter was adjourned back to the Corporations list on 10 March 2008. The registrar conducting the list on 3 March 2008 was advised that the company was about to complete the sale of the subject restaurant and that the sale may be affected f winding up orders were made.

11. In these circumstances, I indicated that I would proceed with the final hearing to determine whether:

    a) declaration in relation to breaches of the Act and the Chilli's Texas Grill Australian Workplace Agreement;

    b) the imposition of penalties pursuant to ss.407 and 719 of the Act against the respondent; and

    c) an order under s.719(5) of the Act that the respondent pay damages to Ms Kirrily Piper

    should be made.

Background

12. The respondent operated a restaurant business at the Northgate Centre, Wollongong under the trading name of "Chilli's Texas Grill" ("Chilli's). In August 2006, Ms Kirrily Piper attended two interviews for a food and beverage service position at Chilli's and was successful in obtaining that position. On 17 August 2006, she attended an orientation session at Chilli's conducted by a store manager, Ms Carly Jones. During that session, Ms Piper was given an AWA. Ms Piper read the AWA for about five to ten minutes, while the orientation session continued, and then signed it. Her signature was witnessed by another participant attending the orientation session. The signature page was then removed from the document and handed back to Ms Jones while Ms Piper retained the balance of the document.

13. Ms Piper was not given a copy of the AWA before the orientation session on 17 August 2006, nor was she given access to the AWA in writing, as required by s.337(1) of the Act.

14. On 13 October 2006, the respondent lodged with the Workplace Authority (formerly Office of the Employment Advocate) a declaration form in relation to the AWA between the respondent and Ms Piper. The AWA was not lodged with the Workplace Authority within 14 days of being approved (ie by 5 September 2006) as required by s.342(1) of the Act.

15. Ms Piper commenced work at Chilli's on 31 August 2006 as a part-time employee. On 15 December 2006 Ms Piper resigned. Throughout her employment with the respondent, Ms Piper was given less than 20 hours work each fortnight in breach of clause 5(c) of the AWA. The respondent also failed to inform Ms Piper of her core hours of employment as required by clause 5(c) of the AWA.

16. Ms Piper was a young university student working on a part-time basis as a "Food Server". Ms Piper was vulnerable to exploitation by virtue of her youth, the unskilled and low paid nature of the work, and the shortage of available work in the Wollongong area.

Evidence

17. Mr Farmer indicated to the Court that he relied upon the following affidavits as unchallenged evidence in this matter:

    a) the affidavit of Sundar Rajagopalan sworn 13 September 2007;

    b) the affidavit of Kirrily Joy Piper affirmed 13 September 2007;

    c) the affidavit of Brian Forbes affirmed 20 November 2007.

Legislation

18. Section 324 of the WR Act (as it was in force at the relevant times) provides as follows:

> *So far as the context permits:*
>
> *(a) a reference in this Part to a workplace agreement includes a reference to a proposed workplace agreement.…*

19. Section 326(1) provides that:

> *(1)An employer may make an agreement (an Australian workplace agreement or AWA) in writing with a person whose employment will be subject to the agreement.*

20. Section 337 of the WR Act relevantly states that:

> *(1If an employer intends to have a workplace agreement (other than a greenfields agreement) approved under section 340, the*

employer must take reasonable steps to ensure that all eligible employees in relation to the agreement either have, or have ready access to, the agreement in writing during the period:

(a) beginning 7 days before the agreement is approved; and

(b) ending when the agreement is approved.

(2) The employer must take reasonable steps to ensure that all eligible employees in relation to the agreement are given an information statement at least 7 days before the agreement is approved.

(8) An employer contravenes this subsection if:

(a) the employer lodges a workplace agreement; and

(b) the employer failed to comply with subsection (1) or (if applicable) paragraph (3)(b) in relation to the agreement.

Contravention--information statement

(9) An employer contravenes this subsection if:

(a) the employer lodges a workplace agreement; and

(b) the employer failed to comply with subsection (2) or (if applicable) paragraph (3)(a) in relation to the agreement.

(10) Subsections (8) and (9) are civil remedy provisions.

21. Section 340 relevantly provides as follows:

(1) An AWA is approved if:

(a) the AWA is signed and dated by the employee and the employer; and

(b) those signatures are witnessed…

22. Section 341 provides:

(1) An employer contravenes this subsection if:

(a) the employer lodges a workplace agreement (other than a greenfields agreement); and

(b) the agreement has not been approved in accordance with section 340.

(2) Subsection (1) is a civil remedy provision.

23. Section 342 relevantly provides:

> *(1) If an AWA, an employee collective agreement or a union collective agreement has been approved in accordance with section 340, the employer must lodge the agreement, in accordance with section 344, within 14 days after the approval.*
>
> *(3) Subsections (1) and (2) are civil remedy provisions.*

24. Section 347 relevantly provides:

> *(1) A workplace agreement comes into operation on the day the agreement is lodged.*
>
> *(2) A workplace agreement comes into operation even if the requirements in Divisions 3 and 4 and section 342 have not been met in relation to the agreement.*

25. Section 826 relevantly provides:

> *(1) Where it is necessary to establish, for the purposes of this Act or the BCII Act, the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:*
>
> *(a) that the conduct was engaged in by an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; and*
>
> *(b) that the officer, director, employee or agent had the state of mind.*

26. Section 407 of the Act enables the Court to order pecuniary penalty as follows:

> *(1) The Court may order the person who contravened the civil remedy provision to pay a pecuniary penalty of up to:*
>
> …
>
> *(b) if the person is a body corporate--5 times the maximum number of penalty units specified in subsection (2).*
>
> *(2) The maximum number of penalty units is as follows:*
>
> …

(c) for subsection 337(8)--30 penalty units;

(d) for subsection 337(9)--30 penalty units;

(g) for subsection 342(1)--30 penalty units;

Penalty

27. The following are the amounts against which this Court can exercise its discretion to determine a penalty in relation to each breach. The applicant is seeking penalties in relation to:

a) failure to provide ready access to the AWA (s.337(8));

b) failure to provide an information statement (s.337(9)); and

c) failure to lodge the AWA within 14 days (s.342(1)).

The applicant is also seeking penalties for the following contravention of the respondent's AWA:

a) failing to advise Ms Piper of the core hours of employment (as required by clause 5 (c); and

b) failure to provide Ms Piper with a minimum of 20 hours of paid employment in each 14 day cycle (as required by clause5(c)).

Section 407 and 719 of the Act permit the Court to impose a penalty on the respondent in breach of the Act and an AWA. The penalty is a civil remedy.

28. The applicant, an appointed workplace inspector within the terms of s.167 of the Act has standing pursuant to s.718 of the Act to seek the imposition of penalties. The respondent is a corporation and an "employer" under the meaning of s.6 of the Act.

29. Section 4AA of the *Crimes Act 1914* (Cth) sets the monetary value of a penalty unit at $110 which results in the maximum penalty as follows:

a) s.407(2) of the Act provides that the maximum penalty be imposed for a corporation in relation to breaches of ss.337(8), 337(9) and 342(1) of the Act is five by thirty penalty units for each breach being $16,500 per breach; and

b) s.719(4) of the Act provides that the maximum penalty to be imposed on a corporation for breach of a term of an AWA is three hundred penalty units for each breach being $33,000.

30. Mr Farmer, in his written submissions identified a number of considerations relating to the Court exercising its discretion in relation to the imposition of penalties pursuant to s.719 of the Act. These were identified in the decision: *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 per Mowbray FM at [24] where his Honour stated:

> *[24] 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 the penalty (see for example Trade Practices Commission v CSR Ltd [1991] ATPR 52,135 at 52,152–52,153, NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 291–292; Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd (No 2) [1999] FCA 1714 at [7–8], Textile Clothing and Footwear Union of Australia v Lotus Cove Pty Ltd [2004] FCA 43 at [46–47]).*

31. This was affirmed in the decision: *Kelly v Fitzpatrick* [2007] FCA 1080 per Tracey J at [14] where his Honour stated:

> *[14] In Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:*
>
> > *The nature and extent of the conduct which led to the breaches.*
> >
> > *The circumstances in which that conduct took place.*
> >
> > *The nature and extent of any loss or damage sustained as a result of the breaches.*
> >
> > *Whether there had been similar previous conduct by the respondent.*

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

The size of the business enterprise involved.

Whether or not the breaches were deliberate.

Whether senior management was involved in the breaches.

Whether the party committing the breach had exhibited contrition.

Whether the party committing the breach had taken corrective action.

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

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

The need for specific and general deterrence.

The parties accepted that these considerations should guide the exercise of my discretion in the present proceeding.

32. This approach has also been adopted in *Construction, Forestry, Mining and Energy Union v Hamberger* (2003) 127 FCR 309 at [51]; *Hodgkiss v Sunland Construction (Qld) Pty Ltd* [2006] FCA 1566 at [11].

33. Mr Farmer has assisted the Court in identifying those considerations which are relevant to this matter and I will rely substantially on those submissions as set out below.

Nature and extent of conduct

34. Mr Farmer submits that the respondent's conduct in failing to provide Ms Piper with an information statement or seven days ready access to her AWA prevented her from being properly informed of the terms of which she had agreed. She was not provided with the opportunity to engage in fair and open bargaining.

35. Section 337(AWA pre-lodgement provisions) was introduced to the Act by the *Workplace Relations (WorkChoices) Act 2005 Amendments*.

Parliament recognised that employers are in a privileged position in the agreement making process and have a responsibility to ensure their employees are able to make informed decisions about the workplace agreement they are entering into. Sections 337(8) and 337(9) attach penalties for breaches in these procedures. The *WorkChoices* legislation afforded Ms Piper, a vulnerable employee, protection by ensuring that her employer complied with the agreement making provisions within the legislation. Ms Piper should have had access to seek advice and make an informed decision during these negotiations.

Nature of the loss

36. The respondents breached their own AWA provisions by failing to provide Ms Piper with the minimum twenty hours per fortnight for each of the last six fortnights of her employment. It is submitted that the breaches were consistent and extensive in the context of Ms Piper's approximately three and a half months employment. This indicates a regular disregard of the respondent's obligation. The total loss to Ms Piper arising from the breach of clause 5(c) of the AWA is $720.25. I will return to the quantification of this amount in the consideration of penalties below.

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

37. It is submitted that s.719(2) of the Act requires that where two or more breaches of a "term of an applicable provision" arise out of course of conduct, they are to be treated for the purposes if s.719(2) is constituting a single breach of a term. The two breaches of clause 5(c) of the AWA arise from a failure to discharge two separate obligations under that clause, and to that end it is submitted that each of the breaches are discrete and separate for the purposes of penalty. However, s.407 does not provide that the Court treat the agreement making breaches as arising from a single course of conduct. Nevertheless, the three agreement making breaches arise from separate provisions of the Act and it is submitted that each of the breaches are discrete and separate for the purposes of penalty. I agree with those

submissions and accordingly will treat the five breaches as discrete and separate for the purpose of assessing penalty.

Size of respondent's business

38. It is submitted that the respondent operates its business as part of the large Chilli's group of companies, under a US parent company. Outlets operating in Australia include Wollongong (which is the subject of these proceedings), Wentworthville, Perth, Sunshine Coast, Tasmania and Townsville. The relationship between these individual outlets is not clear, however there appears to be some sharing of resources such as the services of a specialist HR and Payroll Manager, Ms Nicky Griffin, in the Wollongong, Shellharbour and Wentworthville businesses.

39. The affidavit of Brian Forbes indicates that the AWA's lodged by Brinkers cover both the businesses of Wollongong and Wentworthville. Whereas the 'Chilli's Texas Grill AWA' lists Brinker Australia Pty Ltd Chilli's (Shellharbour) Pty Ltd and Chilli's (Penrith) Pty Ltd as the employers trading as Chilli's Texas Grill. Although there is no evidence as to staff numbers I have formed the impression that there is a large number employed in the restaurants over evening weekend periods with up to 50 staff in the Wollongong restaurant. Various references are made to the positions of Store Manager, Training Manager, Assistant Training Manager and HR and Payroll Manager which indicate that the business has a well defined and developed management structure. I agree with the submission that this indicates a sophisticated business operation and this is relevant to the imposition of penalty.

40. I have referred earlier in this judgment to the financial position of Brinker Australia Pty Ltd which has been provided by one of its directors who appeared at the hearing on 18 December 2007 seeking an adjournment. The information provided in the affidavit of John Anthony Fleming detailed the proceedings in the Equity division of the Supreme Court of NSW where a winding up application was being made. However, an employer's obligation to adhere to industrial instruments and the requirements of the WR Act are not affected by

their financial position. I rely upon the observations that are made in the decision in *Cotis v Pow Juice* [2007] FMCA 140 at [68]-[77].

Whether or not the breaches were deliberate

41. It is submitted that the respondent's actions demonstrate a reckless disregard for its obligations under the Act by employing staff on AWA's, along with the apparent failure to provide training to its managers on the appropriate legislative requirements. The existence and structure of these AWA's indicates that the organisation has gone to considerable effort to draft, adopt and have the document approved. From these actions, it seems that the reasons for this are to reap the benefit of the added flexibility available with form of employment arrangements. However, the organisation has failed to instruct its manager as to how the arrangements are to be implemented and administered on a daily basis.

42. I agree with the submission that the respondent's failure to provide Ms Piper of her core hours and consistent failure to provide her with a minimum of 20 hours per fortnight results in positive, wilful and deliberate breaches demonstrating a cavalier attitude of the obligations to Ms Piper.

Involvement of senior management

43. It is submitted that the breaches were caused by actions or omissions of persons appointed as "store managers" of the Wollongong restaurant, namely Imran Suleman and Carly Jones, as well as Nicky Griffin, the respondent's HR and Payroll Manager. In the circumstances I am satisfied that the breaches were known to management.

Whether the respondent has exhibited contrition, or took corrective action

44. I agree with the submission that there is no evidence before me to indicate contrition or corrective action on the part of the respondent to warrant any significant reduction in penalty.

Need for specific and general deterrence

45. It is submitted that general deterrence will always be a significant factor in sentencing for breach of the Act. The imposition of penalties act as a warning to other employers and reinforces the seriousness in which the courts treat the offending conduct. The need for general deterrence is especially high in industries that employ young, low paid and inexperienced workers such as the hospitality industry. The importance of the penalty carries with it a message that proper care ought to be taken to ensure such workers are treated in accordance with industrial law.

46. The authorities have emphasised the significance of deterrence in setting pecuniary penalty: *CPSU (Community and Public Service Union) v Telstra Corporation* [2001] FCA 1364 at [9]; *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 at [60]. In *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd* [2001] FCA 383, his Honour Finkelstein J at [13] when discussing the general deterrence in a trade practices matter stated:

> *13 … If general deterrence is the principal object of imposing a penalty, the number of cases that still come before the court, and the seriousness of the conduct that is involved in some of them, suggests that past penalties are not achieving that object. For a penalty to have the desired effect, it must be imposed at a meaningful level. Most antitrust violations are profitable. Accordingly, the penalty must be at a level that a potentially-offending corporation will see as eliminating any prospect of gain.*

47. It is submitted that given the substantial responsibilities the Act places upon employers in the agreement making process, general deterrence of such breaches is a very important consideration in imposing an appropriate penalty. The failure to comply with the pre-lodgement and lodgement requirements threatens the integrity of the agreement making process and the application of penalties is an important "check and balance" system which allows AWA's to operate on lodgement.

48. Mr Farmer brought to the Court's attention that the *Workplace Relations Amendment (Transition to Forward and Fairness) Bill 2008*

is currently before the parliament. The bill proposes to prevent the making of new AWA's. However, the bill is yet to be passed by parliament. Penalties act as a deterrent for breaches in the agreement making process.

Contravention of the AWA pre-lodgement requirements s.337(8)

49. By s.826 of the Act, the respondent contravened s.337(8) in that it:

a) lodged a workplace agreement; and

b) failed to comply with the requirements of s.337(1) to take reasonable steps to ensure that the employee had, or had ready access to, a copy of the proposed agreement in writing during the period beginning seven days before the proposed agreement was approved (namely, 15 August 2006) and ended when the proposed agreement was approved (namely, 22 August 2006).

50. In the affidavit of Kirrily Joy Piper, paragraphs [15] to [28] detail what occurred during the orientation session held at Wollongong on 17 August 2006. Specifically paragraphs 18 to 20 discuss the processing of the AWA as follows:

> *18. At or around this point in the orientation session, Carly distributed AWA's to everyone. As she was handing them out, she said words to the effect of: "This is your AWA which you have to sign. It contains the terms and conditions of your employment. Please have a look at it now and sign it. If you are not comfortable signing it now, you can take it home and read it, and bring it back later."*
>
> *19. I spent about 5-10 minutes skim-reading the AWA after it was handed to me, while the orientation session continued. I felt that in order to secure my position at Chilli's, it would be best if I singed the AWA straight away. In my experience, jobs for young people are difficult to come by in the Wollongong area, because there is a large population of university students. Everyone else in the room was signing their AWA on the spot and I did not want to jeopardise my chances of getting the job by saying I wanted to take the AWA home to read it before I signed it. Even though the telephone message my mother left for me said I 'got the job', I considered the phone call as only an offer of a job. I did not see myself as actually having the job until I signed whatever*

employment contract Chilli's wanted me to sign, because nothing about the job had been confirmed in writing until that point.

20. About 10 minutes after the AWA was handed to me, I wrote in my details and signed my name on the signature page. I then swapped AWA's with the girl who was sitting next to me at the orientation session, Laura Johnston, and we signed as witnesses to each other's AWA's.

51. Considering the above evidence in conjunction with the issues in paragraphs [30]-[31], [34]-[36] and [37]-[38] I believe a penalty of $8,000 should be imposed for breach of s.337(8).

Contravention of AWA pre-lodgement requirements – s.337(9)

52. By s.826 of the Act, the respondent contravened s.337(9) in that it:

a) lodged a workplace agreement; and

b) failed to comply with the requirements of s.337(2) to take reasonable steps to ensure that the employee in relation to the proposed agreement was given an information statement at least seven days before the proposed agreement was approved.

53. Paragraphs [4]-[14] of the affidavit of Kirrily Joy Piper clearly set out the circumstances in which she obtained the position at Chilli's and her attendance at two interviews prior to the orientation session. Paragraph [12] states:

12. The issue of an Australian Workplace Agreement (AWA) in relation to my potential job at Chilli's was not discussed at either the first or second interview.

Also relevant are paragraphs [30]–[31], [34]–[36] and [37]–[38] above. Ms Piper was not provided with a copy of an information statement at any stage. It is not clear whether this was overlooked in the case of Ms Piper or that the organisation did not have one available to provide to any potential employee. I impose a penalty of $8,000 for the breach of s.337(9).

Contravention of AWA pre-lodgement requirements – s.342(1)

54. By s.826 of the Act, the respondent contravened s.324(1) in that:

a) an AWA was approved in accordance with s.340(1); and

b) the respondent failed to lodge the AWA within 14 days of the date that it was approved.

55. The affidavit of Brian Forbes indicates that his review of the Phoenix computer system that is used to record the lodgement of AWA's with the Workplace Authorities indicates that Brinker Australia Pty Ltd has made 11 electronic lodgements with the Workplace Authority consisting of either single or multiple copies of agreements. Of the 11 electronic lodgements between 10 May 2006 and 13 October 2006, 22 individual AWA's were received. In the absence of any complaint in respect of the documents other than those relating to Ms Piper suggest that the only late filing was her late filing fee and not the remaining 21.

56. After considering the size and structure of the respondent's business and the retention of specialist HR and Payroll Manager, it would be expected that a person holding this position would be well aware of the requirements of the legislation and this view is supported by the fact that the provision has been complied in respect to 21 previous filings with only one late filing. There is no evidence before me to explain this occurrence and I can only infer that there has been some failure in the organisation of internal administration. I believe a penalty of $4,000 should be imposed for the breach of s.342(1).

Breach of AWA provisions

57. The applicant's statement of claim sets out the following facts relevant to the breach:

> *The employee was employed on a part-time basis by the Respondent*
>
> *Particulars*
>
> *(i) The employee was paid at all times in accordance with the hourly wage rate for probationary part time employee, as provided for in Attachment B of the AWA.*

(ii) In the lodgement documentation accompanying the AWA completed on behalf of the respondent on 13 October 2006, the respondent's employment status is recorded as part time.

(iii) Pursuant to clause 14(a) of the AWA, the employee was subject to a 3 month probationary period at the commencement of her employment with the respondent.

In the respondent's payslips for the periods ending:

- *18 October 2006;*
- *1 November 2006;*
- *14 November 2006;*
- *29 November 2006*
- *13 December 2006; and*
- *27 December 2006,*

the respondent's position is described as 'AWA 19 Years Old Prob'.

(iv) Under clauses 14(d) and Attachment B of the AWA ,only full-time and part-time employees are subject to probationary periods. The respondent was not a full-time employee.

At all material times, the respondent was bound by clauses 5(c) and 15.4 of the AWA in relation to the employee.

Particulars

(i) The AWA provides that the respondent is a party to the AWA.

(ii) Clause 5(c) provides that:

"Part-Time employees' are those Employees specifically engaged by the Employer as Part time Employees. Part-time Employees will be advised of their core hours of employment. These stipulated core hours will be between a minimum of 20 hours and up to a maximum of 76 hours per 14 day cycle.

By section 826 of the Act and the matters pleaded above, the Respondent breached clause 5(c) of the AWA in that it:

a) failed to advise the Employee of her core hours of employment; and

b) did not provide the employee with a minimum of 20 hours' paid employment each fortnight from 13 October 2006 until 21 December 2006.

As a result of the breaches by the respondent of clause 5(c) of the AWA, the Employee suffered loss and damage in the amount of $720.25.

58. The affidavit of Kirrily Joy Piper at paragraphs [29]-[44] set out the details of Ms Piper's period of employment at Chill's and particularly the issue concerning hours of work and rate of pay. The copy of the AWA attached as Annexure 2 to Ms Piper's affidavit at 5(c) states:

> *"Part-time employees" are those Employees that are specifically engaged by the Employer as Part time Employees. Part-time Employees will be advised of their core hours of employment. These stipulated core hours will be between a minimum of 20 hours and up to a maximum of 76 hours per 14 day cycle.*

59. That same document Attachment B sets out the pay rates for part time employees as adults, 20 year olds, 19 year olds, 18 year olds and 17 year olds for the grades probation, grade 1 and grade 2 together with the relevant rate. Ms Piper's payslips contained in Annexure 6 of her affidavit originally record her position as *AWA 19 year old prob* [probationary] progressing to *AWA 19 year old grade 1* at the expiry of the probationary period. Paragraph [32] of her affidavit states:

> *I work different hours every week. I was never told that I would be working a certain number of hours each week, or particular shifts. I just looked at the roster on the noticeboard on each of my shifts to check when I was next working.*

60. The affidavit records the discussions that Ms Piper had with both Trent Dawson, Duty Manager, and Imran Suleman, Store Manager. It was brought to their attention that she was not working the 20 hours per fortnight in accordance with Clause 5(c) of the AWA which in effect meant that she was working casual hours but being paid at a lower part time rate.

61. I am satisfied that Ms Piper was not provided with her core hours in accordance with the provisions of Clause 5(c) of the AWA and a penalty of $16,000 should be imposed for the breach of this provision. If the company was intending to only provide Ms Piper with limited

hours in accordance with the AWA they were obliged to advise her of her core hours so that she could both plan for the variations in hours worked together with her expectation of attendance.

62. Ms Piper indicates in paragraph [40] that she sought the following advice:

> *40. That afternoon, I spent some time on the phone seeking advice on my situation. I spoke with various institutions including the Office of Workplace Services, the Office of the Employment Advocate, the New South Wales Department of Industrial Relations and a community legal centre. I was referred from one institution to another.*

After receiving advice, she returned to Chilli's and had further discussions with Imran Suleman who advised her that he was relying upon clause 15.4 of the AWA and believed that he was applying it correctly. He advised Ms Piper that he had consulted with his superior. This infers that more senior members of the organisational structure were supporting this interpretation of the AWA and that this error in the interpretation of the AWA was not the sole responsibility of Mr Suleman but was confirmed by more senior members of the organisational structure. In these circumstances, I believe the penalty of $16,000 should be imposed on the second breach of the AWA agreement.

Application of the totality principle

63. The maximum applicable penalty in this case is $115,500, in respect of the five breaches alleged by the applicant. It is submitted that in determining the pecuniary penalties for multiple individual breaches it is appropriate for the Court to apply the totality principle ensuring that the penalty in aggregate is just and appropriate in all circumstances: *CPSU v Telstra Corporation* (2001) 108 IR 228 at [230]; *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. The orthodox approach to applying the totality principle was adopted by his Honour Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080 at [30] where his Honour stated:

> *[30] … 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.

64. In the recent decision *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, their Honours Gray, Graham and Buchanan JJ considered whether an aggregate of penalties should be imposed in an award breach proceeding and whether the imposition of the penalty was excessive. Their Honours applied the totality principle and reduced the quantum of penalty. His Honour Gray J at [12]-[13] stated:

[12] Much of the argument put by counsel for the appellant involved a detailed comparison between the facts of this case and the facts of two other cases in which lower penalties had been imposed in respect of award breaches. The two cases, both judgments of the same Federal Magistrate, are Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 and Flattery v The Italian Eatery T/as Zeffirelli's Pizza Restaurant [2007] FMCA 9. This was a fundamentally wrong approach. Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of a case, not by a line by line comparison with another case. See the passage from the judgment of Burchett and Kiefel JJ in NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 295, set out in the reasons for judgment of Buchanan J at [87].

[13] Penalty decisions in other cases can be of value in demonstrating that there is a range of penalties generally considered appropriate to a particular type of case. The individual circumstances of the case at hand must then be examined, in order to determine at what point in the appropriate

> *range the penalty should be set. This does not involve a comparison with the facts of other cases.*

65. Their Honours took different approaches in reaching an aggregate sum and then applied the totality principle. Their Honours Gray and Graham JJ referred to the High Court decision in *Markarian v R* (2005) 228 CLR 357 at [37] where the majority approved what was said by Gauldron, Gummow and Hayne JJ in *Wong v R* [2001] HCA 64 at [74]-[76].

66. I acknowledge that this organisation has introduced AWA's into the work environment to assist in the management of a workforce in a hospitality / restaurant environment where work loads of the organisation vary considerably throughout the weekly cycle. However, there appears to have been failures in the system as some of the requirements of the Act have not been complied with. The provisions of the organisation's own AWA have been incorrectly interpreted and applied by members of the organisation management structure.

67. However, in light of the circumstances the organisation has complied with its obligation in respect to a number of employees and this breach relating to Ms Piper is the only issue which has led proceedings. Therefore, I believe that a reduction in the total penalty should be applied. By reducing the aggregate by 25% I am satisfied that the penalty is 'just and appropriate' in a situation where an organisation has adopted a policy approach to employment conditions which is advantageous to it but has failed to complete all of the necessary steps to ensure its compliance with the legislation introduced to maintain the protection of the individual. Consequently, I reduce each individual penalty by 25%.

68. There is no evidence before the Court that the organisation has made any attempt to pay Ms Piper the amount of her loss due to the failure to comply with the provisions of their own AWA. In the circumstances, I order the organisation to pay interest on the amount of $720.25 from the date that her resignation became effective to the date of this judgment at the applicable rate found in the *Uniform Civil Procedure Rules 2005*.

I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM

Associate:

Date: