FEDERAL MAGISTRATES COURT OF AUSTRALIA

BYRNE v KNL GROUP PTY LTD TRADING AS DONUT KING & ANOR *[2008] FMCA 1440*

INDUSTRIAL LAW – Multiple contraventions of the *Workplace Relations Act* and industrial instruments – considerations as to penalty.

Workplace Relations Act 1996, ss.340, 342, 728
National Fast Food Retail Award 2000
Australian Pay and Condition Classification Scale

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Kelly v Fitzpatrick (2007) 166 IR 14

Applicant:	INSPECTOR NICOLE BYRNE
First Respondent:	KNL GROUP PTY LTD TRADING AS DONUT KING (ACN 109 042 122)
Second Respondent:	KENNETH LIU
File Number:	MLG 100 of 2008
Judgment of:	Burchardt FM
Hearing date:	23 September 2008
Date of Last Submission:	23 September 2008
Delivered at:	Melbourne
Delivered on:	27 October 2008

REPRESENTATION

Counsel for the Applicant:	Ms R.M. Doyle
Solicitors for the Applicant:	Deacons Lawyers
Counsel for the Respondents:	In person

THE COURT DELCARES THAT:

(1) The First Respondent contravened subsection 341(1) of the Workplace Relations Act 1996 (Cth) ("the WR Act") in respect of employees Ebony Bowden, Rachelle Dawes, Laura Dettman, Tricia Dewar and Amy Sia.

(2) The Second Respondent contravened subsection 341(1) of the WR Act in respect of employees Ebony Bowden, Rachelle Dawes, Laura Dettman, Tricia Dewar and Amy Sia.

(3) The First Respondent contravened subsections 337(2) and 337(9) of the WR Act in respect of employee Tamara Bransgrove.

(4) The Second Respondent contravened subsections 337(2) and 337(9) of the WR Act in respect of employee Tamara Bransgrove.

(5) The First Respondent contravened s.346A of the WR Act in respect of employees Ebony Bowden, Rachelle Dawes, Laura Dettman, Tricia Dewar, Amy Sia and Tamara Bransgrove.

(6) The Second Respondent contravened s.346A of the WR Act in respect of employees Ebony Bowden, Rachelle Dawes, Laura Dettman, Tricia Dewar, Amy Sia and Tamara Bransgrove.

(7) The First Respondent contravened regulation 8.11 of the *Workplace Relations Regulations 2006* ("the Regulations") in relation to an AWA purporting to apply to the employment of employee Tamara Bransgrove.

(8) The Second Respondent contravened regulation 8.11 of the Regulations in relation to an AWA purporting to apply to the employment of employee Tamara Bransgrove.

(9) The First Respondent contravened regulation 8.12 of the Regulations in relation to an AWA purporting to apply to the employment of employee Tamara Bransgrove.

(10) The Second Respondent contravened regulation 8.12 of the Regulations in relation to an AWA purporting to apply to the employment of employee Tamara Bransgrove.

(11) The First Respondent failed to pay employees Colleen Beamish, Ebony Bowden, Tamara Bransgrove, Jade Condie, Rachelle Dawes, Laura Dettman, Tricia Dewar, Jemma Furnival, Amy Sia and Liseby Stathakis wages and conditions to which they were entitled pursuant to the *National Fast Food Retail Award 2000* and the applicable Australian Pay and Classification Scale.

THE COURT ORDERS:

(12) That a penalty of $25,000.00 be imposed upon the First Respondent for its contraventions of the WR Act as declared above.

(13) That a penalty of $5,000.00 be imposed on the Second Respondent for his involvement in the said contraventions.

(14) That the above penalties be paid into the Consolidated Revenue Fund.

OTHER MATTERS

(15) The Court notes that the First Respondent has paid to each of the following employees the following amounts pursuant to s.719(6) and s.720 of the WR Act in respect of the underpayments referred to in Declaration 13 above:

(a) $1,579.75 to Ms Colleen Beamish;

(b) $585.08 to Ms Ebony Bowden;

(c) $257.50 to Ms Tamara Bransgrove;

(d) $523.70 to Ms Jade Condie;

(e) $773.83 to Ms Rachelle Dawes;

(f) $1,191.23 to Ms Laura Dettman;

(g) $2,050.16 to Ms Tricia Dewar;

(h) $372.85 to Ms Jemma Furnival;

(i) $531.56 to Ms Amy Sia; and

(j) $1,075.21 to Ms Liseby Stathakis.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 100 of 2008

INSPECTOR NICOLE BYRNE
Applicant

And

KNL GROUP PTY LTD TRADING AS DONUT KING (ACN 109 042 122)
First Respondent

KENNETH LIU
Second Respondent

REASONS FOR JUDGMENT

1. The Respondents have committed a cornucopia of contraventions of the *Workplace Relations Act 1996* ("the WR Act"). The only ultimately significant issue in this case is the quantum of penalty which should be imposed upon each of the Respondents for that conduct.

The relevant facts

2. There are no issues as to the various formal matters such as the appointment of Inspector Byrne, her capacity to bring these proceedings and the incorporation of the First Respondent. The Second Respondent is a director and shareholder of the First Respondent. It is conceded not only that he has been involved in the contraventions within the meaning of s.728 of the WR Act but also that he was at all times the guiding force of the First Respondent.

3. The First Respondent operates a retail store at the Cranbourne Centro shopping centre and sells doughnuts and ancillary attractions. During the relevant period, the First Respondent employed a number of employees, all of whom were casuals.

4. Of the ten employees with whom these contraventions are concerned, three were over 21 at all times, one was 19 or 20 years old, one was 18 and the others ranged between 15 and 17 years of age.

5. From 26 May 2005 the First Respondent was bound by the *National Fast Food Retail Award 2000* and from 27 March 2006 onwards the First Respondent was bound by the *Australian Pay and Condition Classification Scale*. Those instruments taken together required the application of certain pay rates and ancillary payments such as overtime, annual leave and the like.

6. It is not necessary to set out in full the contraventions that took place of the industrial instruments. They are set out in the statement of agreed facts filed by the parties on 17 April 2008 at paragraphs 28-36. I note that underpayments to the various employees ranged from some hundreds of dollars to in excess of $2,000.00 in one instance.

7. As early as June 2006 following complaints made to it, the Office of Workplace Services, as it then was, commenced investigations of the Respondents. At the hearing before me the Second Respondent asserted that he had at all times cooperated properly with the investigation, which is inconsistent with the history set out in the agreed statement of facts.

8. If one looks at paragraphs 47-64 of the agreed statement of facts, it is quite plain that the Applicant had to issue a number of notices to produce, compliance with which was far from ready. Further, the Applicant had to issue a number of breach notices because the Respondents, at least initially, denied any liability.

9. Furthermore, it took the Respondents until late 2007 to effect repayments of the sums that were not paid; even allowing for some confusion on the part of the Respondents as to where their obligations truly lay in this regard, I accept the submission of the Applicant that it was scarcely as prompt as it could have been.

10. Notwithstanding the fact that the Respondents had been alerted to the fact that their industrial affairs were by no means wholly in order by mid 2006, the Respondents lodged a number of Australian Workplace Agreements (AWAs) in circumstances that contravened a number of the legislative provisions as to AWAs. Those breaches are once again set out and their history detailed in paragraphs 37-44 of the agreed statement of facts. I note that there are two underpayments of entitlements still not paid, although I also note that the Respondents have undertaken to make those payments as rapidly as possible.

11. In my view, the Applicant's submission that the Respondents had breached the Award and WR Act in relation to seven contraventions (as set out in paragraph 10 of the Applicant's submissions in relation to penalty filed on 19 September 2008) should be accepted. I also accept that the Respondents contravened on five occasions as set out in paragraph 23 of the Applicant's submissions.

12. I further note, however, that counsel for the Applicant very properly conceded the asserted contraventions of s.342 of the WR Act in respect of Tamara Bransgrove may be problematic. There is a question as to whether or not the obligation contained in s.342 of the WR Act to lodge an agreement obtains where it has not in fact been approved under s.340.

13. Given the overall disposition of this case, I do not propose to find the contraventions of s.342 in respect of Tamara Bransgrove to be established. That is because the point is open to argument both ways. The Respondents here were represented solely by Mr Liu, who is not in a position to put any contrary argument owing to his lack of legal training. The determination and disposition of this interesting legal point should await a case in which both sides are represented.

14. It should be noted that the inclusion or otherwise of these contraventions under s.342 would make in the circumstances no difference to the ultimate outcome in any event.

15. So far as the breaches of the conditions contraventions are concerned, I regard the following factors as being of particular significance:

    a) These were all casual employees.

b) Almost all of them were young, and some of them very young.

c) The course of conduct embarked upon by Mr Liu was deliberate. In his submissions before me he said that he had always made it clear he could not pay penalty rates and that the other parties to his employment agreements had agreed (their capacity to disagree is clearly disempowered by the factors referred to above).

d) Arising from the former, Mr Liu knew that what he was doing was in breach of the relevant industrial legislation.

e) Mr Liu was a senior figure in the First Respondent. His conduct was that of senior management, albeit that phrase needs to be looked at in the context of the fact that this was a very small operation.

f) Mr Liu has expressed abject contrition before the Court.

g) The First Respondent does not appear to be a particularly profitable corporation.

h) Albeit that cooperation with the investigation was patchy at best, the provision of the agreed statement of facts and the non-contesting of the proceedings at Court has saved both the Applicant and the Respondents the cost and expense of a lengthy trial.

i) No previous similar conduct is alleged against the Respondents.

j) The underpayments were significant given the very low wages that obtained for the employees concerned, even though the absolute amount of moneys concerned was small.

16. In relation to the AWA claims, the relevant considerations in part are set out above (for example the size of the operation, its degree of industrial sophistication and the like) but would also include:

a) The course of conduct in relation to the AWAs was embarked upon at a time when the Respondents should have been on notice as to proper compliance with industrial law and instruments generally because they were already the subject of investigation by the Applicant.

b) The forms of conduct engaged in by the Respondents in relation to the AWA struck at every stage at the scheme of the legislation which, putting the matter broadly, is designed to promote the free and fair bargaining process which is supposed to give rise to AWAs. In this regard, I accept the submissions made orally and also detailed at paragraphs 36-48 of the Applicant's submissions in relation to penalty.

The approach to determining penalty

17. Here I accept that a number of the multiple breaches arose out of a course of conduct and that they must be treated as a single breach. The Applicant has already given full credit to the Respondents for that principle in the draft minutes of order proposed.

18. Second, to the extent that two or more contraventions have common elements this should be taken into account in considering an appropriate penalty so that the Respondents are not penalised more than once for the same conduct. Once again, this consideration has been reflected in the draft orders prepared by the Applicant.

19. Thereafter, the Court is required to consider a penalty in respect of each course of conduct, and finally to consider the application of the totality principle. Here, the Applicant seeks declarations in respect of each of the agreed contraventions of the legislation. For the reasons already given, I will make all the declarations sought save those in respect of Tamara Bransgrove.

20. This brings me to the question of the imposition of penalties. The Applicant seeks in effect that each Respondent pay one penalty for the contraventions identified in relation to the various underpayments and breaches of conditions and a further penalty in relation to the contraventions of the legislation in relation to AWAs.

21. On one view, this represents a very significant series of concessions by the Applicant, but in my view they are appropriate to be made in the circumstances of this case. Thus, the maximum penalties that may be imposed are $33,000.00 times two for the First Respondent and $10,000.00 times two for the Second Respondent.

22. The Applicant expressly conceded that in all the circumstances this might be a case where a relatively low if not nominal penalty should be imposed on Mr Liu. Nonetheless, this is a case where even in the absence of the necessity for specific deterrence, which I accept is not really likely to be of great moment, general deterrence is important.

23. That this is so arises from a number of considerations. First, the legislative scheme has to be considered. It is important that people in low-paid jobs with only basic conditions of employment get at the very least the minimum entitlements that the relevant legislation and industrial instruments provide.

24. Next, and by extension to the former principle, general deterrence is necessary to ensure that these conditions are indeed provided. Further, it is important that there be a proper penalty imposed for the serious nature of the conduct engaged in. Mr Liu's own evidence made it clear that, at least in part, he was aware he was breaching industrial instruments (see paragraph 15(c) above).

25. In relation to the AWAs, the legislative scheme is likewise important. The employees with whom we are concerned in this case were vulnerable, being both casual employees and by and large youthful. They were not empowered stand-alone negotiators.

26. Finally, and this applies in relation to all the contraventions, the state of the authorities involving the retail industry is now such that it is proper to take judicial notice of the fact that contraventions of industrial law appear to be regrettably rife in the retail industry in which the Respondents operate. Leaving aside even decisions of other judicial officers, my own case load has involved a regrettably numerous series of examples of retail industry infractions.

27. Balancing all the relevant considerations together, these contraventions seem to me to fall about in the midpoint of the range. Penalties of $16,500.00 for each contravention upon the First Respondent and $5,000.00 in respect of each contravention by the Second Respondent would seem to be appropriate. These would produce cumulative totals of $33,000.00 for the First Respondent and $10,000.00 for the Second Respondent, a total of $43,000.00.

28. It is perhaps, however, slightly artificial in a sense to look at these penalties in isolation. Although it is clear that the WR Act enables penalties to be imposed both on corporations and directors, the fact is that all the money will ultimately come, it is most likely, out of the same source.

29. I think a penalty in excess of $40,000.00 upon what appears to be a somewhat marginal business operation such as this would be "crushing" (see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 ("*Ophthalmic Supplies*") at [95] and [98]). Nonetheless, it needs to be borne in mind, as Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [28]:

> *"That no less than large corporate employees, small businesses have an obligation to meet minimum employment standards."*

30. The totality principle involves a final look to see that the sentence imposed is appropriate. In my view, and applying the principles set out in *Ophthalmic Supplies*, the penalty upon the First Respondent should be $25,000.00 and on the Second Respondent should be $5,000.00.

31. I do not think it is appropriate to suspend the operation of any of these penalties, not least because Mr Liu knowingly embarked upon the contraventions involving pay and conditions (at least in part) and because the conduct of the Respondents taken as a whole does not make it otherwise appropriate.

32. I will, however, as counsel for the Applicant indicated might be appropriate, hear the Respondents on the question of time to pay.

33. Finally, the Applicant seeks that the set penalties be paid into the Consolidated Revenue Fund and I see no reason why that is not appropriate. I will so order.

I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Ms B Evans

Date: 27 October 2008