



Australian Government
Workplace Ombudsman

**IN THE MAGISTRATES' COURT
OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION**

COURT NUMBER W03168344

BETWEEN

**Joshua Iser (a workplace inspector appointed pursuant to section 167(2) of the
Workplace Relations Act 1996)**

Plaintiff

and

Con Papageorgiou trading as Sharx

Defendant

TRANSCRIPT OF HEARING 23 JULY 2008

Magistrate Kate Hawkins
For the Plaintiff: Matthew Follett
For the Defendant: no representation

**DISCLAIMER: THIS IS AN EDITED EXCERPT OF THE ABOVE HEARING.
NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.**

- HER HONOUR
1. This is a matter in which the Plaintiff alleges that the Defendant, who is a sole trader of a fish and chips shop known as Sharx Fish & Chips, trading at Mountain Gate shopping centre, is alleged to have breached the following clauses and sections:
 - a. s 182 of the Workplace Relations Act 1996 ('the Act') by failing to pay the minimum rates of pay to two junior employees as required under the *Australian Fair Pay and Conditions Standard* ('the Standard');
 - b. a breach of clause 12.1 of the *Fast Food Retail Victoria Common Rule Declaration 2005* ('the Award') in failing to pay the Claimants for the minimum number of hours required under that Award;
 - c. clause 24.2.1 of that Award in failing to pay the Claimants the minimum rates of pay for hours worked on Saturdays;
 - d. clause 24.2.2 of the Award for failing to pay the minimum rate of pay for hours worked on Sundays; and
 - e. clause 24.2.3 of the Award for failing to pay the minimum rate of pay for hours worked after 6:00pm.
 2. After the Plaintiff lodged the Statement of Claim in this matter, a document was received by the Court which purported to be a defence to these proceedings. It not being in proper form was rejected by the Court and the Defendant has failed to file any formal defence to these proceedings.
 3. I note that the Court has invited him to do so, as has the Plaintiff's solicitors, but he has neglected to file any further correspondence of any nature, certainly not a defence in proper form with the Court.
 4. Accordingly, on the 21 April 2008, the Court comprised by her Honour Magistrate Chambers made judgement in default and ordered the defendant to pay to the Claimants the amounts of \$472.40 to the first Claimant and \$806.67 to the second Claimant by way of underpayments together with the interest amounts of \$74.24 and \$129.15 on those amounts.
 5. To date I am informed that these orders have not been complied with by the Defendant.
 6. This matter is listed today for a hearing in relation to penalty. Affidavits containing the evidence upon which the Plaintiff has intended to rely have been served on the Defendant and he has been put on notice of the hearing today.
 7. He has not attended at Court today and I am satisfied that he is on notice of the material to be raised in this hearing and of the hearing

itself.

8. Having perused that affidavit evidence, I am satisfied that the alleged breaches have been proved by the Plaintiff and I find the breaches to which I have referred above formally proven.
9. I will now turn to consider the penalty applicable in relation to these breaches.
10. For the record, I have relied on the affidavit of the first Claimant and the affidavit of the second Claimant, both affirmed on the 27 May 2008, together with an affidavit of the first Claimants mother affirmed on the same day, together with an affidavit of the workplace inspector, Mr Joshua Iser, sworn on the 22 July 2008.

MATTHEW
FOLLETT

11. Your honour.

HER HONOUR

12. Yes.

MATTHEW
FOLLETT

13. I just might note that that affidavit of Mr Iser was not served on the Defendant, given that it was sworn yesterday, but essentially it just gives a chronological history of what's occurred and everything in it the Defendant obviously has a copy of, either been sent to him or he sent it back. I just thought I should point that out.

HER HONOUR

14. Thank you very much for that correction. The material contained in Mr Iser's affidavit isn't necessary for the conclusion of a finding of the breach of the Award provisions in any event.

MATTHEW
FOLLETT

15. No

HER HONOUR

16. Certainly rely on the material that's set out in the Claimants affidavits to reach that conclusion. And for the record, note that Mr Iser's affidavit contains largely a history of the correspondence with the Defendant.

MATTHEW
FOLLETT

17. Yes

HER HONOUR

18. And does not add to the evidence required to reach the conclusion of breach. Thank you.
19. In determining penalty in relation to this matter I have regard to the specific provisions of the Act, specifically s 719(2) which provides that where two or more breaches of the term of an applicable provision are committed by the same person and they arise out of a course of conduct by that person, they shall constitute a single breach of the provision. That's clearly applicable in this case where the conduct arises over a period of ten weeks or so and involves repeated underpayments of the applicable rates.

20. The maximum penalty which may be imposed by the Court, which is referable to each of these breaches is that for a sole trader or natural person of 60 penalty units of \$110 per unit each. That's a maximum penalty which may be imposed by this Court in relation to each breach of the Award of \$6,600.
21. Firstly I must identify the separate contraventions involved. Each breach of each separate obligation is referable for consideration of the provisions of s 719 of the Act. Whilst certain breaches may be technically separate breaches I have regard to where there are common elements of the conduct which give rise to those breaches. I take that into account in determining the appropriate penalty for each contravention.
22. It's important that the Court does not penalise the Defendant more than once for the same conduct. The penalty I imposed must be an appropriate response to what the Defendant did.
23. I stress that this is a separate task from determining after taking into account all of the considerations I will refer to. In a final view of the matter to apply, what has come to be known as, the 'instinctive synthesis', in making that assessment.
24. I have regard to the decision in '*Merringtons*' and *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8, a decision of the Federal Court I refer to as a guide to the appropriate approach in determining penalty in relation to these matters.
25. For simplicity, the contraventions alleged against the Defendant can be categorised as falling into the following five distinct categories:
 - a. the requirement to pay the hourly rate of pay set;
 - b. the failure to pay the minimum number of hours of each shift worked by the Claimants. There was a minimum for three hours per shift to be worked;
 - c. thirdly, the failure to pay the required loading for hours worked on Saturdays;
 - d. fourthly, loading worked on Sundays; and
 - e. fifthly, the required loading for hours worked after 6:00 pm on days other than Saturdays, Sundays or Public Holidays.
26. I treat those as five distinct breaches, however, there is some commonality in relation to the latter three of those alleged breaches. And whilst clearly they must be treated as separate and distinct breaches, I will have some regard to that feature in ultimately determining penalty.
27. I note that each term was breached repeatedly by the Defendant in respect of both the Claimants.

28. In calculating, therefore, the maximum penalty that the Defendant faces in relation to these breaches is \$33,000. The factors I must have consideration to in relation to penalty are a non-exhaustive list but the major factors are conveniently outlined by Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 and that list has been adopted and affirmed by his Honour Justice Tracey of the Federal Court in the *Kelly v Fitzpatrick* [2007] FCA 1080 case.
29. Turning to the specifics of this particular case, two young women one of whom approached the Defendant looking for employment and subsequently encouraged her girlfriend to apply. One was 15 years of age the other 14 years of age commencing, I presume given their age, in their first jobs, fresh from school.
30. They were looking for part-time work to fit around their other commitments. Clearly they were vulnerable junior employees without knowledge and experience in the workforce.
31. I note that the relevant Award makes provision for a substantial discount in the rate of pay to be paid to such employees. It specifically provides that for employees of less than 17 years, they are to be only paid 50% of the adult rate. That is a considerable benefit to any employer and perhaps acknowledges the lack of experience associated with employing junior employees.
32. The alleged conduct occurred over a ten week period and I accept that it was particularly opportunistic and of an exploitative nature.
33. These employees were young and reliant on the minimum wage. And as I have indicated being a wage that is already significantly reduced by virtue of their age. I accept that junior employees are in a category of employees who may be defined as vulnerable and open to exploitation given their lack of understanding of their lawful entitlements. This is a feature borne out by this case which was brought to the attention of the authorities by one of the Claimant's mothers. It was upon approach by one of the Claimants mothers that the young employees' employment was terminated when he refused to pay what she alerted to him was her daughter's lawful entitlements.
34. It's clear that a rate of pay involved here of \$5 per hour cash as a flat rate of pay ought to be well known, and notorious in our community, as well under the Award rate of pay even for a 15 year old junior worker. This amount fell well below the level payable to the Claimants under the relevant Award and I accept that it was well below a rate that any reasonable employer could legitimately expect was lawful.
35. To this end I find that the contravening conduct was clearly, wilfully reckless as to the need to comply with lawful obligations.

36. It's apparent that the Defendant would only agree to pay \$5 per hour to the Claimants and has not had regard to his legal obligations or the minimum entitlements of the persons he employed. He acted in deliberate disregard to those obligations.
37. I accept that hospitality is an industry traditionally Award covered and knowledge of those Award conditions could be regarded as common place. It is also an industry where junior employees are traditionally employed and therefore it is particularly important that the minimum standards set under the Act are complied with.
38. The Defendant has not chosen to put any material before the Court in relation to any attempts on his behalf to ascertain his legal obligations. Clearly from the material I have before me that he runs at least one hospitality outlet and quite possibly a second in the same shopping centre. As such, it is highly likely that he is employing staff and it's to be expected that any employer does take the necessary steps to ensure that they are complying with legal obligations at all times.
39. I can infer from the material before me that this wilful blindness was a deliberate and exploitative tactic on behalf of the Defendant to avoid his lawful obligations and increase returns for his business.
40. It's quite apparent from the material before the Court that Mr Papageorgiou took a different view to the nature of this employment. He has continued to deny that an employment relationship existed with these two employees. Instead he asserts in a letter to the Plaintiff workplace inspector, dated 9 May 2007, that he was attempting to do these girls a favour by giving them some experience and I quote from his letter in which he concludes that instead of them being happy with getting that experience, that he has been insulted instead of appreciated for what we did for those kids.
41. He says, "Those kids were not employed at my shop. I was doing them a favour and they were giving me an inconvenience and in the end two females have turned into extortionists trying to extort money for nothing from me. Only because they have nothing to lose but a lot to gain if successful. And because...", and I delete the name of the Claimants mother, "looked and sounded very confident and experienced about doing this sort of thing and she has influenced them greatly. I don't believe the kids would ever turn to extortionists had they not been influenced by her because they looked to me like very nice kids and so innocent."
42. It appears that this Defendant clearly does not have an appreciation of what he is required to do as an employer according to law.
43. Whilst the underpaid amounts are relatively small on a numerical basis, they must be put into context of these employees. These were junior employees working on a part-time casual basis. One underpayment was over \$800 for a 15 year old person over a period

of ten weeks. That amounts to \$80 per week which I accept is substantial to that Claimant in the context.

44. The Plaintiff has not alleged any similar previous conduct of this nature by the Defendant and there are no findings of proven breaches alleged in this case against the Defendant. That is a significant matter I take into account by way of mitigation of the penalty imposed today.
45. I accept that the Defendant has operated as a sole trader but, despite being invited to do so, the Defendant has not provided to the Court any evidence of the financial position of his business. However, observation by the Claimants does allow me to infer that the Defendant is still operating the Sharx business and may well be operating other businesses within the Mountain Gate shopping centre of a similar nature.
46. Whilst the Defendant is a sole trader and the size of the business would appear to be quite small, that in itself does not afford the Defendant the benefit of a significant reduction in the potential maximum penalty.
47. The Defendant was a sole trader and I can infer from the evidence clearly was directly involved in the breaches which have been found proven occurring in his business.
48. He has:
 - a. not expressed any contrition what so ever;
 - b. failed to cooperate with the authorities in rectifying this underpayment; and
 - c. continually refuses to recognise his obligations;
 - d. most serious to this end is that despite the Court having made an order for these underpayments to be rectified he has failed to comply to date with that Court order. That is a matter most serious which I take into account in determining the penalty to be imposed today.
49. Paramount in this case is the need to ensure that minimum standards and legal obligations in respect of wages are complied with. One of the principle objects of the Act has been a maintenance of an effective safety net and effective enforcement mechanisms.
50. Parliament has seen fit to set substantial penalties for breaches of these minimum entitlements and that reinforces the importance to be placed on compliance with these minimum standards.
51. A hospitality industry is ripe for exploitation by unscrupulous employers. It's often the first port of call for young people setting out in their first job. Unfortunately, all too often, these young employees are exploited and underpaid and there is a real need for the Court to

send a message by way of general deterrence in the application of the penalty today, particularly to employers in this industry.

52. This is a case where specific deterrence has particular application. Throughout the entire matter the Defendant has refused to acknowledge his obligations as an employer and to the contrary refers to the Claimants by such terms as extortionists.
53. It is apparent that he continues to operate the Sharx business and possibly other businesses. I can draw no inferences on the basis of the material before me as to whether he is now complying with his legal obligations in relation to any other employees.
54. He certainly has stated in a conversation with one of the Complainant's mothers he makes reference to having, and I quote, "I have gone through 23 kids already who do not appreciate the job or the wages. When I was young I worked just for tips and no wages. Kids today are lucky to get \$5 per hour." Whilst from that I can draw no conclusion about whether he has underpaid other workers in the past, it certainly demonstrates an attitude of intending to continue to avoid his legal obligations in the future. Therefore specific deterrence is an extremely important consideration in determining penalty in this matter.
55. There is a clear need to send a message to employers in this particular industry, particularly small business operators and sole traders that employ junior employees that correct entitlements for employees must be paid and steps must be taken by employers to ascertain and comply with those minimum entitlements.
56. It is very easy in this day and age to ascertain what is the correct wage rate for employees. It is as simple as a quick search on the internet. This is not a difficult or expensive task and ignorance of the correct lawful obligations has never been, and certainly in this day and age cannot be seen as, an excuse for underpayment of wages.
57. As I have said, none of the breaches alleged involve the potential punishment of the Defendant for the same or substantially similar conduct, aside from the similarities in relation to the clauses requiring the payment of loadings. I take that into account in determining final penalty.
58. Having gone through the process of considering each of the separate elements which are clearly relevant to the determination of the penalty, I go back and look at the totality of the case and apply the instinctive synthesis test to determine whether the penalty I propose to impose is appropriate in all of the circumstances.
59. It's also important to consider whether any penalty imposed is to be crushing on this Defendant. That's an impossible task to exercise in this case given the absence of financial information before the Court in relation to the viability of the Defendant's business.

60. In conclusion, having applied all of those tests in accordance with the principles to which I have referred, I conclude as follows:
- a. in relation to the breach for failing to pay the required hourly rate of pay to the Claimants, I impose a penalty of \$4,000;
 - b. in relation to the failure to pay for the minimum hours of each shift worked by the Claimants, I impose a penalty of \$4,000;
 - c. in relation to each of the three breaches for failing to pay the required loading;
 - i. for hours worked on Saturdays;
 - ii. Sundays; and
 - iii. for hours worked after 6:00 pm on days other than Saturdays, Sundays or public holidays,

I impose a penalty of \$3,000 per breach.

61. In total that is a penalty of \$17,000 and pursuant to s 841(a) of the Act, I direct that that penalty of \$17,000 be paid into consolidated revenue of the Commonwealth.

62. I grant the Defendant a 30 day stay on payment of that penalty.

63. Is there anything further?

MATTHEW
FOLLETT

64. Nothing further, your Honour.

HER HONOUR

65. Thank you.