FEDERAL COURT OF AUSTRALIA

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

INDUSTRIAL LAW – employer concedes failure to pay the minimum rates of pay to a casual employee under the applicable award – parties agree to statement of facts – consideration of appropriate penalties for breaches

Workplace Relations Act 1996 (Cth), s 178
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

Kelly v Fitzpatrick [2007] FCA 1080 cited
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 cited

AMY CHAUNTELLE SHARPE v DOGMA ENTERPRISES PTY LTD ACN 102 225 972
ACD 28 OF 2007

GYLES J
3 OCTOBER 2007
CANBERRA

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY **ACD 28 OF 2007**

BETWEEN: **AMY CHAUNTELLE SHARPE**
Applicant

AND: **DOGMA ENTERPRISES PTY LTD ACN 102 225 972**
Respondent

JUDGE: **GYLES J**

DATE OF ORDER: **3 OCTOBER 2007**

WHERE MADE: **CANBERRA**

THE COURT ORDERS THAT:

1. In relation to the contravention by the respondent of the terms of the *Retail and Wholesale Industry – Shop Employees – Australian Capital Territory – Award 2000*, as amended from time to time, by failing to pay Mr Nikola Zolotic (the employee) the minimum rate of pay applicable to a casual employee, the following penalties be imposed:

   1.1 For work performed during ordinary hours Monday to Friday: $3000

   1.2 For work performed during ordinary hours on a Saturday: $4500

   1.3 For work performed during ordinary hours on a Sunday: $3000

   1.4 For work performed outside ordinary hours Monday to Saturday: $8000

   1.5 For work performed outside ordinary hours on a Sunday: $4500

   1.6 For work performed on a public holiday: $2000

   A total, in all, of $25,000.

2. Payment of the penalties be deferred for a period of 90 days from 3 October 2007.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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BETWEEN:	**AMY CHAUNTELLE SHARPE** **Applicant**
AND:	**DOGMA ENTERPRISES PTY LTD ACN 102 225 972** **Respondent**

JUDGE: **GYLES J**

DATE: **3 OCTOBER 2007**

PLACE: **CANBERRA**

REASONS FOR JUDGMENT

1 On 16 August last, I made declarations that the respondent had contravened the terms of the *Retail and Wholesale Industry – Shop Employees – Australian Capital Territory Award 2000* (the Award) by failing to pay Mr Nikola Zolotic (the Employee) the minimum rate of pay applicable to a casual employee in six particular circumstances. I also ordered that the respondent pay unpaid entitlements, including interest. Those orders were made by consent. I then stood the matter over for a hearing on penalty. That hearing took place yesterday.

2 The offences occurred between 22 March 2003 and 17 December 2005 in relation to six categories of circumstances. The breaches varied considerably in number and there were differences in distribution as between the various dates. That has some significance because, on 10 August 2004, the maximum penalty for each offence was raised from $10,000 to $33,000.

3 There has been argument as to what the maximum penalty is for each of the offences which have been found. It is not an easy issue because, for the purposes of the declaration, the offences were divided into the period of the week for which the offence took place during each week over that period – not that there were breaches of every term and condition in every such week. Because it was accepted that, within each category, it was the one course

of conduct, one offence was seen to be appropriate. That is all very well, but the maximum penalty was raised during that period.

4 From a practical point of view, it is not a real possibility that the maximum would be exceeded. For comparison purposes, I will assume the maximum penalty to be $22,000 – a rough average of the amounts before and after the increase – bearing in mind the number of offences that were involved. In other words, I have not acceded to the proposition that the maximum penalty is that now applicable, nor have I acceded to the proposition that it is the maximum penalty when the period commenced. That argument can be resolved on another day in a case in which it is critical to the result.

5 The parties have agreed on a statement of facts. That has been marked as an exhibit in the proceeding and is available for anybody to read. Although it has not been read publicly, it is a public exhibit. I will not reproduce in this judgment all of those agreed facts. I should, however, mention some of them.

6 The applicant is a workplace inspector. The penalties are sought pursuant to s 178 of the *Workplace Relations Act 1996* (Cth) (the Act), as it stood prior to the amendments made in 2005 pursuant to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). It has been explained to me why that is the case, having in mind the transitional provisions.

7 The parties are agreed that, generally speaking, the matters which might be relevant in cases of this kind were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, adopted by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080. The parties have put the submissions on that basis.

8 The respondent was a body corporate subject to the Act, and operated a business trading as "Video Ezy Charnwood" in the Australian Capital Territory. The Employee was born on 10 July 1984. He was employed as a casual shop assistant. The respondent filed an Australian Workplace Agreement (AWA) between the Employee and itself with the Office of Employment Advocate on 16 August 2004 which, of course, was a considerable period after the Employee had been engaged. It is said that that was the result of advice from the previous owner of the business.

9 I need not trace through what subsequently took place in relation to that. It was never assessed as meeting the requirements of the Act, that is, the no disadvantage test. On 26 May 2006 which, of course, is after the end of the employment, the Industrial Relations Commission determined that matter adversely to the respondent, the case having been heard in November 2005. No further AWA was filed and there was no certified agreement applicable to the employment, thus the Award applied at all material times.

10 In April 2006, the Office of Workplace Services received a wages and conditions claim from the Employee against the respondent. Investigations and negotiations followed and it is fair to say that the respondent adopted a recalcitrant attitude at that time. It is said that this attitude was, in part, due to advice received from the ACT and Region Chamber of Commerce and Industry which had been involved in the matter on behalf of the respondent. That organisation is not, of course, before me, and I hesitate to make findings which might be critical of it. The fact of the matter is that the proceeding in this Court was necessary to bring the matter to a head. Ultimately, the orders were made by consent and, further, the orders to pay the unpaid entitlements and interest have been complied with.

11 Turning, then, to the headings of relevant matters, I should say this – although it is convenient to refer to these headings, the discretion as to the imposition of a penalty is quite unrestrained by the statute. There are no mandatory matters to be taken into account. I would not agree to substituting a judge's checklist for the unrestrained statutory discretion.

12 I have discussed the nature and extent of the breaches and will come back to that in a moment. Insofar as the circumstances under which the conduct took place, it is true that the Employee was a young worker, being 18 years old when he commenced employment. It is said, however, that the directors of the respondent, themselves, were not very much older than the Employee and that they had no tertiary qualifications and little business experience prior to acquiring the suburban video business. It is said that they lacked expertise. They relied upon the advice of an accountant in setting up the business, but did not seek other professional assistance, in particular did not seek advice as to industrial relations. They did, when trouble with the AWA process emerged, seek advice, but it was not, of course, directed to the initial employment of the particular employee concerned here.

13 The underpayment involved, some $9954 plus interest, is by no means an insubstantial amount and was a significant proportion of the overall entitlements of the Employee. There is no prior conduct of this kind although, of course, they were not in business for very long.

14 I have already dealt with the fact that breaches have been assembled under six headings. In one sense, they arose out of the one course of conduct, but, in my opinion, they are not to be looked upon as only one course of conduct for all purposes.

15 The size of the business enterprise involved has led to some debate between the parties. It is clear enough that this is a suburban store of modest proportions in overall terms. However, it is a significant business enterprise and the reality is that many potential breaches of awards will take place by small enterprises. Nonetheless, it seems to me that the size of the undertaking is relevant, because the nature of a penalty, being by way of deterrent, needs to take account of the amount which would be such as to deter the enterprise itself from re-offending. It must be big enough to cause the enterprise not to risk the eventuality of a penalty by breaching awards and then buying their way out. However, as has been put, we are not, here, talking about BHP Billiton or David Jones.

16 As to whether the breaches were deliberate, it is not suggested that the directors set out to deliberately flout the Award and, because of their relative lack of business experience, that may not be surprising. However, the fact is that an AWA was lodged. It was not accepted. A course of conduct was then undertaken which indicated an involvement with the industrial law which makes it surprising and worrying that there was no appreciation of the fact that awards existed. It has been put on behalf of the applicant that ignorance of the law is no excuse. That is true. However, in relation to penalty, it is a matter to be taken into account.

17 There has been some cooperation with the enforcement authorities although, as I have indicated, it was belated and, in effect, forced by the imminence and the existence of this proceeding. Nonetheless, cooperation, both as to the acceptance of liability and as to the agreement as to facts, is a matter to be taken into account in favour of the respondent.

18 As to contrition, although Mr De Marco, a director of the respondent, has expressed regret in the proceeding, that is tempered by what I have said about the lateness of it. Corrective action was taken but, again, only after this proceeding commenced.

19 I take into account the need for specific and general deterrence. I appreciate that the penalty should not be oppressive and that it is not a criminal sanction. There is some evidence that a substantial penalty could have an impact on the viability of the respondent. However that may be, the non-adherence to the Award and the nature and scale of the underpayment here indicates that if the law is breached the business community should not get the idea that they can take the risk of underpaying and then buy their way out of it with a modest penalty. The penalty must be imposed at a meaningful level and, in a sense, the respondent must begin to actually hurt.

20 I have been assisted by looking at the spreadsheet attached to the agreed facts, which sets out the number and distribution of the individual cases of underpayment. I have also received some assistance from a spreadsheet prepared by the solicitor for the respondent, comparing different cases, although that sort of comparison is very difficult because of differing circumstances. The analysis is quite revealing.

21 In assessing penalty I have had regard to scale by the number of the offences and the frequency of offences over the period, and also scale in the sense of comparison, say, between the category of overtime Monday to Saturday with the category of overtime on Sunday – one is obviously greater than the other. I have also in mind that, although technically all breaches do not arise out of the one set of circumstances, in a broad sense they do. There must be a sense of proportion. I am not sure that the totality principle is correctly identified as applicable in these circumstances, but I think a sense of proportion for the overall conduct should be borne in mind.

22 With all of that in mind, I impose the following penalties:

For work performed during ordinary hours Monday to Friday: $3000
For work performed during ordinary hours on a Saturday: $4500
For work performed during ordinary hours on a Sunday: $3000
For work performed outside ordinary hours Monday to Saturday: $8000

For work performed outside ordinary hours on a Sunday: $4500

For work performed on a public holiday: $2000

A total penalty, in all, of $25,000, and a formal order to that effect will be made.

23 On application by the respondent, I will also order that payment be deferred for a period of 90 days from today.

I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gyles.

Associate:

Dated: 9 October 2007

Counsel for the Applicant:	Ms C Dowsett
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondent:	Mr J Wilson
Solicitor for the Respondent:	Williams Love & Nicol
Date of Hearing:	2 October 2007
Date of Judgment:	3 October 2007