

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

No. W01709682

BETWEEN

**INSPECTOR ROGER YATES (a workplace inspector appointed
pursuant to section 167(2) of the *Workplace Relations Act 1996*)
Of Level 6, Customs House, 414 Latrobe Street, Vic. 3000**

Plaintiff

AND

**MILES TRANSPORT PTY LTD
Of 3 Napier Street, Warragul, Victoria 3820**

Defendant

ORDERS

1. The Defendant pay to the Commonwealth the following penalties for two breaches of the *Transport Workers (Long Distance Drivers) Award 2000* :
 - (a) \$3,300 for breach of clause 19; and
 - (b) \$3,300 for breach of clause 34.
2. Payment of the penalties in order 1 to be made within 30 days into Consolidated Revenue pursuant to s.841 of the *Workplace Relations Act 1996*

REASONS FOR DECISION

1. This is an application by the plaintiff for the imposition of penalties under section 719(1) of the *Workplace Relations Act 1996 (Cth)* for admitted contraventions of the *Transport Workers (Long Distance) Award 2000*.
2. There are two distinct breaches of Award alleged:
 - a. The wages clause, cl.19 – in particular, cl. 19.3 – travel per kilometre and 19.5 – loading and unloading; and
 - b. The annual leave clause – cl. 34 – accrual and payment of a pro rata entitlement.

Considerations applicable to penalty

3. Listed under the principal objects described in s. 3 of the Act includes:
 - “... (d) *providing the means:*
 - ... (ii) *to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment; and*
 - (e) *providing a framework of rights and responsibilities for employers and employees, and their organisations, which supports fair and effective agreement – making and ensures that they abide by awards and agreements applying to them...*”
4. This statement emphasises the importance of minimum standards, and the enforcement of those standards.
5. It is also relevant to note that the maximum penalty increased in August 2004 from \$10,000 to \$33,000 per breach. Failure to pay Award rates of pay, and conditions such as annual leave are not trifling matters.

6. For this matter to reach the point of judgement in a Court, it has a long history. Attempts at voluntary compliance have been unsuccessful. Legal proceedings are a last resort.
7. The Federal Court has 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 that penalty.¹ Two decisions of Mowbray FM nicely set out these relevant considerations.²

Background to these proceedings

8. The agreed statement of facts filed by the parties in this matter recites that following a claim lodged with the Workplace Ombudsman by a former employee of the defendant, the plaintiff interviewed Mrs Miles on 26 September 2006. She provided the Inspector with relevant logbooks and wage records.
9. On 23 November 2006, the Inspector discussed by telephone with Mrs Miles his assessment of the alleged underpayments owing to the employee. The following day he sent a letter confirming the details of the conversation and setting out the basis of his calculations.
10. A further telephone conversation was held on 20 November concerning the methodology used to calculate the underpayment. Mrs Miles asked for the return of her documents to check the plaintiff's figures, but unfortunately, it appears that they went astray in the mail.
11. By letter and telephone call on 7 November 2006, Mrs Miles responded to the breach letter denying that any entitlements were owed to the employee, based

¹ 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.

on her own calculations, relying on a time-based rate, rather than a mileage rate set out in the Award.

12. The plaintiff responded by letter dated 19 December 2006, providing further explanation of his calculations.
13. The defendant replied by letter dated 8 January 2007, alleging that there had been a verbal agreement between the employee and the defendant to pay differently than the requirements stipulated by the Award. Mrs Miles indicated the defendant would defend the claims.
14. The defendant's position was further confirmed by telephone on 18 January 2007.
15. Legal proceedings were issued on 22 June 2007.
16. The defendant did not file a notice of defence to this claim. Following the issue of proceedings, they agreed to pay all outstanding entitlements together with interest. They did so on 13 July 2007. The employee concerned has received those entitlements.
17. The sole director of the defendant and his wife, the administration manager of the business attended Court for the hearing to determine penalty in this claim, and were represented by Counsel. Affidavit material was filed on their behalf. They agreed a statement of facts, which has greatly assisted the Court. They appeared genuinely concerned to ensure future compliance with all employee entitlements.

Nature and Extent of the Conduct

18. The defendant is a one-person company that conducts a transport business based in the Yarra Junction, most usually transporting refrigerated flowers to the Sydney market. It has only employed people for the last 7 years although it

has been in operation for 18 years. The defendant currently employs five employees. Mary Miles, the wife of the sole director performs the clerical duties including the employment of staff.

19. The employee concerned, Mark Burns was employed on a full time basis commencing 9 September 2004 until his employment was terminated on 13 May 2006, as a Grade 6 Truck Driver.

20. The defendant was unaware until the involvement of the plaintiff in September 2006 of its Award obligations. Mrs Miles incorrectly believed that an oral agreement could override any award obligations. The defendant based its pay rates upon what Mrs Miles understood others in the industry paid. She gave no evidence of seeking professional advice about the obligations of the defendant.

21. The defendant over a 20-month period of employment failed to pay Mr Miles, \$5,669.15 in entitlements under the award. It was only after proceedings were issued that the defendant remedied the underpayment. Such an underpayment is significant. To be denied his entitlement to accrued annual leave would have affected greatly on the employee and his family.

Similar previous conduct

22. No prior contraventions of the Act or other workplace legislation are alleged against the defendant.

Size of the company

23. Profit and loss statements tendered by the defendant company reveal an annual turnover in the order of \$1.5 million, with an operating profit of \$108,000 in 2005 and an operating loss of approximately \$32,000 in 2006. Current figures were not available. It has been operating for 18 years.

Deliberateness of the breaches

24. The breaches are not wilful, but have occurred in circumstances where the defendant has had a reckless disregard of its lawful obligations.

Involvement of senior management

25. Mrs Miles, the wife of the sole director is the administrative manager and is responsible for the day-to-day operations of the company, including the engagement of employees.

Corporate contrition, corrective action and cooperation with the enforcement authorities

26. The defendant declined to remedy the underpayment until legal proceedings were commenced despite multiple communications with the Inspector. Once proceedings were served, the defendant was extremely cooperative in rectifying the underpayment, together with interest. They cooperated fully to facilitate the hearing of this matter. I accept their actions, once the seriousness of the situation was understood, constitute an expression of remorse.

27. The defendant has taken advice and is in the process of preparing AWA's to cover its existing employees.

Deterrence

28. I am satisfied that this defendant has been specifically deterred from engaging in similar future conduct, by its involvement in these proceedings. However, the issue of general deterrence looms large. As stated by Justice Finkelstein in *CPSU v Telstra Corporation Limited*³, "*Even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's*

³ (2001) 108 IR 228 at 231

disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct." The Federal Court has also stated that even if the employer is a small business, the penalty must be imposed at a meaningful level.⁴

29. Ignorance of the law is no excuse for the underpayment of wages. It is important that all employers, small or large ensure that they correctly pay all wages and entitlements. Information is now freely available on the internet. Employers and employees are free to bargain – so long as it is done within the parameters set by the *Workplace Relations Act 1996*. The penalty ordered in this case is largely based upon the need for general deterrence – that is to encourage other employers, particularly small employers in the transport industry to ensure that they comply with their obligations in respect of the payment of wages and entitlements.

Discretion and total penalty

30. In determining penalty, regard must be had to the totality principle, which is designed to ensure that the aggregate of the penalties imposed are not such as to be oppressive or crushing, yet provide an appropriate response to the conduct leading to the breaches⁵.

31. Each breach is a separate matter warranting a discrete penalty. The maximum penalty for each breach is \$33,000, giving a total of \$66,000.

32. Having regard to the matters raised above, particularly the admissions by the defendant, their size, their cooperation with the authorities and corrective action I consider that a penalty in the order of 10% of the maximum is warranted. This penalty is to be paid into Consolidated Revenue.

⁴ See Tracey J in *Kelly v Fitzpatrick* [2007]FCA 1080 at [28] and *ACCCC v ABB Transmission and Distribution Ltd* [2001] ATPR 41-815 at [13]

⁵ See Tracy J in *Kelly*

A handwritten signature in black ink, appearing to read 'Kate Hawkins', with a large circular flourish at the end. A horizontal line extends from the end of the signature to the right.

Kate Hawkins

Magistrate

30 August 2007