IN THE MAGISTRATES' COURT
AT MELBOURNE
INDUSTRIAL DIVISION

No. X00344391

BETWEEN:

INSPECTOR MARTIN EVAN DWELLY (A workplace inspector appointed pursuant to s.167(2) of the *Workplace Relations Act 1996 (Cth))*

Plaintiff

and

TIMRYL PTY LTD
(ACN 097 227 659)

Defendant

REASONS FOR DECISION

Introduction

1. Timryl Pty Ltd (**Timryl**) is a company in the business of baking, delivering and selling bread products. Mr Mark Siciliano is the director of Timryl, which trades under the name "Universal Bakery".

2. The Plaintiff, Mr Dwelly, is a Workplace Inspector appointed in accordance with section 167(2) of the Workplace Relations Act 1996 (**the WR Act**). In February, 2008, the Plaintiff lodged a Complaint and Statement of Claim in this Court alleging Timryl had underpaid four of its employees, Ms Julie Robinson, Mr Chris Davies, Mr Anthony Dobson and Mr Nicholas Peperkamp.

3. Between 25 July, 2005 and 22 August, 2005, Ms Robinson was employed by Timryl as an Accounts Assistant, performing clerical and administrative duties. Messrs Davies, Dobson and Peperkamp were employed for periods between 2004-2006 as full-time delivery drivers working night shift. As part of their duties, the delivery drivers assembled customer orders onto crates, loaded and unloaded the trucks and delivered the bread to the locations of the various customers.

4. In an Amended Statement of Claim filed on 25 July, 2008, the Plaintiff alleged Timryl breached the following:

(a) Clause 16 (wages) and 27 (proportionate annual leave on termination) of the *Clerical and Administrative Employees Victorian Common Rule Award 2005* (**the Clerks Award**) in respect of Ms Robinson;
(b) Clause 34 (night shift allowance) of the *Transport Workers Victorian Common Rule Award 2005* (**the Transport Workers Award**), in respect of the delivery drivers;
(c) In the alternative, clause 24.2 (night shift allowance) of the *Bread Trade (Victoria) Award 1999* (**the Bread Trade Award**) in respect of the delivery drivers;
(d) Clause 34 of the preserved Australian Pay and Classification Scale (**APCS**) derived from the Transport Workers Award in respect of Mr Pepercamp;
(e) In the alternative, clause 24.2 of the preserved APCS derived from the Bread Trade Award in respect of Mr Peperkamp.

5. In a Statement of Agreed Facts filed on 6 November, 2008, Timryl admitted the breaches of clauses 16 and 27 of the Clerks Award in respect of Mrs Robinson and of clause 24.2 of the Bread Trade Award in respect of the drivers. However, Timryl denies having breached the provisions of the Transport Workers Award in respect of the delivery drivers or the preserved APCS derived from that Award or the Bread Trade Award in respect of Mr Peperkamp.

6. On 11 November, 2008 leave was granted by the Court for the Plaintiff to further amend its Statement of Claim to allege, again in the alternative, a breach of the *Transport Workers (Mixed Industries) Award 2002* (**the Mixed Industries Award**) or the preserved APCS derived from the Mixed Industries Award in respect of the delivery drivers. Timryl denies having breached the terms of the Mixed Industries Award, and in particular denies

being respondent to that award by virtue of membership of the Victorian Employers' Chamber of Commerce and Industry (**VECCI**).

7. The Plaintiff seeks the imposition of a pecuniary penalty on Timryl under section 719(1) of the WR Act and s178(1) of the pre-reform WR Act.

8. Before considering the question of penalty however, the following issues arise for determination:

   (a) Which award applied to the employment of the delivery drivers – the Bread Trade Award as submitted by Timryl, or the Transport Workers Award or alternatively, the Mixed Industries Award?

   (b) If the Mixed Industries Award applies to the employment of the delivery drivers, was Timryl bound by that award by virtue of membership of VECCI?

9. In determining this matter, I have had regard to the following material filed (and in some cases tendered in evidence) on behalf of the Plaintiff:

   (a) The Agreed Statement of Facts dated 6 November, 2008;
   (b) The Outline of Evidence of Martin Evan Dwelly;
   (c) The Outline of Evidence of Julie Robinson;
   (d) The Outline of Evidence of Chris Davies;
   (e) The Outline of Evidence of Anthony Dawson;
   (f) The Outline of Evidence of Nicholas Peperkamp.

10. I have further had regard to the material filed on behalf of the Timryl, being:

   (a) the Affidavit of Mark Sicilliano dated 14 October, 2008;
   (b) The Outline of Evidence of Mark Sicilliano dated 31 October, 2008;
   (c) The Outline of Evidence of Peter McNeill dated 31 October, 2008.

11. I have also taken into account the evidence of Mr Dwelly and each of the delivery drivers who gave oral evidence in these proceedings, in addition to the evidence of Mr Sicilliano and Mr McNeill, a former Victorian Branch Secretary of the Bakery Employees and Salesmen's Federation of Australia (**BESFA**) between 1989 and 1999, and following amalgamation with the Australian Liquor and Hospitality Miscellaneous Workers Union (**the LHMU**) in 1993, the Secretary of the State Baking and Sales Division of the LHMU between 1993 to 2000.

Which Award Applied to the Delivery Drivers?

The Bread Trades Award

12. Timryl contends that the application of the Bread Trades Award extends to the employment by it of the delivery drivers. It is not disputed that the defendant is a direct respondent to the Bread Trades Award under its trading name "Universal Bakery".[1] The question that arises is whether the scope of the Bread Trades Award, properly construed, extends its scope and operation to the work performed by the delivery drivers.

13. Clause 6 of the Bread Trades Award details the scope and application of the award in the following terms:

> *This award shall apply to the employment of employees being members or not of the Australian Liquor, Hospitality and Miscellaneous Workers Union, engaged in or in connection with the trade of bread making or baking in the State of Victoria.*

14. On behalf of the defendant, it is submitted that this provision establishes two criteria to fall within the scope of the Bread Trades Award. The first conditions is that the employees are members, or eligible to be members of the LHMU. The second condition is that the employees are engaged *in or in connection with* the trade of breadmaking or baking in Victoria (added emphasis).

[1] See Bread Trade (Victoria) (Roping- In No. 1) Award 1999

15. As to the first condition, clause 6 does not expressly prescribe eligibility for membership of the LHMU as a condition. However, in my opinion, the application of the award in clause 6 to employees, "being members or not" of the LHMU can only sensibly be construed as applying to employees eligible to be members of the LHMU whether members or not of the Union.

16. The court heard evidence of Mr McNeill (not challenged by the Plaintiff) that delivery drivers were formerly covered by the BESFA, known as the Breadcarters Union, which was a Union eligible to cover employees in the baking industry in Victoria being "principally employed in the slicing, packaging, loading and transport and delivery of bread and bakery products".[2] In around 1993, Mr McNeill says BESFA amalgamated with the LHMU.

17. Following amalgamation, Part 13 of the Eligibility Rule of the LHMU relevantly provided as follows:

Without in any way limiting or being limited by the conditions of eligibility for membership elsewhere in this rule, the following persons shall also be eligible for membership; persons employed in or in connection with the Industry of Bread (including hamburger buns, bread rolls and crumbs), Yeast Goods, Crumpets, Cakes , Pastry, Pastry Goods and Allied Products Manufacture and Distribution from the Manufacturer to the manufacturer's customers....

Provided that there shall not be eligible for membership of the Union any persons who are or would have been eligible for membership of the Transport Workers' Union of Australia except in accordance with its registered rules as at 19 October, 1978, except:

(i) persons in the State of Victoria, New South Wales and Queensland who are wholly or partly engaged in the industry of bread carting including bread carters, spar drivers, foremen carters, bread-packers, inspectors and collectors.

[2] Exhibit A, Outline of Evidence of Peter McNeill, paragraph 1

18. I am satisfied on the evidence, that the delivery drivers are employees eligible to be members of the LHMU, by reason of the Part 13 of the Eligibility Rule of the LHMU.

19. In respect of the second condition, the Plaintiff submits that the delivery drivers could not be said to have been "engaged in or in connection with" the trade of breadmaking and baking. The Plaintiff submits to be engaged in or in connection with a trade there needs to be a relationship between the employment of the drivers and the activities under consideration: *R v. Watson, ex parte the Australian Workers Union* (1972) 128 CLR 77 (**Watson's case**). In that case, the High Court held that work done in or about a ready mix concrete plant was not work done in the building industry or, in a relevant sense, work incidental to building operations.

20. Further, the Plaintiff argues that there is no classification in the Bread Trades Award that applies to the work of driving, for instance, no breadcarter classification exists under the award.

21. On behalf of the defendant it is submitted that the words "in or in connection with" should be construed expansively and that the words *"have a wide connotation, requiring merely a relation between one thing and another. They do not necessarily require a causal relationship between the two things": Our Town FM v. Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479.

22. In my opinion, the words "in or in connection" take their meaning from the context and purpose of the instrument in which they appear. In this case, they appear in an award made under the WR Act. Accordingly, the words should be construed as words of wide import to give effect to the protection afforded to employees by the safety net of minimum terms and conditions contained in awards.

23. It is not disputed that the defendant is engaged in the trade of breadmaking and baking. There is, however, inconsistent evidence about the extent to which the delivery drivers duties involve work, such as collating orders, preliminary to undertaking their driving and delivery duties.

24. Mr Davies, who was employed by Timryl as a delivery driver between October, 2004 and May, 2005, agreed under cross-examination that collecting the baked products prior to delivery took between 3-4 hours. This was the time estimate given by Mr Sicilliano. Mr Davies could not recall how many customers he was required to assemble orders for. However, he did not dispute that it may have been in the vicinity of 34 customers.

25. In contrast, Mr Dobson and Mr Peperkamp gave evidence that it took between 1 and 1.5 hours to assemble the crates with the bread products. Mr Dobson said the night shift started at midnight, and that "it was usually about 1.30am by the time I got out of there" to deliver the orders. However, under cross-examination he agreed other delivery drivers may not have left until 2.00-2.30am. Mr Peperkamp said the assembly of orders took him "one and a half hours tops", but agreed that the other drivers, who were older, could possibly have taken 3-4 hours. He said he had between 30-40 customers on his run.

26. In my opinion, a determination of this issue requires an objective analysis of the evidence. On the balance of the evidence, I am satisfied that each delivery driver was responsible for assembling into crates the orders of approximately 34 customers. Whilst some delivery drivers may be able to undertake this work considerably faster than others, I consider that, on average, the assembly of the orders would take drivers in excess of one and a half hours, and more likely between two to three hours. The witnesses conceded that for some drivers the process may take up to four hours. I find that this aspect of the job of assembling customer's orders is a significant part of the role of delivery drivers employed by Timryl. In relation to this finding however, there is no doubt that for the majority of the time worked each shift by the delivery drivers they are the road.

27. I consider there to be a clear relationship between the activities of the delivery drivers employed by Timryl and its business undertaking of breadmaking. The factual situation here can be contrasted with that in

Watson's case. There the work performed at the ready mix concrete plant was preliminary to the work done in the building industry. The Court found that the concrete was mixed for a variety of purposes, one of which was use in construction. In contrast, based on my findings here, the delivery drivers spend a substantial period of time, albeit not the majority of their time, in the defendant's premises assembling orders by choosing the required bread, rolls, buns etc, onto crates, and then loading onto the trucks for delivery. In delivering the bread products, including unloading the crates at the premises of customers of Timryl, the delivery drivers are clearly performing duties integral to the defendant's baking operations.

28. In my view, it is not relevant that the work performed by the drivers is capable of being sub-contracted. This was a concession made by Mr Sicilliano in evidence upon which the Plaintiff relies. However, the fact that an employer may be able to sub-contract a discrete work function (for instance, a clothing manufacturer that contracts-out the work of machinists to outworkers) does not alter the characterisaton of the work as integral to the business undertaking.

29. The classification structure contained in the Bread Trades Award is not based on occupations or positions/duties. It contains generic classification "levels", from Level 1 to Level 5. I have had regard to the uncontested evidence of Mr McNeill as to the intention of the LHMU in the creation of the Bread Trades Award to continue coverage of all members of the former breadcarters union, including those involved in the slicing, packaging, loading and distribution and delivery of bread and bakery products. In my view, the fact the Bread Trades Award does not specifically contain a classification for drivers (in circumstances where the award does not contain a classification definition for any employee covered by its scope) does not preclude a construction of the Award in favour of coverage of the delivery drivers.

30. For the foregoing reasons I find the work of the three delivery drivers the subject of these proceedings is governed by the terms and conditions contained in the Bread Trades Award.

31. The question then arises as to whether the work of the delivery drivers may also be governed by the Transport Award or the Mixed Industries Award.

Transport Workers Award and Mixed Industry Award

32. The scope and application of the Transport Workers Award is contained in clause 6.1 as follows:

> *The industry covered by this award is or is in connection with the transport of goods, wares, merchandise, material or anything whatsoever whether its raw state or natural state, wholly or partly manufactured state or of a solid or liquid or gaseous nature or otherwise, and/or livestock.*

33. The scope of the Mixed Industry Award, at clause 6, is relevantly identical to the scope of the Transport Workers Award, yet significantly, after the words *"and/or livestock"* the following is added:

> *...where the work performed is ancillary to the principal business, undertaking or industry of an employer respondent to this award.*

34. The principal business of Timryl is in or in connection with the business of breadmaking and that the work performed by the delivery drivers is ancillary to that principal business or activity. The opening phrase of the Mixed Industries Award, at clause 6, clearly refers to an industry that is not the employer's principal industry. In contrast, on a plain reading of the scope of the Transport Workers Award, the relevant "industry" is that which is or is in connection with the business of transporting goods and wares. It is clear the defendant is not involved in the transport industry.

35. As an alternative proposition, the Plaintiff submits that the delivery drivers are employed in or in connection with the transport of goods and wares and therefore covered by the Transport Workers Award. The Plaintiff relies on the evidence of the delivery drivers that a substantial component of their work involves driving duties. However, I consider that the opening words of

clause 6 of the Transport Workers Award draws a clear nexus between such work and employment in the industry covered by the award, that is, the transport industry. Here the drivers are employed in the industry of breadmaking and bakery.

36. Although certainly not determinative of the issue, I also note that the employer respondents to the Transport Workers Award are transport companies, in contrast to the Mixed Industries Award where none of the listed respondents are transport companies.

37. I was referred by the Plaintiff to a decision of the Australian Industrial Relations Commission (**AIRC**) where Harrison SDP stated that the Mixed Industries Award *"is a general award designed to pick up employees engaged in the transport of goods as an ancillary function to an employer's principal business"*[3]. This observation is consistent with a plain reading of the scope of the Mixed Industries Award. In this case, the principal business of Timryl is that of making continental bread rolls and loaves. The delivery of those bread products to customers of Timryl by the drivers is, without doubt, ancillary to that principal business.

38. For the foregoing reasons, I am satisfied that work performed by the delivery drivers falls within the scope of the Mixed Industries Award and not the Transport Workers Award. The Defendant further submits however, that the drivers cannot be subject to the Mixed Industries Award as they are not employed in a category or classification contemplated by that award. The classifications contained in the Mixed Industries Award mirror those in the Transport Workers Award. The classifications include drivers, and loaders/leading loaders. The defendant submits that the evidence establishes that the drivers perform a range of duties, not limited to driving.

39. However, I am satisfied on the evidence that, whilst other duties are performed by the drivers, those duties, such as assembling the orders onto trays for loading onto the trucks, are preliminary to and "in connection with"

[3] Transport Workers Union of Australia v. A T & D A Tudorovic Pty Ltd & Ors [2003] AIRC 233

their substantive duties as delivery drivers. Accordingly, I am satisfied work performed by the delivery drivers was governed by the Mixed Industries Award.

Was the Defendant a respondent to the Mixed Industries Award?

40. The defendant is not a named respondent to the Mixed Industries Award. Clause 7.2.3 of the award is relied upon by the Plaintiff in circumstances where is binds VECCI in respect of all the employees of their members. Similarly, section 149(1)(d) of the Act (prior to WorkChoices amendments) provided for application of an award by virtue of an employer's membership of an "organisation" bound by that award. VECCI is one such organisation. The issue is whether, for the purposes of the award and the Act, Timryl was a member of that organisation.

41. During his evidence, Mr Sicilliano the director of the Defendant, gave evidence that Timryl is a member of VECCI. Also in evidence are documents produced by VECCI in response to a Summons issued by the Plaintiff[4]. These documents reveal the status of the defendant's association with VECCI as being that of a "Subscriber". The covering letter from VECCI states that it does not treat Subscribers as fully entitled members of the organisation and says Timryl was never considered a financial member of VECCI.

42. On behalf of the Defendant it is submitted that the Rules of VECCI make not reference to Subscribers. The Rules do distinguish between Associate Members and Members, the former having no voting rights. Given that subscribers cannot exercise the rights and privileges of membership, it is submitted that a Subscriber cannot be considered a member of VECCI.

43. The Plaintiff referred me to a decision of the AIRC in *Carpenter v. Corona Manufacturing Pty Ltd*[5], a decision of Commissioner Whelan, where this issue

[4] Exhibit 29 – Letter from VECCI dated 11 November, enclosing Member Profile Information
[5] PR 924136, 30 October, 2002

was considered. The Defendant submits that this decision does not bind the court and should not be followed. First, the Defendant submits the decision blurs any distinction between members of organizations (who have corresponding rights, such as voting rights) and other parties, such as subscribers who do not enjoy such rights[6]. Second, the Defendant submits that the circumstances in that case, where a member resigned its membership and joined as a "subscriber" to avoid award obligations, formed the basis of the Commissioner's decision and has no application to the facts in this case.

44. In my opinion the reasoning of Commissioner Whelan in Carpenter's case is persuasive. Commissioner Whelan notes, at paragraph 74 of her decision, that neither the Act nor VECCI's rules define the term "member", although "the Act provides that members of registered organisations (of which VECCI is one) have certain rights and VECCI's rules also create both rights and obligations associated with membership". However, Commissioner Whelan continues to observe (at paragraph [74]):

It is insufficient in my view to argue, however, that because the respondent has not been afforded those rights or required to perform those obligations by VECCI that this provides proof that the respondent is not a member of VECCI. Those rights and obligations I accept are corollaries of membership and not indicia of such.

45. In that case, Commissioner Whelan determined that the true nature of the relationship between VECCI and the employer is to be determined by the nature of the contract entered into between them. In that case, as here, the employer was a subscriber. Commissioner Whelan noted that the rules made no provision for membership with this status. The rules only provide for members and associate members. Clearly a members pays a subscription and Commissioner Whelan noted, in her decision that the meaning of "subscriber" has links to the term subscription. I do not consider that Commissioner Whelan's decision turned on the resignation of the member. Rather, the decision focuses on the true nature of the contractual relationship

[6] See Amalgamated Engineering Union & Ors. V. Metal Trades Employers Association (1931) 30 CAR 729 at 733

as at the time the employer sought to obtain subscriber status. There is no reference, as a basis for the decision, to a lack of bona fides in the decision to join as a subscriber.

46. In my opinion, the decision of Commissioner Whelan is consistent with the objects of the Act, one of which being to ensure the maintenance of an effective safety net or wages and conditions through enforceable awards to underpin enterprise bargaining. For that reason, any interpretation of the word "member" under the Act should be given a broad, purposive construction. In the absence of any provision in the VECCI's Rules governing 'subscribers' as discrete from members, I am satisfied, on the reasoning of Commissioner Whelan in Carpenter's case, that Timryl was, during the relevant period, of member of VECCI and accordingly, bound by the Mixed Industries Award.

47. As a consequence of my finding, both the Bread Trades Award and the Mixed Industries Award apply to the employment of the drivers by Timryl. Such a situation was considered by Marshall J in the decision of *Health Services Union of Australia v. North Eastern Healthcare Network* [1997] FCA 1084[7]. It is clear from this authority, that Timryl is obliged to accord to its employees the superior conditions. On this issue, Marshall J observed:

"The situation where two awards govern the terms and conditions of employment of certain employees, whilst relatively unusual, it is not an unknown one. In those circumstances, the employer is obliged to accord to its employees the better conditions in respect of the matters dealt with in the awards, thus obeying all its obligations. It is not the function of this Court to determine which award is more appropriate."

48. I now turn to consider the question of what, if any, pecuniary penalty should be imposed on the Defendant in the circumstances.

[7] See also *North Western Healthcare Network v. HSUA* [1999] FCA 897, being an appeal to the Full Court of the Federal Court against the decision of Marshall J. No issue was taken, on appeal, against this aspect of Marshall J's decision.

The Relevant Legislative Provisions

49. Under section 719(1) of the WR Act, a penalty may be imposed in respect of a breach of a term of an award (and a term of the APCS) on a person bound by that provision. The maximum penalty that may be imposed on a corporation such as Timryl for the breach of a term of an award (or the APCS) is $33,000.

50. Significantly, section 719(2) of the WR Act provides that where the breaches of the award provision "arise out of a course of conduct" the breaches shall be taken to constitute a single breach of the term.

Course of Conduct

51. It is clear that s719(2) of the WR Act only operates in respect of the one term of an award or order: *Gibbs v. The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223 (**Gibbs case**).

52. The parties agree that the failure to pay the permanent night shift loading pursuant to clause 28.6 of the Mixed Industries Award and clause 28.6 preserved APCS derived from that award, or in the alternative, the shift work penalty rates pursuant to clause 24.2 of the Bread Trades Award and clause 24.2 of the preserved APCS constitute a continuing course of conduct. Further, the Plaintiff concedes the Defendant has the benefit of section 719(2) of the Act (and of s178(2) of the pre-reform Act) in relation to each of the employees: *Quinn v. Martin* (1977) 31 FLR 25.

53. Accordingly, the plaintiff submits (and the defendant agrees) that maximum penalty that may be imposed by the Court on the company, Timryl is $99,000.00.

Factors Relevant to Penalty

54. Factors relevant to penalty have been considered in a number of decisions, to which I was referred: see for instance, *Flattery v. Zeffirelli's Pizza Restaurant* [2007] FMCA 9 and *Mason v. Harrington Corporation Pty Ltd T/as Pangaea Restaurant & Bar* [2007] FMCA 7. These cases set out a list of non-exhaustive factors which, in light of the objects of the WR Act, may be considered in determining an appropriate penalty. I analyse the evidence in light of these considerations below.

Nature and Extent of the Conduct

55. In respect of the drivers, noting my finding that both the Bread Trades Award and the Mixed Industries Award apply, and noting Timryl's legal obligations to accord the delivery drivers the better of the conditions, the contravening conduct occurred over a significant period. It applied to the entire period of the employees' employment (ranging from one month to over a year). The underpayments are significant for employees reliant on the award safety net.

56. In relation to Ms Robinson, the two breaches which are admitted by Timryl occur over the brief period of her employment (three weeks) but are also entitlements based on a safety net of wages and conditions, including payment of accrued annual leave.

57. I do not consider the evidence demonstrates the breaches by the Defendant were either deliberate of wilful. At its highest, it could be said the Defendant was reckless as to full compliance with its award obligations, certainly with respect to obligations under the Clerks Award and the Bread Trades Award.

Nature and Extent of Loss or Damage

58. As it transpires, these were significant underpayments for employees reliant on the minimum safety net. The defendant's evidence is that he relied on

advice from the previous owner and VECCI in determining what to pay employees. However, Mr Sicilliano also gave evidence that, where employees had a concern about rates of pay, he would advise them to contact Wageline. The Defendant should be under no misapprehension that the Court views the obligation to ascertain and pay appropriate award wages and conditions as one that rests entirely on it, as the employer.

59. Moreover, whilst underpayments calculated in accordance with the Clerks Award and the Bread Trade Award have now been mostly rectified by the Defendant, this took a considerable period and occurred after the Plaintiff's attempts to secure voluntary compliance had been exhausted. The underpayments were not rectified until almost 2 years after Ms Robinson ceased employment and over 3 years in respect of the drivers.

60. The Defendant now owes in the vicinity of $7,088.94 in respect of the outstanding Mixed Industry Award entitlements[8]. However, for reasons I address later in my decision, I consider there to be mitigating circumstances that attend this breach.

Similar Previous Conduct

61. The Defendant has not been charged with or convicted of any breach of applicable awards or the WR Act in the past, and this is a matter I have taken into account in determining penalty.

62. The Defendant does concede however, that the failure to pay the night shift allowance is not isolated to the employees the subject of these proceedings.

Size of the Business

63. Timryl is a relatively small business employing a total of approximately 20 employees. There is no evidence of a dedicated human resources employee, or resource. The business is largely conducted by Mr Siciliano. The Plaintiff

[8] Assuming the calculation of these entitlements are equivalent to those claimed by the Plaintiff under the Transport Workers Award.

submits that this is not a particularly relevant matter on the question of penalty. However, it is one of the factors identified in the authorities as being relevant on the question of penalty and I have taken it into account. On this issue I have also had regard to the Profit and Loss Statement in evidence[9] and note that Timryl's liabilities exceed its assets. As at 30 June, 2008 the net loss of the company was $30, 403.00.

Involvement of Senior Management

64. Mr Siciliano, a director of the Defendant and the only relevant actor in this matter, concedes he was involved in the breaches.

Contrition, Corrective Action and Co-operation with the authorities

65. Until proceedings were issued, the Defendant did not co-operate with the Workplace Ombudsman when it raised issues in relation to the entitlements of Ms Robinson and Mr Davies. After the proceedings, were issued and the Defendant received legal advice, the Defendant did take corrective action. By cheque dated 4 June, 2008 the Defendant paid to Ms Robinson the sum of $650.59 net, based on the Grade 3 classification under the Clerks Award. On 26 August, 2008, it paid the drivers most of the Bread Trade Award underpayments, together with interest.

66. Mr Siciliano gave evidence in which he expressed his contrition and remorse for the breaches, both personally and on behalf of the Defendant. I had the opportunity to assess Mr Siciliano as a witness and I accept the contrition expressed by him was genuine.

67. Mr Siciliano also gave evidence of the stress and pressure he was under at the time of the investigations by the Workplace Ombudsman, including investigations by the Australian Tax Office, the illness of his father, the long hours he was working, his father's ill heath and of having himself suffered a heart attack. He said the business was and remains in difficulties.

[9] Exhibit D

68. Whilst I accept as genuine the various pressures on Mr Siciliano at the time, on the facts (as agreed), it is clear that at least with respect to Ms Robinson and Mr Davies, he was given from December, 2005 until 8 August, 2007 to rectify the underpayments. His failure to co-operate with the Workplace Ombudsman during this period, even in the circumstances, is an aggravating feature of his conduct and is relevant to penalty.

Specific and General Deterrence

69. Clearly, the need for specific and general deterrence is relevant to the imposition of a penalty under the WR Act. Noting the genuine remorse shown by Mr Siciliano on behalf of the Defendant and noting the corrective steps taken in relation to the Clerks Award and the Bread Trades Award, I consider that specific deterrence has largely been achieved. Mr Siciliano gave evidence of steps taken to ensure the drivers are paid whatever is the applicable night shift allowance since February, 2006 however, I note that it was not until proceedings were issued that the full amounts claimed by the Plaintiff were paid.

70. Notwithstanding this, and the entitlements now due under the Mixed Industries Award, I do not consider the need for specific deterrence to play a significant role in imposing a penalty.

71. General deterrence remains an important factor, regardless of the size and financial circumstances of the Defendant. The Court is required to impose a penalty that serves as a warning to other employers that non-compliance with minimum standards is a serious matter and that compliance with award obligations is of paramount importance.

72. In my judgment, there is force in the submission of the Defendant that "the uncertainty surrounding which award applies to the employment of the Drivers is a factor which the Court should take into account in determining the quantum of penalty"[10]. This is particularly the case in respect of the

[10] Defendants Outline of Submissions dated 1 December, 2008 at paragraph 14.

Mixed Industries Award. However, the submission is not as persuasive in relation to the Bread Trades Award, and the failure of the Defendant to rectify the underpayments to the drivers under that award in a timely manner.

Penalty Decision

73. Clearly, there is a significant overlap in the obligations imposed by the various award obligations in respect of night shift penalties payable to the drivers. I have taken this into account as the Defendant should not be penalised more than once for the same conduct.

74. Taking all of the above factors into account, I consider the following penalties to be appropriate:

(a) Failure to pay the basic periodic rate of pay to Ms Robinson under clause 16 of the Clerks Award - $6,600.00;
(b) Failure to pay the required proportionate annual leave on termination of employment to Ms Robinson under clause 27 of the Clerical Award - $6,600.00;
(c) Failure to pay the shift work penalty rates to the delivery drivers in accordance with clause 24.2 of the Bread Trade Award, and the permanent night shift loading under clause 28.6 of the Mixed Industries Award, and pursuant to the derived APCS derived from those awards - $9,900.00.

75. Having fixed an appropriate penalty for each course of conduct, I am required to consider the aggregate penalty, to determine whether it is an appropriate response to the conduct that lead to the breaches, and is not oppressive or crushing[11].

76. Having regard to the totality principle, or what is commonly referred to as the "instinctive synthesis" test, I consider that the penalties imposed in respect of breaches of the Clerks Award should be reduced to an aggregate

[11] See Australian Opthalmic Supplies Pty Ltd v. McAlary-Smith [2008] FCAFC 8

penalty of $6,600.00 as a reasonable and just penalty in response to the breaches identified with respect to Ms Robinson. Given the Defendant has already derived significant benefit from s719(2) of the WR Act (and section 178(2) of the pre-reform WR Act) as a result of my decision, I do not consider any further reduction warranted in respect of the underpayment of the delivery drivers.

77. Accordingly, the Defendant is ordered to pay an aggregate penalty of $16,500.00 pursuant to section 719(1) of the WR Act.

78. I order that the pecuniary penalty referred to in paragraph 77 be paid into the Consolidated Revenue, with a stay of 30 days on my order.

79. I note that the parties are to confer as to the precise terms of the Orders sought in relation to the quantum of the underpayments. Accordingly, I reserve liberty to apply.

AJ Chambers
Magistrate
24 March, 2009.