FEDERAL MAGISTRATES COURT OF AUSTRALIA

JONES v RWH PARCEL DELIVERY PTY LTD & ANOR *[2008] FMCA 1153*
(No.2)

INDUSTRIAL LAW – Pecuniary penalties imposed – consideration of matters relevant to penalty – breaches of award – underpayment of employees – totality principle.

Corporations Act 2001 (Cth)
Workplace Relations Act 1996 (Cth), ss.717, 719, 727, 728

Jones v RWH Parcel Delivery Pty Ltd & Anor [2008] FMCA 429
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Kelly v Fitzpatrick [2007] FCA 1080

Applicant:	ELIZABETH JONES
First Respondent:	RWH PARCEL DELIVERY PTY LTD
Second Respondent:	REES HOUSTON
File Number:	BRG 733 of 2007
Judgment of:	Cassidy FM
Hearing date:	12 June 2008
Date of Last Submission:	7 July 2008
Delivered at:	Brisbane
Delivered on:	12 August 2008

REPRESENTATION

Counsel for the Applicant:	Mr Murdoch
Solicitors for the Applicant:	Corrs Chambers Westgarth
The Respondents:	In person

ORDERS

(1) That the first respondent pay the Commonwealth $25,000.00 for breach of an applicable provision of the preserved Australian Pay and Classification Scale derived from the *Transport, Distribution and Courier Industry Award – Southern Division State 2003 (Qld)* relating to payment of wages and payment of casual loading.

(2) That the second respondent pay the Commonwealth $5,000.00 for involvement in the contravention by the first respondent referred to in order 1.

(3) That the first respondent pay the penalty set out in order 1 in instalments of $2,500.00 to be paid on the 15th day of each month commencing 15 August 2008 and, in the event that the first respondent defaults on any payment, the entire balance of the money payable to the Commonwealth pursuant to order 1 becomes due and payable within 7 days of the default.

(4) That the second respondent pay the penalty set out in order 2 in instalments of $500.00 to be paid on the 15th day of each month commencing 15 August 2008 and, in the event that the second respondent defaults on any payment, the entire balance of the money payable to the Commonwealth pursuant to order 2 becomes due and payable within 7 days of the default.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 733 of 2007

ELIZABETH JONES
Applicant

And

RWH PARCEL DELIVERY PTY LTD
First Respondent

REES HOUSTON
Second Respondent

REASONS FOR JUDGMENT

1. The defendant, RWH Parcel Delivery Pty Ltd, is a body corporate for the purposes of the *Corporations Act 2001* (Cth). Mr Houston is the sole director of RWH Parcel Delivery Pty Ltd. The company was an employer for the purposes of s.719 of the *Workplace Relations Act 1996* (Cth) ("the Act").

2. The applicant has helpfully set out the legislative framework in part 2 of the submissions that they tendered in this matter and I adopt that (without the footnotes) as an accurate outline of the provisions relevant to my determination in this matter relating to penalty.

> *1. Section 719(1) of the Act relevantly provides:*
>
> *"An eligible court may impose a penalty in accordance with this Division on a person if*
>
> *(a) the person is bound by an applicable provision; and*
>
> *(b) the person breaches the provision."*

2. *The Federal Magistrates Court is an eligible court under section 717 of the Act.*

3. *An "applicable provision" is defined in s.117 of the Act as follows:*

"applicable provision, in relation to a person, means:

(a) a term of one of these that applies to the person:

(ii) ...(ii) an Australian Fair Pay and Conditions Standard;

(ii) ...(iv) a collective agreement..."

4. *Under section 171 of the Act the Australian Pay and Classification Scale (APCS) forms part of the Australian Fair Pay and Conditions Standard (Standard). A breach of a provision of the APCS is therefore a breach of an "applicable provision".*

5. *A "notional agreement preserving State awards" (NAPSA) is not included in the definition of "applicable provision". However, clause 43 of schedule 8 of the Act provides that an NAPSA "may be enforced as if it were a collective agreement" and that a workplace inspector has the same functions and powers in relation to a NAPSA that he or she has in relation to a collective agreement. The effect of this provision is that a penalty may be imposed under section 719 for a breach of a term of an NAPSA as if it were a term of a collective agreement and therefore an "applicable provision".*

6. *Section 719(6) of the Act provides:*

> *"Where, in proceeding against an employer under this section, it appears to an eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an AWA), the court may order the employer to pay to the employee the amount of the underpayment."*

7. *Section 727 of the Act provides that section 719 of the Act is a "civil remedy provision". Section 728 of the Act provides:*

> *(1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.*

(2) For this purpose, a person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention;

(d) has conspired with others to effect the contravention."

3. In the decision of *Jones v RWH Parcel Delivery Pty Ltd & Anor* [2008] FMCA 429 I found that the State Award applied to the 16 employees whose wages were in dispute. On 16 May 2008 I made the order that provided for payment to the 16 employees, including interest. The application was contested with respect to:

a) Whether the "Transport Distribution and Courier Industry Award Southern Division 2003" (Original State Award) (Rate 1) applies to these employees or whether the Queensland Minimum Wage set by the Queensland Industrial Relations Commission (QIRRC) (QMW) (Rate 2) applies;

b) Whether Susan Miller and Allan Wolfenden worked for more hours than are set out in the wage sheets provided by the Respondents. The Applicant alleged Ms Miller worked 36 hours. The submission at the end of evidence changed this to 34 hours. It was alleged Mr Wolfenden worked 20 hours; and

c) Whether Ms Aldworth and Ms Turner were paid separate cash payments for working certain hours. The respondent alleges he paid these employees cash for additional hours they worked because they were receiving Centrelink benefits.

4. There was a hearing on 12 June 2008 to hear the parties' submissions on penalty and further directions were made that allowed Mr Houston

to file an affidavit setting out the financial circumstances of the first and second respondents. This he did.

5. I must now consider what the appropriate penalty is in the present case.

6. Section 719(2) of the Act requires the Court to consider two or more breaches of an applicable provision that arise out of a "course of conduct" to constitute one single breach of the applicable provision.

7. In his submissions Mr Murdoch said this about s.719(2):

> *2. It has been held in relation to this clause (and its predecessor, s.178 of the Act) that:*
>
> *(i) Where breaches of a particular term arise out of the same course of conduct, even if they involve different employees, they must be treated as a single breach. For example, in Cotis v Pow Juice Pty Ltd [2007] FMCA 140 it was held:*
>
> > *"A further consideration in respect of the operation of s.719(2) is if an industrial instrument is breached in the same way across a number of different employees effectively employing the same work...I believe that I am required to treat the breaches of a single provision of the industrial instrument in respect of up to 22 different employees, as constituting a single breach of that provision. Only one penalty can be imposed for the breach of that individual provision."*
>
> *Where a large number of employees are involved, however, this is a relevant consideration in respect of the penalty imposed for the breach (see below).*
>
> *(ii) Where these are breaches of two distinct terms of an industrial instrument, they are not to be treated as a single breach even if they arise from one course of conduct. For example, in Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 it was held:*
>
> > *"The parties have submitted that the failure to pay Mr Sorrosa for his accrued annual leave and his annual leave loading on termination should be treated as part of the one course of conduct and one breach, not two. In my view, this is not permissible under section 719. While I agree that these two breaches arose from one course of conduct, they are breaches of two distinct terms of the Award, subclause*

34.6 and subclause 34.13... They therefore do not fall under section 719(2). This matter is however relevant to penalty imposed for each...".

3. Applying these principles, in this case there are:

i) If the Original State Award applies, two breaches being

(A) Breach of the applicable provisions regarding wages;

(B) Breach of the applicable provisions regarding casual loading;

ii) If the Original State Award does not apply, one breach being a breach of the applicable provision regarding wages.

8. Mr Murdoch pointed out in his oral submissions that the first and second respondents have breached the Act, therefore, s.719(2) applies in the present case. The breach is a failure to pay the Award and the failure to pay the casual loading. There are 16 employees involved. thus there are technically 32 breaches for the company and 32 breaches for Mr Houston. However, s.719(2) provides that this equates with one breach for the company and one breach for Mr Houston, as I understood Mr Murdoch's submission.

9. Under s.719 of the Act the maximum penalty for each breach is $33,000.00 for the company and $6,600.00 for the individual.

10. The applicant submits the factors that I should take into account to determine penalty are helpfully summarised in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. The applicant said in written submissions at paragraph 5:

5. Mowbray FM identified a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does, the amount of the penalty. These considerations are

(i) The nature and extent of the conduct that lead to the breaches.

(ii) The circumstances in which that conduct took place.

(iii) The nature and extent of any loss or damage sustained as a result of the breaches.

(iv) Whether there has been similar previous conduct by the respondent.

(v) Whether the breaches were properly distinct or arose out of one course of conduct.

(vi) The size of the business enterprise involved.

(vii) Whether or not the breaches were deliberate.

(viii) Whether senior management was involved in the breaches.

(ix) Whether the party committing the breach had exhibited contrition.

(x) Whether the party committing the breach had taken corrective action.

(xi) Whether the party committing the breach had cooperated with the enforcement authorities.

(xii) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.

(xiii) The need for specific and general deterrence.

11. Mr Murdoch also referred me to the totality principle contained in *Kelly v Fitzpatrick* [2007] FCA 1080 at [30].

12. The applicant is seeking a penalty of $30,000.00 for the first respondent and $6,000.00 for the second respondent. The reasons the applicant is seeking this level of penalty can be summarised as follows:

    (1) The Act emphasises the importance of minimum standards and Australian workers rely on these.

    (2) In the present case there are multiple contraventions involving 16 workers with underpayments totalling $27,586.30 over a 12 month period.

    (3) The respondents deliberately disregarded their statutory obligation, so submitted the applicant. I accept the respondents developed their own method of calculating wages based on the number of parcels delivered, not the time it took to deliver the

parcels. This was developed because this was all the respondent could afford to pay, so he said.

(4) The first respondent did not voluntarily comply with its obligations. Legal proceedings had to be commenced.

(5) The respondents did not cooperate with enforcement by the authorities. Payments were not offered by the respondent until four months after the proceedings were filed and there was some difficulty with the first payment; the cheques were cancelled before the parties could cash them.

(6) There is a need to deter other employers from similar conduct. I think this is a very important factor in these cases. The applicant submitted that if a significant penalty is not imposed, there is a risk that some employers will not comply with their obligations to provide employees with their minimum entitlements in the expectation that the low penalty for getting caught makes taking the risk of underpaying employees attractive.

I wholeheartedly adopt and endorse that submission.

(7) The amount of the underpayments in this case is significant for employees who are in lowly paid positions.

(8) Finally, there is no evidence to indicate remorse on the part of the respondents. I note there was a partial payment during the course of these proceedings in mid-December 2007.

I accept the submissions that were made by the applicant.

13. The factors in mitigation are that the business was only a small operation. Neither of the respondents have any previous history of a similar conduct.

14. In this case the respondents filed an affidavit on 25 June 2008 setting out the financial position of both Mr Houston and the company. Mr Houston is in a very poor financial position and the company has debts of approximately $17,500. Mr Houston's sworn evidence is that he does not foresee the company trading in the future.

15. In considering all the factors that I have outlined in this judgment, it is appropriate to order that the company pay $25,000.00 and Mr Houston pay $5,000.00. However, I am satisfied, given the difficult financial circumstances of both the respondents, it would be appropriate to allow the respondents to make instalment payments of 10 per cent of the penalty on the 15th of each month.

16. For the foregoing reasons, I make the orders as set out at the commencement of these reasons.

I certify that the preceding sixteen (16) paragraphs are a true copy of the reasons for judgment of Cassidy FM

Associate: C. Lasslett

Date: 14 August 2008