FEDERAL MAGISTRATES COURT OF AUSTRALIA

LAWLOR v PERSONAL HIRE PTY LIMITED T/AS WORKFORCE EXTENSIONS ACN 115 130 455 *[2009] FMCA 228*

INDUSTRIAL LAW – imposition of pecuniary penalties against corporate and individual respondents

Workplace Relations Act 1996, s. 716, 717, 719, 728

Martin v Fresho Foods Pty Ltd (2009) 222 FLR 385
Blandy v Coverdale NT Pty Ltd [2008] FCA 1533
Gibbs v City of Altona (1992) 37 FCR 216
CFMEU v Coal & Allied Operations (No 2) (1999) 94 IR 231
Kelly v Fitzpatrick [2007] FCA 1080
Rojas v Esselte Australia Pty Ltd (No 2) [2008] FCA 1585
Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38
Carr v CEPU & Anor [2007] FMCA 1526
Finance Sector Union v Commonwealth Bank of Australia (2005) 224 ALR 467
CPSU v Telstra Corporation Ltd (2001) 108 IR 228

Applicant:	INSPECTOR LISA LAWLOR
Respondent:	PERSONAL HIRE PTY LIMITED T/AS WORKFORCE EXTENSIONS ACN 115 130 455
File Number:	BRG 712 of 2008
Judgment of:	Wilson FM
Hearing date:	13 March 2009
Date of Last Submission:	13 March 2009
Delivered at:	Brisbane
Delivered on:	20 March 2009

REPRESENTATION

Counsel for the Applicant:	Mr James
Solicitors for the Applicant:	Piper Alderman Lawyers
Counsel for the Respondent:	N/A
The Second Respondent in person:	Mr Fangaloka

ORDERS

(1) That the first and second respondents pay to the applicant, on behalf of the following employees, the following amounts:

  (a) Darren Hoffman $1365.32;

  (b) Stephen West $1365.32; and

  (c) Elysabeth Hale $459.91;

(2) The payment of the amounts in order 1 shall be made within twenty eight (28) days of the date of these orders.

(3) That the first respondent pay to the Consolidated Revenue of the Commonwealth of Australia the sum of $35,750.00 for breaches of the following applicable provisions:

  (a) The obligation to pay basic periodic rates of pay pursuant to s.182(1) of the Act, in accordance with the Australian Fair Pay and Conditions Standard;

  (b) The obligation to pay a district allowance in accordance with clause 5.6.15 of the Building and Construction Industry NAPSA;

  (c) The obligation to pay overtime rates in accordance with clause 6.3 of the Building and Construction Industry NAPSA;

  (d) The obligation to pay rates for work performed on public holidays in accordance with clause 6.5 of the Building and Construction Industry NAPSA;

  (e) The obligation to pay rates for work performed on Saturdays and Sundays in accordance with clause 7.6 of the Building and Construction Industry NAPSA.

  (f) The obligation to pay pro rata annual leave in accordance with s.232 of the Act and clause 7.1 of the NAPSA;

  (g) The obligation to pay a loading of 17.5% on accrued annual leave pursuant to clause 7.1.5(c)(iii) of the NAPSA.

(4) The second respondent pay to Consolidated Revenue of the Commonwealth of Australia the sum of $7150.00 for being involved in the breaches by the first respondent set out in order (3).

(5) That the penalties referred to in orders (3) and (4) be paid within twenty eight (28) days of the date of these orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 712 of 2008

INSPECTOR LISA LAWLOR
Applicant

And

PERSONAL HIRE PTY LIMITED T/AS WORKFORCE EXTENSIONS ACN 115 130 455
Respondent

REASONS FOR JUDGMENT

1. The applicant, a workplace inspector employed by the Workplace Ombudsman, seeks the imposition of pecuniary penalties against the first and second respondents, pursuant to s.719(1) *Workplace Relations Act* 1996.

2. The second respondent, the sole director and shareholder of the first respondent, appeared at the final hearing, on his own behalf and on behalf of the first respondent. As a result of discussions between the parties, the respondents did not contest their breaches of the applicable legislation. The parties thereafter presented the matter to the Court on the basis of agreed facts, as set out in the applicant's Statement of Claim, as varied consequential to the discussions between the parties at the Court (exhibit 2).

3. The relevant facts agreed by the parties were as follows:

   a) The first respondent carried on business as a labour hire company in Western Queensland;

b) The first respondent employed Darren Hoffman and Stephen West between 7 April 2006 and 12 May 2006 on a casual basis;

c) The first respondent was obliged to pay each of Hoffman and West:

   i) Basic periodic rates of pay pursuant to s.182(1) of the Act, in accordance with the Australian Fair Pay and Conditions Standard;

   ii) A district allowance in accordance with clause 5.6.15 of the Building and Construction Industry NAPSA;

   iii) Overtime rates in accordance with clause 6.3 of the Building and Construction Industry NAPSA;

   iv) Rates for work performed on public holidays in accordance with clause 6.5 of the Building and Construction Industry NAPSA;

   v) Rates for work performed on Saturdays and Sundays in accordance with clause 7.6 of the Building and Construction Industry NAPSA.

d) The first respondent did not pay each of Hoffman and West the correct amounts during their employment. They were entitled to each be paid $6,505.32 but were in fact paid $3,960;

e) The first respondent has subsequently made payments to each of Hoffman and West of $1,180;

f) The first respondent employed Elysabeth Hale between 26 June 2006 and 18 August 2006 as an administration assistant;

g) The first respondent was obliged to apply the terms of the Clerical Employees NAPSA to Ms Hale, and in particular allow:

   i) For the accumulation of pro rata annual leave in accordance with s.232 of the Act and clause 7.1 of the NAPSA;

   ii) For the payment of a loading of 17.5% on accrued annual leave pursuant to clause 7.1.5(c)(iii) of the NAPSA.

h) At the cessation of Ms Hale's employment she was not paid for accrued annual leave, nor the loading applicable thereto, in the total sum of $459.91.

4. I have arrived at the figure of $6,505.32 in subparagraph 3d above by adding to the figure of $6,499.02 set out in exhibit 2 the sum of $6.30 being the district allowance of $1.05 per week for a period of six weeks.

5. In *Martin v Fresho Foods Pty Ltd* (2009) 222 FLR 385 I discussed the statutory scheme as a result of which the terms and conditions of State Awards continued to apply to certain employees under the federal legislation. I there discussed applicable provisions (a term used in s.717 of the Act), the Australian Fair Pay and Conditions Standards (ACPS), pre-reform wage instruments, and Notional Agreements Preserving a State Award (NAPSA). Having regard to the agreement reached between the parties in this case, it is unnecessary for me to rehearse what I have said in that earlier case.

6. The applicant identifies seven breaches of the applicable legislation, being the failure to make each of the payments required under the applicable provisions referred to at subparagraphs 3(c) and 3(g) above. Although five of the breaches were committed in respect of two employees (Hoffman and West) they arose, I am satisfied, out of a course of conduct by the first respondent. Accordingly, they are to be treated as a single breach of each provision: s.719(2) of the Act.

7. That is, the breach of each applicable provision in respect of two employees is to be treated as a single breach, but a penalty must be considered in the case of each of the seven distinct breaches: *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533 applying *Gibbs v City of Altona* (1992) 37 FCR 216.

8. The maximum penalty for each breach is, so far as the first respondent is concerned $33,000; and, so far as the second respondent is concerned $6,600.

9. The principles applicable to determining the appropriate penalty are not controversial. In *CFMEU v Coal & Allied Operations (No 2)* (1999) 94 IR 231 at 232 Branson J said:

"The Act gives no explicit guidance as to the circumstances in which an order imposing a penalty . . . will be appropriate or as to the circumstances in which a penalty of or near the maximum, or alternatively of a lesser amount, may be called for. The Court is simply directed to consider what is appropriate in all the circumstances of the case.

The following matters, which are not intended to comprise an exhaustive list, seem to me to be considerations as to which the Court may appropriately have regard in determining whether particular conduct calls for the imposition of a penalty, and assuming that it does, the amount of the penalty:

(a) the circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the Act);

(b) whether the respondent has previously been found to have engaged in contravention of . . . the Act;

(c) where more than one contravention of [the Act] is involved, whether the various contraventions are properly seen as distinct or whether they arise out of the one course of conduct;

(d) the consequences of the conduct found to be in contravention of . . . the Act;

(e) the need, in the circumstances, for the protection of industrial freedom of association; and

(f) the need, in the circumstances, for deterrence.

10. In *Kelly v Fitzpatrick* [2007] FCA 1080 Tracey J at [14] said:

"In Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 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". Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:

- *The nature and extent of the conduct which led to the breaches*
- *The circumstances in which that conduct took place*

- *The nature and extent of any loss or damage sustained as a result of the breaches*
- *Whether there had been similar previous conduct by the respondent*
- *Whether the breaches were properly distinct or arose out of the one course of conduct*
- *The size of the business enterprise involved*
- *Whether or not the breaches were deliberate*
- *Whether senior management was involved in the breaches*
- *Whether the party committing the breach had exhibited contrition*
- *Whether the party committing the breach had taken corrective action*
- *Whether the party committing the breach had cooperated with the enforcement authorities*
- *The need to ensure compliance with minimum standards by provision of an effective means of investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence."*

11. Further, in *Kelly* at [30] Tracey J. said:

> *"Another factor that must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought properly be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see CPSU v Telstra Corporation Limited (2001) 108 IR 228 at 230 [7]. The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring it is an appropriate response to the conduct which led to*

the breaches: see Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36 at 53. See also Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65 at [145] per Jessop J. This approach was recently described, in the criminal context from which the totality principle is derived, as "the orthodox, but not necessarily immutable, practice" adopted by sentencing courts, see Johnston v R (2004) 205 ALR 346 at 356 [26] per Gummow, Callinan and Heydon JJ."

12. The decision of the Full Federal Court in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560 is instructive. At [12] Gray J deprecated the use of "comparator" cases. His Honour said:

> *"This was a fundamentally wrong approach. Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of a case, not by a line by line comparison with another case... "*

13. At [13] his Honour said:

> *"Penalty decisions in other cases can be of value in demonstrating that there is a range of penalties generally considered appropriate to a particular type of case. The individual circumstances of the case at hand must then be examined, in order to determine at what point in the appropriate range the penalty should be set. This does not involve a comparison with the facts of other cases."*

14. Graham J at [53] – [56] referred to other relevant decisions of the Full Court and of the High Court, and at [60] adopted the checklist of Tracey J in *Kelly v Fitzpatrick*:

> *"53. In Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65; (2007) 158 FCR 543 at [93]-[94] (Ponzio) Lander J summarised the purpose of imposing penalties for breaches of the Act as follows:*
>
> > *93 There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both*

personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as deterrence to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.

94The individual or personal circumstances of the contravenor must be taken into account as also any relevant matter in mitigation. For a contravention of these sections the minimum penalty which addresses punishment and deterrence, both personal and general, will be appropriate. Where one act may involve a number of contraventions, as in this case, it would be generally inappropriate to impose separate penalties because almost inevitably that would offend against the totality principle as known to the criminal law. ...

54. The ultimate control on the judicial sentencing discretion is the requirement that the sentence be proportionate to the gravity of the offence committed. In pursuit of other sentencing purposes, a judge may not impose a sentence that is greater than is warranted by the objective circumstances of the crime. Both proportionality and consistency commonly operate as final checks on a sentence proposed by a judge (per McHugh J in Markarian v The Queen [2005] HCA 25; (2005) 228 CLR 357 at [83] (Markarian v The Queen); see also Veen v The Queen (No 2) (1998) 164 CLR 465 at 472).

55. The acceptance of the role of instinctive synthesis in the judicial sentencing process is not opposed to the concern for predictability and consistency in sentencing that underpins the rule of law and public confidence in the administration of criminal justice. The synthesising task is conducted after a full and transparent articulation of the relevant considerations

including an indication of the relative weight to be given to those considerations in the circumstances of the particular case (per McHugh J in Markarian v The Queen 228 CLR 357 at [84]).

56. In addressing consistency, it is important to note that Burchett and Kiefel JJ said in NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 295, namely:

> *A hallmark of justice is equality before the law, and, other things being equal, corporations guilty of similar contraventions should incur similar penalties: Trade Practices Commission v Axive Pty Ltd [[1994] ATPR 42,782 (41,795). There should not be such an inequality as would suggest that the treatment meted out has not been even-handed ... However, other things are rarely equal where contraventions of the Trade Practices Act are concerned. In the present case, differing circumstances, size, market power and responsibility for the contraventions, as well as other factors, complicate any attempt to compare the penalties imposed on the appellant with those imposed on the other corporations.*
>
> *Another form of comparison is not appropriate. The facts of the instant case should not be compared with a particular reported case in order to derive therefrom the amount of the penalty to be fixed. Cases are authorities for matters of principle; but the penalty found to be appropriate, as a matter of fact, in the circumstances of one case cannot dictate the appropriate penalty in the different circumstances of another case. The point was well made by Spender J in Trade Practices Commission v Annand and Thompson Pty Ltd [[1987] ATPR 48,390 (40,772)] (at 48,394) when he said:*
>
> > *Each case must, of course, be viewed on its own facts and facts may be infinite in their variety.*

15. It follows, as his Honour also said, that "[t]he quantum of penalties imposed in other cases can seldom be of very much direct assistance."

16. Buchanan J, after referring to the checklist in *Kelly v Fitzpatrick* said, at [91]:

> *"Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a*

penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations. There is no suggestion in the present case that the learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties."

17. In *Rojas v Esselte Australia Pty Ltd (No 2)* [2008] FCA 1585 Moore J said at [65]:

> *"Although "check lists" of the above kind are a useful starting point in determining whether a penalty ought to be imposed, and if so the level of such penalty, at the end of the day the task of the Court is to fix a penalty that pays appropriate regard to the contraventions that have occurred: Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560 at [91]. Moreover, as the Full Court noted in Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170 at [60], while general guidance as to the appropriate penalty may be obtained through an analysis of comparable cases, it remains necessary for the Court to give careful consideration to the circumstances of the case before it (see also Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith . . . at [12] per Gray J."*

18. In the case of Ms Hale no reason for the breaches was advanced. The second respondent, who did not file any affidavit evidence, stated to the Court that the non-payment was an oversight and he thought it had been attended to by a former business partner.

19. The breaches in so far as the two employees Hoffman and West are more serious. The second respondent stated to the Court that the first respondent paid the two men a flat hourly rate. This was plainly in contravention of their relevant statutory entitlements. The second respondent said that, in addition, the two men were paid for their travelling, meals and accommodation costs as they were working in central Queensland. Of course, that contention overlooks the fact that the two employees were entitled to be paid a working away from home allowance under the applicable provisions.

20. I conclude that the first respondent's conduct in respect of all breaches was deliberate, but accept that it was not in deliberate defiance of the legislation. I accept that the second respondent thought that he was

paying the two men an additional amount which brought their flat hourly rate to a figure closer to what the Award required. In relation to the period of two weeks when no payments were made to the two men, the second respondent told the Court that payment was withheld due to misconduct on the part of the men at the camp where they were staying. There was no entitlement to withhold payment as occurred, but there was, it seems, a reason why that occurred.

21. The breaches in respect of Ms Hale occurred over a period of less than eight weeks. In respect of Hoffman and West it took place over a period of six weeks.

22. The most serious breach concerns the failure to pay Hoffman and West their correct ordinary time remuneration. This component represents in the order of a little less than half of the overall underpayment. The failure to pay overtime accounts for almost a quarter of the underpayment. The other breaches resulted in lesser amounts.

23. The first respondent has made two payments to Hoffman and West that have reduced the amount of their underpayment. This mitigating conduct must however be looked at in light of the failure of the first respondent to abide by a repayment agreement negotiated with the applicant.

24. There is no suggestion that either respondent has previously been found to have engaged in similar conduct.

25. There is no evidence as to the financial size of the first respondent. The second respondent stated to the Court that it no longer trades. It was, by all accounts, not a large concern. The second respondent was, as contemplated by s.728 of the Act, involved in the contravening conduct of the first respondent. He was the sole director of the first respondent.

26. The second respondent provided limited assistance to the applicant. The first respondent failed to comply with breach notices issued to it. The second respondent participated in interviews with the applicant, but refused to provide requested documents. The second respondent failed to comply with repayment plans negotiated with the applicant on 5 March 2008.

27. No 'discount' should be given for an early admission of liability. The applicant had great difficulty effecting service on the respondents, particularly the second respondent. The applicant was required to fully prepare its case for final hearing. The co-operation of the second respondent on the day of final hearing amounted to a recognition by him that the writing was on the wall, and that he would be best served acknowledging responsibility and seeking the best penalty that could be achieved. I accept that there is a strong possibility that any penalty imposed on the first respondent will not be paid.

28. In *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 Simpson FM usefully considered whether the financial health of the respondent corporation was a relevant consideration in determining the quantum of penalty. At [26-30] his Honour referred to the following relevant authorities:

> *"26. The first respondent is a small company and, I infer, has very few if any assets. However as Justice Tracey said in Kelly v Fitzpatrick (supra):*
>
> > *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level."*
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> *27. In Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paras.27 to 29 it was said:*
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> > *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to a Court's consideration of penalty."*
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> *28. Notwithstanding financial hardship that an employer may be experiencing Lynch v Buckley Sawmills Pty Ltd (1984) 3 FCR 503, 508 Keely J said:*
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> > *"In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying*

with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed."

29. In PKIU and Others v Vista Paper Products Pty Ltd and Another (1994) 127 ALR 673 Wilcox CJ, in penalising both a company in receivership and its bankrupt controlling director said:

> *"While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate."*

30. Driver FM said in Cotis v MacPherson [2007] FMCA 2060 [12]; (2007) 169 IR 30:

> *"It is, in my view, important to make the point that employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the Workplace Relations Act.""*

29. There is then the matter of deterrence, both general and specific.

30. As Lucev FM said in *Carr v CEPU & Anor* [2007] FMCA 1526 at [29]:

> *"General and specific deterrence are significant considerations given that deterrence is a primary objective of imposing penalties. It is necessary for deterrence to be both specific and general. Specific deterrence relates to the need to deter a contravener from further contravention of the [Act] whilst general deterrence refers to the need to deter others from contravening the [Act] by showing the seriousness with which the Court considers the contraventions. The penalties must be meaningful and consistent with other considerations to be taken into account in determining an appropriate penalty. In light of legislative changes in recent years, a "light handed approach" is no longer applicable to the imposition of civil penalties for breaches of industrial law . . ."*

31. The last sentence from the passage just extracted is derived from the judgments in *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467, for example Merkel J at 487; and (2007) 157 FCR 329 at [192] per Branson J.

32. In *CPSU v Telstra Corporation Ltd* (2001) 108 IR 228 at 231 Finkelstein J said that a penalty must be imposed at a 'meaningful' level.

33. I am also mindful that although the respondents are separate legal entities, the second respondent is in fact the controlling mind of the first respondent. Whilst there is no question of 'double punishment' for the same breach, I do take into account when imposing penalties on each of the first and second respondents, that with a very small entity such as the first respondent, which is effectively a 'one-man company' any penalty ordered to be paid by the first respondent is in effect going to have to be paid by the second respondent.

34. I note that in *Saya Cleaning* Simpson FM imposed penalties on both the corporate respondent and its sole director. His Honour did not discuss how the close interrelationship of the corporate and individual respondents impacted on the quantification of those penalties. His Honour seems to have imposed penalties on the individual respondent at the same level (in proportion to the total available penalty) as for the corporate respondent.

35. In respect of the underpayment of ordinary time remuneration, given the length of the period during which the breach occurred and the number of employees involved, a penalty is called for in the lower half of the permissible range. I impose a penalty on the first respondent of $11,000. I impose a penalty on the second respondent of $2,200.

36. In respect of the failure to pay overtime, in breach of clause 6.3 of the Building and Construction Industry NAPSA, I impose a penalty of $8,250 on the first respondent, and $1,650 on the second respondent.

37. In respect of the failure to pay the appropriate rates for work carried out on public holidays, in breach of clause 6.5 of the Building and Construction Industry NAPSA, the amount involved is substantially the

same as for the non-payment of overtime. I impose a penalty of $8,250 on the first respondent, and $1,650 on the second respondent.

38. In respect of the failure to pay appropriate rates for work carried out on weekends, in breach of clause 7.6 of the Building and Construction Industry NAPSA the amount involved is $742.06 for each of the two employees. I impose a penalty of $3,300 on the first respondent and $660 on the second respondent.

39. In respect of the failure to pay the district allowance, in breach of clause 5.6.15 of the Building and Construction Industry NAPSA the amount involved is $6.30 for each of the two employees. In the exercise of my discretion I would not impose any additional penalty for this breach.

40. The failure to pay accrued annual leave to Ms Hale is a breach of an important obligation. The amount involved is small and the conduct occurred over a period of only several weeks. I impose a penalty of $3,300 on the first respondent and $660 on the second respondent.

41. The failure to pay the leave loading on accrued annual leave in respect of Ms Hale is less serious than the failure to pay accrued annual leave. I impose a penalty of $1,650 on the first respondent and $330 on the second respondent.

42. The total penalties that I would impose are therefore: on the first respondent $35,750; and on the second respondent $7,150. That is to be viewed against maximum possible penalties of $231,000 against the first respondent and $46,200 against the second respondent. In those circumstances, when regard is had to the totality principle, I consider the total penalty imposed on each respondent to be appropriate, and not warranting any further discount.

43. The applicant seeks an order pursuant to s.719 (6) of the Act that the respondent make payment to each identified employee the amount of the underpayment. I agree that such an order should be made. I propose to order that the total amount of underpayment be paid to the applicant, on behalf of the affected employees, who should then make the payment to the individual employees. The payment should be made in favour of the

affected employees, but sent to the applicant, who can monitor compliance with the orders.

44. There will be orders as set out at the commencement of these Reasons.

I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of Wilson FM

Associate: Lynnette Chin

Date: 20 March 2009