Australian Government
Workplace Ombudsman

IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION

COURT NUMBER W01650240

BETWEEN

Bryce Selwood (a workplace inspector appointed pursuant to section 167(2) of the *Workplace Relations Act 1996* (Cth))

Plaintiff

and

Jason Gordon Bjorksten

First Defendant

and

Kelly Elizabeth Bjorksten

Second Defendant

(trading as BURKO AUTOMOTIVE & TRANSMISSIONS COLLECTIVELY KNOWN AS THE Employer) (ABN 41468798986)

TRANSCRIPT OF HEARING 22 NOVEMBER 2007

Magistrate Kate Hawkins
For the plaintiff: David McLaughlin
For the defendant: Michael Flynn

DISCLAIMER: THIS IS AN UNEDITED EXCERPT OF THE ABOVE HEARING. NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.

HER HONOUR: 1. I will now give my decision in relation to this application for penalty. I've earlier found, and I confirm, one breach by the defendants Jason and Kelly Bjorksten trading as Burko Automotive and Transmission, one breach of clause 5.5.1 of the *Retail Trade Industry Sector Minimum Wage Order* and five breaches of various provisions of the *Vehicle Industry Repair Service and Retail Award* 2002. These breaches have been admitted through counsel appearing on behalf of the defendants at this hearing and accordingly I find them proven.

2. We now turn to the question of the imposition of penalty pursuant to Section 719 of the *Workplace Relations Act* Post-1956 Reform in respect of these breaches. The defendants appear through legal representative at court today but have not attended personally due to (I'm told) their financial circumstances. I direct that the court make a copy of my reasons for decision and cause copies of my reasons to be forwarded to both plaintiff and defendants free of any charge.

3. These proceedings relate to underpayment of wages in respect of one apprentice employed by the business partnership, I think it was, is that correct? Partnership?

MICHAEL FLYNN : 4. Sole trader. Yes, Your Honour.

HER HONOUR: 5. Sole trader. A young apprentice who at the relevant times was aged between 19 and 22 years of age, was underpaid a total amount of some $2,484.85 over a period of employment of approximately two years. These underpayments relate to underpayment of wages, underpayments of overtime, underpayment of tool allowance and underpayment of accrued annual leave. Initially the plaintiff, an inspector of the Office of Workplace Ombudsman and his colleagues had sought voluntary compliance in respect of the rectification of these underpayments from a period in late 2006. Rectification of those underpayments was not made. The plaintiff also sought that time and wage records be provided to ensure that the underpayment was correctly calculated but those were not forthcoming. Eventually the plaintiff issued legal proceedings on the 18th of June of this year after some nearly 12 months of seeking voluntary compliance.

6. Upon issue of proceedings, contact was directly made by the defendants with the plaintiff or its solicitors on the date that the defence to that application was due, being the 17th of July.

7. Agreement was reached to an instalment plan being made to pay off that underpayment, but eventually as that didn't occur there were subsequent communications. It's fair to say that it's now been paid in full at the last hour before court; I'm just trying to locate the exact date that that was paid but it is relatively recently I believe. The first instalment was on the 3rd of September.

MICHAEL FLYNN

8. I believe that's 22nd October.

HER HONOUR

9. 22nd of October. Thank you Mr Flynn.

10. The *Workplace Relations Act* sets out a principle objective to ensure the setting of minimum standards and a process whereby compliance with those minimum standards for wages and entitlements is to be ensured. Various decisions of both the Federal Court and the Federal Magistrates' Court and also decisions of this court have emphasised the importance of those minimum standards and the enforcement of those.

11. In respect of these matters there are five contraventions alleged. The plaintiff concedes that two of those being in relation to the rate of pay, essentially overlap and therefore the application of the totality principle, which the court must apply, cause there to be effectively four breaches considered by this court. So the relevant principle that the court must apply is to ensure penalties in aggregate are just and appropriate, and that the total number of breaches considered will justify treating the maximum number of breaches as four with a maximum relevant penalty of $26,400.00.

12. It's worthy to note that as the defendants are individuals, the maximum for each breach is $6,600.00 whereas had they been a corporate entity, the relevant maximum for each breach would have been $33,000.00 per breach, leading to a maximum penalty well in excess of $100,000.00. Parliament saw fit to increase the maximum penalties for these breaches most significantly, some period of time ago, and that reflects the seriousness which Parliament views the underpayment of wages and breaches of the *Workplace Relations Act*.

13. The apprentice who was the subject of the underpayment in these circumstances, was a young woman engaged in the employment in rural Victoria? I think it was.

MICHAEL FLYNN

14. Yes.

HER HONOUR

15. She was on a minimum wage. Her starting wage, I'm told, was little over $5.00 an hour. This was a person who was in a very vulnerable position in relation to her employment. Her bargaining position undoubtedly would have been weak and she was undertaking an apprenticeship and had no prior experience in the industry nor any qualifications prior to starting work. As such, she relied on the bare minimum entitlements and standards which are provided in the Retail Sector Wage Order and the Vehicle Industry Award.

16. The underpayment of $2,485.45 is a huge amount compared to her weekly wage at the time of her termination, so this would have been the high point of her weekly wage progressing undoubtedly from a lower level. At termination her weekly wage was $434.00 so this is a very significant underpayment in the context of the employee concerned. These are matters which will be taken into account in determining the appropriate penalty to be applied in these circumstances.

17. The defendant ran a small business in rural Victoria. I'm told and accept that this was the first business that they had been engaged in and it was a husband and wife enterprise. The defendants employed one to two employees at any one time. I'm told but note there has been no material to corroborate these assertions from the bar table, that at the time of the employee's termination in July 2006 the apprentice was the only employee engaged by the defendant and the business has ceased to trade. I'm told that Mr Bjorksten contracted meningitis at this time and sustained very serious health consequences as a result of that illness. Consequently the business ceased to trade and, I'm told, that the financial consequences of that illness and business generally have been severe on Mr and Mrs Bjorksten. However, they did not forward any documents which would have been easily within their possession to confirm that parlous state of their finances or the health impact upon Mr Bjorksten of that illness. I can therefore only place minimal weight upon the submissions made by Mr Flynn on their behalf. I also have no corroborating evidence of the financial viability or otherwise of their business.

18. It is not alleged that the defendants have previously been engaged in any conduct breaching award provisions or this Act. The defendant, I'm told, contended that the record of hours worked by the apprentice and provided by her to the Workplace Ombudsman were not an accurate record. However, I note that the plaintiff called for time and wages records to be produced and they were not forthcoming. The defendants failed to provide any contradictory evidence of hours worked and wages paid despite those requests.

19. It is most significant, a factor that I do take into account in determining

penalty, that whilst the underpayments were outstanding for some 15 months since they first accrued and nine months after the defendants were contacted by the department, they have subsequently rectified all underpayments as alleged by the department. However, the apprentice concerned has been denied access to those monies and was not paid any interest for the outstanding monies over that time. It's fair to conclude that the breaches were directly attributable to the conduct of the first and second defendants who both owned and managed their business. It's said that they contacted and relied upon information from Wage Line, however, it is their responsibility as an employer and the responsibility of all employers to confirm the information they rely on when paying wages and entitlements are in fact correct.

20. The conduct of the defendants and the extent of their contrition and remorse is a significant factor in determining penalty. I accept that the defendants have conveyed an apology through their legal advisor who appears pro bono on their behalf today, and accept that they have gone to the trouble of arranging for a legal representative to appear today and so, to a certain extent, are acknowledging their responsibility for the underpayments in this matter. That is a factor which will weigh to their benefit. However, they have deliberately delayed rectifying these underpayments until they were essentially at the door of the court. They may well have many other financial pressing difficulties in their life but I do note that the scheme of the bankruptcy and insolvency provisions of the relevant laws generally place unpaid wages and entitlements at the head of the queue, apart from certain other matters. I won't go into the technical aspects of that but they are priority debts and it's clear that it’s not until the inevitable that they have faced up to paying these debts.

21. Now Mr Flynn urges me to consider that the defendants' circumstances are unusual. Unfortunately, they are not in my experience. Small businesses are plagued with various problems and these sorts of situations are rife in our community. There is a very high need for the message to be sent to the proprietors of small businesses that they must not ignore their obligations as employers to pay correct wages and entitlements to their employees. Priority must be given to those matters and it is not an excuse to proffer financial difficulty or health issues as grounds for non-payment of those matters.

22. The issue of deterrence is one for the court to consider. There are both aspects of specific, which means the relevance to this defendant, and also issues of general deterrence which relates to the role of the court in sending messages to the community at large which need to be weighed up. The Federal Court in a number of cases and most recently, one example being His Honour Justice Tracey's comments in the case of *Kelly v Fitzpatrick ([2007] FCA 1080),* mirror the observations of other judges that the issues of specific deterrence will not, or the individual, will not outweigh the need for general deterrence in these matters.

23. My comments in relation to specific deterrence are to note that I'm told and accept that the defendants do not engage any employees now, their business is not operating and that they are earning an income as PAYE employees and therefore the immediate threat of them continuing to breach the *Workplace Relations Act* is a limited one. Therefore I accept that the need for a penalty to be imposed to ensure specific deterrence are limited. The need, however, for general deterrence is large. It's important that for a penalty to have a desired effect, it must be imposed at a meaningful level. It must be such that a potentially offending employer will see the penalty as not worth the prospects of gain. Furthermore, and I quote from the plaintiff's submissions, which is a quote from a case in the *Finance Sector Union v Commonwealth Bank of Australia ([2005] FCA 1847)*, that the changing rules of Industrial Regulation can be set at nought if the court does not act strongly to discourage and deter parties from flagrantly and deliberately breaching industrial terms of freely made agreements merely because their own self interest later dictates against compliance with those terms. Whilst that quote relates to a breach of an agreement and this relates to a breach of minimum standard provisions, the import is the same. More recently, the case of *Inspector Cotis v Pow Juice Pty Ltd ([2007] FMCA 140)*, it's not necessarily a binding authority but I have read it recently and certainly its import is relevant to these proceedings and I concur with the comments proffered during that case in relation to financial difficulty suffered by the defendant, the quote being "if the circumstances require a substantial penalty to be imposed the financial difficulty itself will not deter the imposition of a penalty".

24. Finally, taking all matters into account, it is essential that the penalty ensures that employers do not neglect their obligations under the umbrella of financial difficulty and there is a real need to deter employers generally from the exploitation of lower paid and young workers.

25. I'm told that the plaintiff and defendant have discussed what they see as an arrange of appropriate penalties being in the range of $10,000 to $12,000 for the total of the four breaches with the defendants being jointly and severally liable. This court clearly is not bound by that submission but I do note it.

26. Weighing up all of the factors and the conduct of this defendant and the needs that I've discussed, I adopt an approach of applying discounts for certain things. An acknowledgement and acceptance of the conduct is a significant factor and most significant is that the underpayment has been rectified and that the defendants have appeared via you Mr Flynn at the hearing today. Those factors, in my view, amount to a discount, if you like, of approximately 50% of the maximum penalty ought be applied. I do think it appropriate given that the conduct and the context that an

aggregate penalty for the four breaches of 50% of the maximum be applied in these circumstances. Accordingly, I will impose on the defendants penalties under both sub-sections 178(1) of the Pre-Reform *Workplace Relations Act* and, alternatively sub-section 719(1) of the Post *Workplace Relations Act* for these breaches in the total sum of $13,200.00. Now I direct that those penalties be paid into consolidated revenue and I will discuss with the parties a timetable for those payments. I understand that it's agreed over a period of six months. Could you, perhaps together, write a minute of dates and those payments and pass those up please?

[The parties then handed up short Minutes of Order].

HER HONOUR 27. Thank you. I direct that payment of the penalty previously referred to, be paid according to the following schedule; $2,200.00 by the 21st December of this year with further instalments of the same amount being made on the 21st of January, the 21st of February, the 21st of March, the 21st of April and the 21st of May 2008. Is there anything further?

DAVID McLAUGHLIN 28. Sorry, Your Honour, just to clarify. The penalty was jointly and severally?

HER HONOUR 29. Yes. I order that the penalty of $13,200.00 is imposed or that both defendants jointly and severally are liable for that penalty. I've made that clear in the orders and the court extract should reflect that.

MICHAEL FLYNN 30. Thank you Your Honour.

HER HONOUR 31. Thank you for appearing pro bono. It certainly assists the court.