IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

Claim No. U02591259

BETWEEN

KERRYN SHACKLOCK

Plaintiff

AND

CRAIG ARNETT (T/A A1 TROLLEYS)

First Defendant

LONAH PTY LTD (T/A WYLES SUPERMARKET SERVICES)

Second Defendant

ORDERS

THE COURT DECLARES THAT:

1. In the period 13 December, 2003 to 25 September, 2004, the Second Defendant failed to pay its employee Daniel Wiseman the minimum wage as required by a term of an order of the Australian Industrial Relations Commission, being the *Property and Business Services Industry Sector – Minimum Wage Order – Victoria 1997* (**the Order**) and in so doing breached the Order.

2. On or about 13 December, 2003 the Second Defendant entered into a contract of employment with Daniel Wiseman which provided for wages less favourable to Daniel Wiseman than the minimum wage provided for under the Order and in so doing breached section 505(1) of the *Workplace Relations Act 1996 (Cth)* (**WR Act**).

3. In the period 17 May, 2002 to March, 2005, the Second Defendant failed to pay its employee Bradley Hill the minimum wage as required under the Order and in so doing breached the Order.

4. On or after 17 May, 2002[1], the Second Defendant entered into a contract of employment with Bradley Hill which provided for wages less favourable to Bradley Hill than the minimum wage provided for under the Order and in so doing breached section 505(1) of the WR Act.

AND THE COURT FURTHER ORDERS THAT:

5. The claim against the First Defendant is dismissed.

6. The Second Defendant pay Daniel Wiseman the sum of $10,061.87, plus interest of $4,235.40, calculated to 1 May, 2008[2], within 14 days of this Order.

7. The Second Defendant pay Bradley Hill the sum of $15,204.20[3] plus interest of $5,561.61, calculated to 1 May, 2008, within 14 days of this Order.

8. Subject to Order 10, a penalty in the amount of $3,000 be imposed on the Second Defendant for contravening s505(1) of the WR Act in respect of Mr Wiseman.

9. Subject to Order 10, a penalty in the amount of $3,000 be imposed on the Second Defendant for contravening s505(1) of the WR Act in respect of Mr Hill.

10. The penalties imposed by Orders 8 and 9 must be paid into the Consolidated Revenue Fund by the Second Defendant within 30 days of the Second Defendant being adjudged to have breached any provision of the WR Act, provided that the breach of the WR Act was committed within twelve months of the date of this Order.

---

[1] Being the date agreed between the Plaintiff and the second Defendant.
[2] The Plaintiff advised the Court on 1 May, 2008 that subject to certain matters resolving between the Plaintiff and the second Defendant prior to 8 May, 2008, the Plaintiff did not seek payment of interest beyond 1 May, 2007.
[3] The initial amount claimed on behalf of Mr Bradley Hill totalled $23,995.08. On 1 May, 2008 the Court was advised that agreement had been reached between the parties that the sum for which the second Defendant was liable was agreed at $15,204.20 on the basis that the difference would be paid to Mr Hill by the second Defendant prior to 8 May, 2008.

11. A penalty in the amount of $5,280.00 be imposed on the Second Defendant for contravening the Minimum Wage Order in respect of Daniel Wiseman to be paid into the Consolidated Revenue Fund within ~~14~~ 30 days of this Order.

12. A penalty in the amount of $6,800.00 be imposed on the Second Defendant for contravening the Minimum Wage Order in respect of Bradley Hill to be paid into the Consolidated Revenue Fund within ~~14~~ 30 days of this Order.

REASONS FOR DECISION AS TO PENALTY

INTRODUCTION

1. On 19 January, 2008 I published my Reasons for Decision and invited the Plaintiff and the Second Defendant to confer regarding draft Orders and ordered that they file draft Orders with the Court within 28 days.

2. The Plaintiff filed draft Orders with the Court on 14 February, 2008. The Second Defendant did not advise either the Plaintiff or the Court whether it opposed the proposed form of Orders by that date.

3. The proceedings were adjourned to 24 April, 2008 for the Court to hear submissions as to what, if any, penalty should be imposed on the Second Defendant. On that date, the Court afforded an opportunity to Counsel for the Second Defendant to address any issues it wished to raise regarding the proposed form of Orders submitted by the Plaintiff. The Court was informed that the Second Defendant did not want to be taken to be consenting to the Orders, however advised it took no issue with the form of the Orders proposed.

4. In the circumstances of this case, I consider it appropriate that there be declarations as to the contraventions in the terms proposed by the Plaintiff. I consider that making the declarations sought is appropriate in order to explain the basis for the penalties ordered: *Hadgkiss v Aldin [2007] FCA 2068.*

5. In light of my findings that the Second Defendant, trading as Wyles Supermarket Services (**Wyles**) was the employer of Mr Hill and Mr Wiseman, having been engaged by Mr Arnett for and on behalf of Wyles, it follows that an order must be made dismissing the Plaintiff's complaint against Mr Arnett, the First Defendant.

6. It also follows from my findings that Mr Wiseman and Mr Hill were paid significantly below the minimum hourly rate prescribed by the Minimum

Wage Order. The quantum of the underpayments is not disputed by Wyles. By operation of s506(2) of the WR Act, the term providing for the minimum hourly rate in the Order is to be taken to be a term of an award for the purposes of s178. Orders in respect of each underpayment are made pursuant to s.178(6) of the WR Act together with interest pursuant to s179A.

THE PENALTY PROVISIONS

7. Section 178 of the WR Act is a civil penalty provision. With effect from 10 August, 2004 the maximum penalty increased from $10,000 to $33,000.[4] The contraventions of s505(1) in respect of both employees occurred prior to that date. Accordingly, those two contraventions each attract a maximum penalty of $10,000.

8. The situation with respect to the underpayment contraventions is less clear. The underpayment contraventions were continuing at the time the maximum penalties increased to $33,000, being 10 August, 2004. However, it is clear that, in the main, the underpayments occurred when the maximum penalty was $10,000.

9. The Plaintiff submits that the proper approach is to identify the maximum penalty for the overall conduct by "blending" the maximum penalty figures according to the proportion of the total period for which each of the respective maximum penalties applied. This approach results in a "blended and weighted" maximum penalty with respect to the Hill underpayment (47 months under the old penalty regime, 9 months under the higher penalty regime[5]) of $8,392.86 plus $5,303.10 averaging $13,600. With respect to the Wiseman underpayment (10.5 months under the old penalty regime and 1.5 months under the new) the weighted average is $8,571.43 plus $4,714.29,

---

[4] *Workplace Relations Amendment (Codifying Contempt Offences) Act 2004*

[5] Following negotiations between the parties, it was agreed on 8 May, 2008 that the Orders against the Second Defendant should apply to a lesser period of 17 May, 2002 to March, 2005. I have not altered the blended and weighted maximum penalty however, noting that the underpayments for the earlier period have now been paid by the Second Defendant to Mr Hill. Taking this into account I have not altered the weighted average as working in favour of the Second Defendant.

rounded down to $13,200. The Second Defendant raised no objection to this approach.

10. In my view, the approach proposed by the Plaintiff is a fair and balanced approach to the appropriate maximum penalty, taking into account the overall conduct over the relevant period.

11. The Plaintiff concedes that the multiple contraventions of the Minimum Wage Order in respect of the underpayment of each employee occurred as a result of a course of conduct by Wyles. By reason of s178(2) of the WR Act, the Court is required to treat the multiple contraventions as one contravention of the Order. Accordingly, the Plaintiff submits Wyles is liable for two contraventions of the Order, one for each of Messrs Hill and Wiseman. It further submits that Wyles contravened s505(1) by entering into an agreement with each of the employees which prescribed a rate of pay less than that prescribed by the Order, being a further two contraventions of that provision. Accordingly, it submits that Wyles committed four contraventions of the WR Act.

12. In contrast, the Second Defendant submits that by applying s178(2) to the circumstances of the case, only one penalty can be imposed in respect of the underpayment. In my view however, it is clear the term is contravened in respect of each employee, giving rise to two distinct contraventions of the Order. In relation to the breach of s505(1) the Second Defendant submits that "any breach that has occurred in this regard arises out of the same set of circumstances or factual matrix that led to the underpayment, ie. the offering by Mr Arnett of a rate of pay less than the prescribed minimum." In my view, the obligation imposed by s505(1) is clearly a distinct one. The contravention in respect of each employee is similarly discrete. Whether the provisions contravened impose *"cumulative obligations or obligations that substantially overlap"*[6] is a matter that is considered in relation to the overall penalty applicable to the contraventions.

[6] Gibbs v. Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216 at 223.

RELEVANT CONSIDERATIONS IN THE ASSESSMENT OF PENALTY

13. Numerous authorities have set out the range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and the quantum of any penalty to be imposed.[7]The Court was referred to the considerations set out by Mowbray FM in particular[8] as adopted by Tracey J in *Kelly v. Fitzpatrick* (2007) 166 IR 14. Whilst these considerations were referred to by the Full Court of the Federal Court in *Australian Ophthalmic Supplies Pty Ltd v. McAlary-Smith* [2008]FCAFC 8, it is clear they do not purport to prescribe all the matters that may be taken into account in the exercise of the Court's discretion. In my view, these considerations must also be considered in light of the objects of the WR Act as set out at s.3, in particular those highlighting the importance of ensuring maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.

14. The Second Defendant submits that no penalty should be imposed for three reasons. First, it outlines the history of the proceedings and in particular, the Plaintiff having joined the Second Defendant after first commencing proceedings against Mr Arnett. Second, and arising from the first, it was given no opportunity for voluntary compliance by the Office of Workplace Services (**OWS**). It contrasts this with the evidence of discussions between the Plaintiff and officers of the OWS and Mr Arnett regarding the underpayment of trolley collectors prior to the proceedings being issued. Finally, and of great significance in the submission of the Second Defendant, is that the *"employment relationship only arose as a result of the Court's decision concluding as a matter of law that the Second Defendant was the employer"*. It is said this is significant, as the *"second Defendant could not have known until the Court decided the matter on 18 January, 2008 that it would be decided that it was the employer"*. By

---

[7] 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].*

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

reason of this analysis, it is said that the breaches are *"not even inadvertent"*, let alone deliberate, reckless or negligent.

15. I address these submissions in the context of each of the factors I consider relevant to penalty in this case.

Nature and Extent of Wyles' Conduct

16. Wyles' submits that the only conduct leading to the breaches was the decision of the First Defendant to offer the employee's an hourly rate of pay. It submits that Wyles, as a matter of causation, did not enter in to the arrangement that led to the underpayments.

17. In my view, this analysis significantly and artificially downplays the role Wyles' played in the overall operation of the trolley collection services, the arrangements it put in place with Mr Arnett and its overall control over the activities of Mr Arnett/A1 Trolleys. These are set out in detail in my reasons for decision, but in summary I refer to the following findings:

    (a) Wyles is in the business of providing supermarket trolley collections services to various supermarket chains under contract – (Reasons, para 1);
    (b) In February, 2006 David Allan, general manager of Wyles, approached Mr Arnett who then worked for Wyles as a trolley collector, to put a proposal that rather then working directly for Wyles, he could establish a business contracting to Wyles to provide the services on its behalf. The details of the proposal came from Mr Allan, notably that Mr Arnett would need to register a business name, that Wyles would pay Mr Arnett a fee and Wyles would undertake the administration and book-keeping functions for a fee – (Reasons, para 2);
    (c) Wyles exercised considerable control over the activities of Mr Arnett, and the manner in which the work was carried out – (Reasons, paras 21 to 37), including reserving to itself actual or ultimate control over the

finances of A1 Trolleys – (Reasons, para 34), including processing payments to the employees.

(d) No goodwill was transferred to Mr Arnett under these arrangements. The work undertaken was that required by the contracts that existed between Wyles and the supermarkets. Wyles did not assign these contracts to Mr Arnett/A1 Trolleys. Mr Arnett paid no consideration to win the right to do the work. Mr Arnett did not buy the right to trade under the name Wyles – (Reasons para 40)

(e) Furthermore, I found there was little prospect of Mr Arnett generating any form of profit form the work unless he primarily undertook all the trolley collection work himself and had limited prospect of developing the business, either working exclusively for Wyles or outside – (Reasons para 43).

18. In my view, the conduct of Mr Arnett offering work to Messrs Hill and Wiseman should be considered in the context of these findings, perhaps most significantly my finding that Mr Arnett engaged the employees *with the authority of Wyles, for and on behalf of Wyles* (Reasons, para 57).

19. That said however, it is clear from my findings that it was Mr Arnett who directly hired the workers and offered them a rate of pay. At paragraph 52 of my reasons, I find that *"Mr Arnett's discussions with Mr Allan regarding the rate of pay for the collectors was never more than general. Certainly, there is no evidence to suggest Mr Allan instructed Mr Arnett as to the rate to be paid"*. I have taken this matter into account in determining penalty, particularly in relation to the contravention of s505(1).

20. However, in respect of Wyles' understand and knowledge, I do not accept that Wyles *"could not have known it was the employer"* and operated entirely on an honest, yet mistaken belief as to its legal status. Given the arrangements it had put in place, at its initiative, and the degree of control it elected to exercise over those arrangements, Wyles either knew or should have known there was a real prospect that it was in reality the employer.

21. Moreover, given the processes it put in place for the administration of the payments to the workers, I consider Wyles either knew or should have known the hourly rates being paid to the workers were well below the minimum rates of pay. I note that in the Affidavit of David Allan (Exhibit AR), Mr Allan states that he together with Mr Wyles attended at meetings with the OWS in 2003 regarding terms and conditions of employment payable to employees and that he played an "advisory and facilitative role" in resolving the matter as part of the "services" the Second Defendant offered the sub-contractors. Wyles certainly had managerial employees, such as Mr Allan, with experience in Human Resources and had resources, including administrative resources, that are consistent with a relatively sophisticated operation. I note that between 2002 and 2003 it had "approximately 30 separate business arrangements" as part of its trolley collection business (Exhibit AR, para 6). It also employed trolley collectors directly. I do not accept it was a small business.

22. For these reasons, it is appropriate in my view that a penalty be imposed on Wyles in respect of the contraventions.

Nature and Extent of the contraventions

23. Mr Wiseman and Mr Hill gave evidence in these proceedings. Both were unskilled workers. Mr Wiseman had difficulties reading. I find that both workers had limited bargaining power and were reliant on the 'safety net' of the minimum award rates of pay. I note that as initially claimed Mr Hill was underpaid $23,995.08 over 56 months being around 38% of the minimum hourly rate. Following agreement between the parties as to Orders, Mr Hill is to be paid an amount of $15,204.20, a considerable underpayment. For just over ten months, Mr Wiseman was underpaid $10,061.87, being around one-third of the minimum hourly rate to which he was entitled. These are significant underpayments for employees reliant on a minimum wage.

Similar previous conduct

24. No previous contraventions of the WR Act or other workplace legislation are alleged against Wyles. I have taken this factor into account in determining an appropriate penalty.

25. Wyles also refers in its submissions to evidence of good character, and notably the references to its community and social participation which is dealt with in paragraphs 16-19 of the Affidavit of Mr Allan. I have taken these matters into account, notably the work undertaken by Wyles in its relationship with Workbridge in assisting disadvantaged members of the community to re-enter the workforce. Mr Allan states he has assisted people with disabilities obtain work as trolley collectors either directly or through his sub-contractors. Whilst I have taken this into account as a demonstration of community participation by Wyles, it also serves to underscore the vulnerability of this workforce.

Demonstration of Contrition

26. The submission of the Second Defendant on the issue of contrition is as follows:

"... in so far as the second Defendant has been properly declared by the Court to be the employer (which will be determined by the Federal Court of Australia as a result of the second Defendant's appeal), then it expresses contrition for its failure to pay the two employees the proper amount".

27. Wyles further submits that, in exercising its right of appeal, the Second Defendant should not be penalised.

28. Clearly, there is little or no evidence of contrition by Wyles in respect of the contraventions. Prior to 1 May, 2008 Wyles had taken no steps, either in the form of corrective action or otherwise to remedy the breaches. The underpayments to Messrs Hill and Wiseman remained outstanding at that date. On 1 May, 2008 the Court was advised that the second Defendant had reached agreement with the Plaintiff to pay a proportion of the amount claimed on behalf of Mr Hill (approximately $8,790.00) on the basis that agreement had been reached that an order in a lesser sum would be sought in respect of the underpayments. On behalf of the second Defendant it was put that this payment, made without the need for an Order, was a matter relevant to mitigation. Whilst I have taken the payment to Mr Hill into account, it is a matter to which I have given limited weight given the extremely late stage in the proceedings when the payment was made, and noting also that it was made in the context of negotiations over the Orders to be made.

29. I further note that in all other regards, Wyles has elected to defend these proceedings vigorously. As the Plaintiff properly concedes, in doing so Wyles was simply exercising its rights. Similarly, there can be no criticism of Wyles in exercising its right of appeal. However, whilst these matters could not be said to be aggravating factors, the lack of contrition and the lack of prompt and genuinely voluntary corrective action means there is little before me that warrants a reduction in penalty by reason of mitigation.

30. The second Defendant makes much of the fact the OWS gave it no opportunity prior to it being joined as a party to evidence voluntary compliance. Clearly, it is desirable that parties are given an opportunity to resolve claims on a voluntary basis with the assistance of the OWS before proceedings are initiated. Indeed the evidence of the Plaintiff confirmed that such a process is generally adopted by the OWS. The Plaintiff conceded the OWS had not done so here. However, there is force in the submissions of the Plaintiff that even if such an opportunity was afforded to the Second Defendant, it is unlikely that it would have adopted a different position with respect to liability. The second Defendant continues to maintain it is not the employer, and its expression of contrition being conditional upon it being

determined by the Federal Court to have been "properly" declared the employer is in no way evidence of contrition or an acceptance of responsibility.

Deterrence

31. Wyles' submits that the issues of general and specific deterrence do not arise in this case due to the absence of any evidence of this being a deliberate, reckless or negligent breach on its part. Rather it is said that the breaches arise "as a result of the Court's decision", meaning by reason of the Court's decision rather than any conduct on the part of the second Defendant.

32. For the reasons outlined in paragraphs 17 and 18, I do not accept this analysis. In my view, both specific and general deterrence are important considerations for the Court in imposing penalties under the WR Act. The absence of evidence of a deliberate breach on the part of Wyles is clearly relevant, and that much is conceded in the submissions of the Plaintiff and is a matter to which I have given weight. However, as stated previously Wyles either knew or should have known that the rates being paid to the trolley collectors were well below minimum rates.

33. Moreover, the fact that the underpayments occurred over a substantial period is also a relevant consideration. There is no evidence that Wyles, whilst continuing to engage trolley collectors both directly and through "sub-contractors" under similar arrangements, has taken any steps to audit these arrangements to ensure compliance. Given the level of control exercised by Wyles over the administrative arrangements in this case, I do not accept the submission of the Second Defendant that much of this information is outside its control. In my view, the conduct in this case calls for the imposition of a penalty that operates as both a specific, and more importantly general deterrent, in light of the objects of the WR Act.

Submissions as to Penalty

34. The Plaintiff submits that the appropriate penalty range per contravention would be 40 to 60 per cent of the maximum for each contravention. Having regard to the sustained period over which the contraventions of the Minimum Wage Order occurred, a figure at the upper end of that range would be appropriate.

35. The Second Defendant submits that if a penalty is to be imposed, which it opposes, it should be at the lower range with the Court giving consideration to one penalty in light of the overlapping nature of the obligations.

36. In my view, the underpayments of Mr Wiseman and Mr Hill are two distinct breaches warranting the imposition of discrete penalties. I do accept, however, some overlap between the contraventions of the s505(1) obligation and the subsequent underpayments. I have taken this matter into account in determining penalty.

37. In respect of the breaches of s505(1)I have determined as follows:

(a) that a penalty in the amount of $3,000 be imposed on the Second Defendant for contravening s505(1) of the WR Act in respect of Mr Hill,
(b) that a penalty in the amount of $3,000 be imposed on the Second Defendant for contravening s505(1) of the WR Act in respect of Mr Wiseman.

38. However, by reason of the matters to which I have referred in this decision, notably the lack of any prior contraventions, the role played by Mr Arnett in offering the rates of pay to the employees, and the lack of any deliberate conduct by Wyles, I consider that payment of these penalties should be suspended. Accordingly, payment of the penalties for contravention of s505(1) is suspended for a period of 12 months to be paid only if the second Defendant further contravenes the WR Act during the period of the suspension.

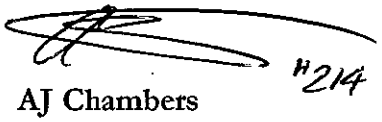
39. In respect of the underpayments, I consider that a greater penalty should be imposed in respect of the contravention regarding Mr Hill, noting the underpayment spanned approximately 57 months. I have however, given limited weight to the repayment by the second Defendant of part of the sum claimed on behalf of Mr Hill. In that case, I consider a penalty in the range of 50% of the maximum is appropriate. In respect of Mr Wiseman, I consider a penalty in the range of 40% of the maximum penalty is appropriate in the circumstances. Accordingly, I impose penalties as follows:

(a) That a penalty in the amount of $6,800.00 be imposed on the Second Respondent for contravening the Minimum Wage Order in respect of Mr Bradley Hill;

(b) That a penalty in the amount of $5,280.00 be imposed on the Second Respondent for contravening the Minimum Wage Order in respect of Mr Daniel Wiseman;

40. I consider that the total penalties in each case, moderated by the suspension of a significant component, give rise to appropriate overall penalties, noting the overlap in obligatons. In my opinion, the penalties in respect of each contravention give effect to the important principles of specific and general deterrence.

41. I order that the penalties be paid within 14 days and be paid into the Consolidated Revenue Fund.



AJ Chambers
Magistrate
8 May, 2008.