Australian Government
Workplace Ombudsman

IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION

COURT NUMBER X02915424

BETWEEN

JOSHUA ISER (a workplace inspector appointed pursuant to section 167(2) of the Workplace Relations Act 1996)

Plaintiff

and

PENANG KAYU NASI KANDAR PTY LTD First Defendant

and

POH MENG HONG Second Defendant

TRANSCRIPT OF HEARING 13 MAY 2009

Magistrate: Kate Hawkins
For the Plaintiff: Ben Vallence
For the Defendant: Jeremy Smith

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

HER HONOUR:

1. Mr Hong, the 2nd defendant is a Malaysian National. He lived and studied in Australia for two years during the 1990's. When he completed his studies he returned to Malaysia and established a career in the advertising industry. Through his employment in Malaysia he became aware of a popular chain of restaurants owned by a Malaysian businessman, Mr Burukan Mohamed. His chain of restaurants specialised in food prepared in the Nasi Kandar style. Mr Hong had no background in the hospitality industry but was impressed with Mr Mohamed's restaurants.

2. The two men reached an agreement for Mr Hong to open a restaurant in a similar vein in Box Hill Victoria. Each invested $100,000 in the restaurant which was named Kayu @ Box Hill. The business opened in October 2005. Mr Hong was the manager while Burukan, remained in Malaysia. The latter gave Mr Hong guidance in exactly how to manage the restaurant including how to run a kitchen, what ingredients were required, how spices could be obtained and the like. Staff were recruited locally, however a chef Mr Sritheran Ramakrishnan was brought from Malaysia because the cuisine is a specialty not well known here.

3. This claim concerns the significant underpayment of wages and entitlements to Mr Sritheran Ramakrishnan and two to her locally engaged casual employees of the restaurant, from the period October 2005 to April 2007. The plaintiff seeks orders under ss.719 and 728 of the *Workplace Relations Act 1996* and s.178 of the Pre-reform *Workplace Relations Act* and also seeks pecuniary penalties in respect of contraventions of the Award and the Australian Fair Pay & Conditions Standard which included Preserved Australian Pay Classification Scales derived from the Award. The plaintiff also seeks orders under s.178 sub-s.(6) of the Pre-reform Act and s.719 sub-s.(6) and s.719 sub-s.(7) of the *Workplace Relations Act*, that the 1st defendant pay to each of the employees the outstanding, unpaid wages and entitlements.

4. The background to this claim is as follows. On 9 October 2008 the plaintiff filed a complaint and a statement of claim in this court in respect of the 1st defendant allegedly underpaying three employees, Mr Sritheran Ramakrishnan, Ms Valerie Alexandra Yuwono and Ms Yuxuan Lai and the 2nd defendant was claimed to be allegedly involved in respect of these underpayments. The original amount of the claim was for $91,267.73. This was reduced by agreement at trial to a total claim of $70,311.39. The 1st defendant admits that wages and entitlements were not paid in accordance with the Award in the amount claimed. The 2nd defendant admits his involvement in the breaches.

5. Both defendants consent to orders being made in respect of the underpayments and the breaches claimed. The 1st defendant was a body corporate pursuant to the Corporations Act of 2001 and engaged in the Malaysian restaurant business. It was the employer of the three employees concerned in this case. The business failed and the assets of the restaurant were sold and the funds used to pay creditors. The 1st defendant has no assets and is no longer trading. Upon being alerted by the plaintiff that the 1st defendant had underpaid its employees the 1st defendant paid the sum of $25,000 which was the remaining assets of the business to the plaintiff's office towards its outstanding obligations owed to its employees. This amount was distributed subsequently on a proportional basis amongst the former employees of the business who had lodged underpayment claims with the plaintiff's office.

6. The 2nd defendant, Mr Hong, was a director and shareholder of the 1st defendant. He was responsible for the day to day operations of the restaurant. He managed the employment and the payment of wages and other entitlements for the business. He did so subject to the approval and agreement of his partner, Burukan who held a 50 per cent interest in the restaurant. Mr Hong admits he aided, betted, counselled or procured each of the contraventions alleged and was, by his acts or omissions, concerned in or a party to each of the

contraventions. Insofar as each of the contraventions occurred after 27 March 2006 when the relevant law was changed, he is treated as being involved in each of the contraventions as if he had contravened the Award and the Act.

7. I will turn to examine the nature and extent of the conduct alleged. The 1st defendant admits it breached the following clauses of the Liquor and Accommodation Industry - Restaurants (Victoria) Award 1998 and sections of the *Workplace Relations Act* outlined as follows:

    a. Clause 17.9.1 concerning rates of pay for full time employees. That is of the Award. Section 182 sub-s.(1) of the Act concerning rates of pay for full time employees.

    b. Clause 13.2.2 concerning the rates of pay for casual employees. Section 185 sub-s.(2) concerning the same matter.

    c. Clause 17.12.1 of the Award concerning rates of pay for junior employees.

    d. Clause 25.3.1 and .2 of the Award concerning overtime rates for full time employees on week days and Saturdays respectively and .3 of the same clause for Sundays.

    e. Clause 26.1.1 and .2 concerning penalty rates for full time employees on Saturdays and Sundays respectively and the same clauses for penalty rates for casual employees on Saturdays and Sundays.

    f. Clause 26.3.1 of the Award concerning a night shift allowance. Clause 22.2.1 concerning a split shift allowance for a full time employee.

    g. Section 235 sub-s.(2) of the Act concerning entitlements to annual leave.

    h. Clause 36.5.1 of the Award concerning superannuation and it

is conceded that no penalty is sought, that this is also a breach of the Superannuation Guarantee Administration Act.

i. Clause 20.2 of the Award concerning payment of wages.

j. Clause 23.3.5 concerning requiring an employer to give an employee a minimum of eight days off for every four weeks worked.

k. Clause 31.5.1 concerning penalty rates for full time employees to be paid in public holidays and 31.9 concerning penalty rates for casual employees on public holidays.

8. The most significant underpayment concerns the employment of Mr Sritheran Ramakrishnan. He was employed over a two year period as a full time cook. He was brought from Malaysia by the 2nd defendant to work at the restaurant as a cook. This was on the basis that he would have a sub-class 457 visa approved. By virtue of information concerning wage rates contained in the correspondence from the Department of Immigration and Multicultural Affairs the 2nd defendant demonstrated that he was aware of the minimum rate of pay for a 38 hour week applicable to a cook working in his restaurant. His visa was incidentally never approved. The 1st defendant failed to keep records of the precise hours worked by its employees. It was agreed by the parties that Mr Sritheran Ramakrishnan worked on average 9.5 hours per day, six days per week.

9. He was provided with accommodation above the restaurant and was paid $900 per month on average, depending on what the business could afford from time to time. Mr Sritheran Ramakrishnan had a total outstanding underpayment at the time of hearing in the amount of $65,341.03. This amount comprised unpaid wages, night shift allowances, split shift allowances, various overtime amounts, accrued annual leave and superannuation contributions. Ms Yuwono was employed over a five month period as a casual food and beverage attendant. She had a total outstanding underpayment of $4128.53 comprising unpaid wages, night shift allowance and superannuation

contributions. Ms Lai was employed over a two month period as a casual food and beverage attendant. She had an outstanding entitlement to $841.83 comprising unpaid wages, night shift allowance and superannuation contributions.

10. This prosecution is brought under the *Workplace Relations Act* in relation to breaches of the Award and the Australian Fair Pay and Conditions Standard. These breaches occurred before and after the *Workplace Relations Act* was substantially amended by the Workplace Relations Amendment Work Choices at 2005 on 27 March 2006. Section 178 sub-s.(1) of the Pre-reform *Workplace Relations Act* enabled a court of competent jurisdiction, including this one, to impose a penalty in respect of a breach of a term of an Award or order of the Commission by a person bound by the Award or order.

11. Section 178 sub-s.(2) provided that where two or more breaches of a term of an Award or order are committed by the same person and the breaches arose out of a course of conduct by that person, the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term. Section 719 of the Post-reform Act essentially replicates the Pre-reform provisions. At all relevant times the maximum penalty which may be imposed for a breach of an Award or order in respect of the 1st defendant is $33,000 per breach and the 2nd defendant $6600 per breach. The approach to determining penalty has been often considered by superior courts, including the Federal Court and I am guided by their approach in determining penalty in this case.

12. Pursuant to the legislative provisions I have outlined also, if multiple offences involve course of conduct, they are to be treated as a single offence and I do so in this case. Secondly, the parties have agreed that where two or more contraventions have common elements, they should be taken into account in determining what is an appropriate penalty in all the circumstances for each contravention. Clearly the defendant should not be penalised more than once for the same

conduct. The totality principle as discussed by the Full Federal Court in the case of Mornington Inn particularly at Paragraphs 41-46 in the judgment of their honours Justice Stone and Buchanan must be applied.

13. Thirdly, the court needs to then consider an appropriate penalty to impose in respect of each contravention having regard to the circumstances of all of the case. Fourthly, having fixed an appropriate penalty for each separate contravention or brief of contraventions as a course of conduct, the court shall take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches. The courts then to apply an instinctive synthesis test or approach in making this assessment. The penalty imposed by the court ought to be an appropriate response to what the defendants did.

14. There has been an agreement between the parties in respect of the number of breaches to be considered for the purposes of imposing penalty in this case. There were 18 contraventions alleged, however the parties have agreed that several of these contraventions in substance are duplications and that for the purposes of proceeding with the matter, they have agreed that these be treated as 11 breaches in relation to penalties which may be awarded by the courts. These contraventions concern the following areas.

15. Rates of pay, overtime rates, penalty rates for Saturday, penalty rates for Sunday, night shift allowance, full time employee split shift allowance, annual leave, superannuation, payment of wages, minimum of eight days off per four weeks and penalty rates on public holidays. These are the 11 discreet areas to be considered for the purposes of imposing penalty. It is to be noted that the defendants have garnered significant benefit by virtue of the plaintiffs agreement to allow these contraventions to be grouped together to constitute one single breach in respect of what are technically multiple breaches.

16. The maximum penalty that the court can therefore impose on the 1st

defendant in respect of these
11 breaches is $363,000. The maximum penalty that the court can impose on the 2nd defendant is $72,600. In determining penalty I have had regard to the non exhaustive lists of factors potentially relevant which have been conveniently summarised by Federal Magistrate Mowbray in the Mason v. Harrington Corporation case which have been affirmed by a number of judges of the Federal Court including His Honour Justice Tracy in the case of Kelly v. Fitzpatrick.

17. I will turn to examine the nature and extent of the conduct in this case. Conduct clearly extended over a significant period of time, over a number of years and throughout the entire period of the employment of each of the employees concerned. The 1st defendant received benefit from the underpayments in that the business whilst making a loss through each of its years, clearly benefited from not paying the proper entitlements to wages. Significantly the underpayments have not been repaid in full. There are still significant amounts owed to the employees which in all likelihood will never be forthcoming.

18. The amount of the underpayment is staggering. The 1st defendant failed to pay Mr Sritheran Ramakrishnan 76 per cent of what he was owed and the casual employees 56 and
65 per cent respectively. Rather than paying Mr Sritheran Ramakrishnan what was originally thought to be $39,100 as a base rate for a 38 hour week which was actually a little bit more than that, he was only paid whatever could be afforded out of the business from time to time. In sponsoring Mr Sritheran Ramakrishnan for a work visa, Mr Hong had acknowledged that he understood he would be required to pay at least $41,850 base salary for a 38 hour week as from 5 September 2006, yet he never received anything like this, even in respect to his base salary. Whilst a higher rate of pay by $1 an hour was paid to casual staff for weekend work, there was no attempt made to pay any other entitlements.

19. The 2nd defendant failed to take meaningful steps to determine what

wage rates were applicable to the employees engaged. The only step he went to was to consult employees of other local businesses including fast food outlets and asked them what they were paid. The conduct is aggravated by the failure of the
1st defendant to keep time and wages books. This prevented the employees and subsequently the plaintiff, from determining the full extent of their underpayments. Thirteen former employees of the 1st defendant were contacted and advised that if they wished to take proceedings in relation to their claims for underpayments, they would need to make themselves available for formal interview and may need to appear in court. Only three of the former employees who have been outlined and named above, elected to pursue their outstanding entitlements.

20. The circumstances in which the conduct took place are relevant. The restaurant in question made a significant trading loss in each year of operation. Mr Hong had no experience in the hospitality business. He relied on advice and guidance from his business partner who is resident overseas. He brought Mr Sritheran Ramakrishnan to Australia to work in the restaurant as a cook on the basis that he would receive the benefit of obtaining a visa yet this did not occur. The 2nd defendant was aware of at least the minimum rates of pay applicable to his employees by virtue of his conduct with the Department of Immigration and Multicultural Affairs, yet this was not paid.

21. I turn to examine the nature and extent of the loss. The conduct affected concerned one male full time adult employee and two female junior casual employees who worked for the 1st defendant. Mr Sritheran Ramakrishnan did not speak English and may be presumed to have no or little knowledge of his employment rights in Australia. The other two employees were young women with little experience in the workforce and it is unknown whether the other employees who chose not to have their claims pursued were similarly affected. The court concludes that in respect of the three employees who did lodge claims by virtue of their age and immigration status,

they were particularly vulnerable as employees.

22. The amount of underpayments in this case defies belief. Particularly in regard to Mr Sritheran Ramakrishnan, it demonstrates a considered pattern of exploitation of a worker brought to Australia, housed in the employer's place of work and required to work long hours around the clock seven days per week. In such circumstances he would have had little opportunity to gain awareness of his lawful entitlements or indeed to experience much of life in Australia at all. To the defendants' credit, there is no evidence of any previous conduct by the 1st or 2nd defendant of this nature or indeed of any adverse type. This is a most significant consideration which falls to the favour of the defendant and is significant consideration in respect of mitigation of the penalty to be imposed.

23. The size of the business is also relevant. This was a small business employing approximately 14 employees, run by a husband and wife team with an overseas business partner. The restaurant was not successful. It made net losses of between $22,000 and $36,000 in each year of its operation. The restaurant no longer operates. The 1st defendant is a shell company with no remaining assets. Regard must also be had to the deliberateness of the breaches. There is little evidence explaining how the 1st defendant came to underpay the employees in the first place. It would appear Mr Hong erroneously relied on representations from nearby employees working in local fast food outlets as to what they received by way of wages.

24. There is no evidence that he made a mistake or did not turn his mind to these issues. Mr Hong states that he was not aware of the requirement to pay penalty rates, overtime provisions, shift allowances or the like, as there was nothing similar in Malaysia. He assumed simply that paying a flat rate was all right. This however was not demonstrated in what he actually did pay because he paid the casual employees $6 an hour for weekday work and $7 for the weekend. Wilful ignorance of an employee's lawful obligations is

clearly no excuse for this sort of conduct, regardless of knowledge of Australian law, entitlements must be paid in full.

25. To his credit however Mr Hong comes to court acknowledging that he did have this obligation and he proffered his state of knowledge as a way of explanation rather than excuse for his conduct. Clearly Mr Hong as senior management, was the directing mind and will of the 1st defendant and has admitted to being involved in these contraventions. Significant to the question of penalty is the approach taken by the defendants and the contrition corrective action and cooperation if any, cooperation they may have had with the authorities prosecuting these matters. Most significantly to the defendants' credit the defendants have made a payment of what was left in the business, being a sum of $25,000 to the plaintiff in order to partially rectify the amount of underpayments owed to these three employees.

26. However, a staggering amount of $70,311.39 remains outstanding to three employees alone. The defendants have admitted their breaches and cooperated with the plaintiff in relation to these proceedings. They have agreed a statement of facts which is a significant matter in respect of facilitating the course of justice. For this they will receive a substantial reduction from the maximum penalty open to the court to impose. Mr Hong has regularly appeared in court and has engaged competent legal counsel to represent his interests, thereby assisting the court. He agreed to be cross-examined and did so in a very open manner during the penalty hearing. He presents as a man taking these allegations and the proceedings most seriously.

27. He has not sought in any way to shirk what is a very serious matter. One of the most significant aspects or one of many significant aspects that the court must have regard to in imposing penalty is the need to ensure compliance with minimum standards of wages and entitlements in Australia. This is one of the principal objects of the *Workplace Relations Act* which sets out that one of the objects is the

maintenance of an effective safety net, an effective enforcement mechanism in respect of the underpayment of wages and entitlements. Parliament has seen fit to prescribe substantial financial penalties for breaching these safety net provisions.

28. Sectors in which safety net wages and conditions operate often tend to employ particularly vulnerable workers. This is a prime example of such a case. Youth, language and cultural barriers and the like make it difficult for employees to negotiate better wages. It is particularly important therefore that the system protects these workers to ensure that they receive what they are entitled to. Prosecutions are difficult and costly. Detections of underpayments largely relies upon reports made by these very vulnerable members of the community. That clearly turns that the court ought have regard to questions of specific and general deterrence.

29. As the business is no longer trading and the 2nd defendant no longer employs workers, the plaintiff does not submit that specific deterrence is a major consideration in this case. General deterrence however is very important in this matter. The court must send a clear message to the community that no matter how small the business and regardless of the size of the operation and the financial position of the company, that all workplace laws and obligations must be strictly adhered to. The court must mark its significant disapproval of the conduct in question and set a penalty with serves as a warning to others not to engage in similar conduct.

30. The penalty must be meaningful, but it must not be crushing on the individuals involved in this case. It matters not whether a business is a husband and wife operation such as this case or a large employer reliant on human resources staff and advisory consultants. Workers must be paid their legal entitlements regardless of the position of an employer. It is relevant however to have regard to the financial position of each of the defendants. As I have already indicated the 1st defendant is no longer trading. The 2nd defendant as an individual is a man with three young children and a wife not currently

working. After the failure of his business he found employment for a short period in May 2008. However he was recently made redundant and is currently unemployed.

31. The global financial crisis will no doubt not improve his prospects of employment in the short term. Mr Hong and his wife own a house in Warrenwood, however after personal debts are taken into consideration they have little remaining equity in the house. They are struggling to pay their mortgage and are at real risk of losing that house. Turning to the question of the amount or quantum of penalty, the parties have agreed that any penalty to be imposed on the 1st and 2nd defendants in respect of this case and these breaches ought to be in the mid range of those permitted by the Act. Counsel for the defendant urges that the 2nd defendant was operating at the behest of another and to impose a penalty above the lower mid range would be crushing in his personal circumstances.

32. This case demonstrates a most grievous disregard of industrial obligations. Mr Hong knew what the base rate for a chef was yet never made any attempt to even pay that amount, let alone to pay for all of the hours above the basic 38 hours per week that Mr Sritheran Ramakrishnan worked. No offset can be made to the amount owed by way of underpayment by the virtue of the provision of accommodation. Quite to the contrary, having Mr Sritheran Ramakrishnan on site would have just made it easier for his employer to exploit him by requiring him to work long hours with split shifts without proper rest breaks and time off.

33. Giving preliminary consideration in the context of this breach I find that the breaches concerning non payment of the base rate of pay, non payment of wages, the failure to provide for annual leave, or to pay superannuation are the most fundamental. The requirement to pay these matters is notorious and it belies belief that anyone who had ever worked or lived in Australia would not, if they turned their mind to the question, know that an employer would be required to pay wages, annual leave and superannuation. Accordingly, taking all

matters into account, I will fix the penalties in respect of these four breaches at an amount of 50 per cent of the maximum.

34. The remaining seven breaches concern non payment of overtime, penalty rates and shift allowances. These are somewhat more complex requirements which require some exploration of individual wage requirements to determine with accuracy in any particular case. Accordingly, I will fix penalties initially at the lower rate of 40 per cent of the maximum for these seven breaches. Therefore, in respect of an initial assessment I consider that a total penalty of $158,400 for the 1st defendant and $31,680 for the 2nd defendant is an appropriate response to the conduct concerned.

35. However, it is necessary, before ultimately determining this question to apply the instinctive synthesis test with particular regard to the relative positions of the parties and their personal circumstances and also to ensure that the penalty imposed is an appropriate response to the conduct alleged and also to determine that the affect of the penalties is not crushing on the defendants. In the context of the amount of the underpayment, the scandalous conduct of the defendants and the reality that the restaurant is no longer trading, I do not consider that the total penalty in respect of the 1st defendant ought be departed from.

36. I do however accept submissions made by counsel for the 2nd defendant that Mr Hong was operating at the behest of another and to impose a penalty above the lower mid range would be crushing in his personal circumstances. Accordingly I will reduce the penalty to be imposed on Mr Hong to an amount of $25,000. I propose to make the declarations sought in the minutes of orders which I will sign and place on the file. Those declarations are that the 1st defendant contravened the provisions of the Liquor and Accommodation Industry - Restaurants (Victoria) Award which I have already outlined at the commencement of my decision.

37. There is also a declaration that the 1st defendant contravened the following applicable provisions of the Australian Fair Pay &

Conditions Standard, s.182 sub-s.(1), s.185 sub-s.(2) and s.235 sub-s.(2) and further that by reason of s.728 sub-s.(1) of the *Workplace Relations Act* the 2nd defendant was involved in a contravention specified in Declarations 1 and 2. I order that pursuant to s.178 sub-s.(6) of the *Workplace Relations Act* and s.719 sub-s.(6) of the Post-reform Act, that the employees be paid all outstanding entitlements by the 1st defendant as follows:

a. Sritheran Ramakrishnan is to be paid $61,231.89.

b. Ms Yuwono $3503.75.

c. Ms Lai $746.63.

38. I also make an order pursuant to s.178 sub-s.(6A) of the Pre-reform Act and s.719 sub-s.(7) of the Post-reform Act that the following amounts be paid by the 1st defendant to a nominated superannuation fund on behalf of Mr Sritheran Ramakrishnan an amount of $4109.14. On behalf of Ms Yuwono $624.78 and on behalf of Ms Lai $95.20. I make a further order pursuant to s.179A sub-s.(1) of the
Pre-reform Act and s.722 sub-s.(1) of the Post-reform Act that the employees be paid interest on the outstanding underpayments as follows:

a. Mr Sritheran Ramakrishnan $3741.45.

b. Ms Yuwono $236.40.

c. Ms Lai $48.20.

39. The 1st defendant is to pay the amounts specified in the orders outline above within 60 days. I direct that the 1st defendant pay into consolidated revenue of the Commonwealth of Victoria a penalty which I have set in the aggregate figure of $158,400. I order that the 2nd defendant pay into consolidated revenue of the Commonwealth a penalty of $25,000. The payment of these penalty sums is to be made within 90 days of the date of this order.

40. That completes my decision in relation to this matter unless the parties have anything they wish to address me on. Thank you.