

**CHIEF INDUSTRIAL MAGISTRATE'S COURT**

**NEW SOUTH WALES**

**JURISDICTION:** Civil (Commonwealth)

**PARTIES:**

**Applicant:** INSPECTOR VI-LAY LIU  
(OFFICE OF THE WORKPLACE OMBUDSMAN)

**First Respondent:** NEOPHONE PTY LIMITED

**Second Respondent:** ALEXANDER TROUSSOV

**Case No:** 113725/07

**Hearing Dates:** 25 August 2008

**Date of Decision:** 14 October 2008

**Legislation:** Workplace Relations Act 1996 (Commonwealth)

**Magistrate:** G J T Hart

**Representation:** Solicitor for the Applicant  
Mr A Salmon  
Fisher Cartwright Berriman  
Solicitors

No appearance for the Respondents

## **REASONS FOR DECISION**

- 1 By decision dated 3 March 2008, Industrial Magistrate G A Miller made findings and orders against the First Respondent herein, Neophone Pty Limited. That decision followed a hearing on 28 February 2008 at which time the Applicant proceeded against the First Respondent only, in circumstances where the Court was informed that the Applicant had been unable to effect service of the initiating documents upon the Second Respondent, Mr Alexander Troussov.
  
- 2 Subsequently, and following the finalisation of the proceedings against the First Respondent, the Court, as presently constituted, was asked to make certain orders as to substituted service in relation to the Second Respondent. The Application for Substituted Service was acceded to, and upon the Court becoming satisfied that service had been validly effected in accordance with such orders for substituted service, the matter was set down for hearing and proceeded on an ex parte basis on 25 August 2008.
  
- 3 It is submitted on behalf of the Applicant that the Court would be satisfied on the evidence presented, including the Affidavit of Ms Maria Tsaoucis, that in mid February 2006, the Second Respondent herein, on behalf of the First Respondent, Neophone Pty Limited, engaged Ms Tsaoucis as a permanent part-time employee of the First Respondent, commencing on 21 February 2006 in the position of Telemarketer/Appointment Settler. The Applicant submits that the Court would be satisfied that the work performed by the employee, Ms Tsaoucis, was such that she was appropriately classified as a Telephone Canvasser (other than for the sale of goods) pursuant to the Clerical and Administrative Employees (State) Award, an award of the Industrial Relations Commission of New South Wales.
  
- 4 The Applicant asserts that between 21 February 2006 and 26 March 2006, the employee's employment was governed by the provisions of the said award and by the provisions of the Annual Holidays Act 1944 (New South Wales). Further, it is submitted on behalf of the Applicant that as a consequence of amendments to the Federal employment legislation, the Court would find that on and from 27 March 2006, the

employment of Ms Tsaoucis was subject to the provisions of a Notional Agreement Preserving a State Award (NAPSA) namely the Clerical and Administrative Employees (State) Award, and further, that the relevant minimum rate provision was set by the Australian Pay and Classification Scale (APCS).

5 In his decision of 3 March 2008, Industrial Magistrate Miller made a number of findings concerning the conduct of the First Respondent, Neophone Pty Limited, referred to in his decision as the “*First Defendant*”. The relevant findings made by Industrial Magistrate Miller were as follows:-

- “1 *The First Defendant, during the period from 2 August 2006 to 16 October 2006, breached subsection 182 (1) of the Workplace Relations Act 1996 (Commonwealth) (Act), being a term of the Australian Pay and Classification Standard from a Notional Agreement Preserving a State Award (NAPSA) derived from Part B, Table 3 of the Clerical and Administrative Employees (State) Award (Award) in relation to the employment of Ms Maria Tsaoucis.*
- 2 *The First Defendant, during the period from 27 March 2006 to 16 October 2006, breached subclause 34(2), Subdivision C, Schedule 8 to the Act being preserved entitlements to annual leave and annual leave loading on termination of employment under the NAPSA derived from clause 14 of the Award in relation to the employment of Ms Maria Tsaoucis.*
- 3 *The First Defendant, during the period from 27 March 2006) to 16 October 2006, breached subclause 34(1), Subdivision C, Schedule 8 to the Act being underpayment of pay in lieu of notice of termination of employment under the NAPSA derived from subclause 27.1 of the Award in relation to the employment of Ms Maria Tsaoucis.*
- 4 *The First Defendant, during the period from 27 March 2006 to 16 October 2006, breached subclause 34(1), Subdivision C, Schedule 8 to the Act being underpayment of superannuation derived from Clause 32 of the Award in relation to the employment of Ms Maria Tsaoucis.*
- 5 *The First Defendant breached subclause 34(1), Subdivision C, Schedule 8 to the Act being non-compliance with the issuing of a Certificate of Service derived from subclause 27.2 of the Award in relation to the employment of Ms Maria Tsaoucis.”*

6 The decision of his Honour, Industrial Magistrate Miller, of 3 March 2008, sets out in considerable detail the relevant findings of fact made by him in support of the five specific findings concerning breaches of the legislation. Whilst his Honour’s decision may not be strictly binding upon me, it has significant persuasive effect. In any event,

the solicitor for the Applicant has provided to the Court and relies upon the affidavit material that was relied upon in the proceedings before Industrial Magistrate Miller, and I have therefore had the opportunity to satisfy myself that the findings against the First Respondent, Neophone Pty Limited, are supported by the evidence. I so find.

7 The Applicant now seeks orders of this Court imposing penalties upon the Second Respondent herein, Mr Alexander Trousov, who was, at material times, the sole director of the First Respondent. The Applicant relies upon Section 728 of the Workplace Relations Act. That section relevantly provides:-

*“728(1) [Involvement in Contravention is Deemed Contravention]*

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

*728(2) [Definition]*

*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; or*
- (d) has conspired with others to effect the contravention.”*

8 Section 727 of the Workplace Relations Act provides that Section 719 is a civil remedy provision for the purposes of Part 14 Division 3 of the Act. In turn, Section 719(1) permits the Court to impose a civil penalty upon a person bound by an applicable provision and where a person breaches that provision.

9 Given the Court’s finding that the First Respondent, Neophone Pty Limited, was in breach in the manner alleged, the question for the Court is whether the Second Respondent was involved in the contravention in accordance with the provisions of the legislation. This issue is addressed by the Applicant in written submissions of Mr Salmon as follows:-

*“18 In order for a person to have accessorial liability under Section 728(2) of the Act, he or she:*

- must have knowledge of the essential facts constituting the contravention;*
- must be knowingly concerned in the contravention;*

- *must be an intentional participant in the contravention based on actual not constructive knowledge of the essential facts constituting the contravention – although constructive knowledge may be sufficient under Section 728(2)(c) in cases of wilful blindness; and*
- *need not know that the matters constituted a contravention.*

*{Armstrong v Bigeni Contracting Pty Limited & Anor [2008] FMCA 485 at 23 citing Yorke v Lucas [1985] 158 CLR 661; Australian Competition & Consumer Commission v Giraffe World Australia Pty Limited [1999] 95 FCR 302; Rural Press Limited v Australian Competition & Consumer Commission [2002] 118 FCR 236; Australian Competition & Consumer Commission v IBM Group Pty Limited [2003] FCAFC 17}.*

*The Plaintiff submits that the Second Defendant had actual knowledge of the essential fact constituting the contravention, was knowingly concerned in the contraventions and was an intentional participant in the contraventions as, at all relevant times, during the term of the employee’s employment, and during the Workplace Ombudsman’s investigation of the matter, the Second Defendant was;*

- *the sole director and company secretary of the First Defendant (Liu Affidavit, annexure V);*
- *the managing director of the First Defendant (Tsaoucis Affidavit, paragraph 6);*
- *the person responsible for overseeing the day to day operation of the business including the recruitment and termination of employees of the First Defendant (Tsaoucis Affidavit, paragraphs 6 and 21);*
- *aware that money was outstanding to the employee upon termination of her employment (Liu Affidavit, paragraph 22); and*
- *aware that entitlements owed to the employee could not be met by the First Defendant upon termination of the employee’s employment as the First Defendant did not have any assets to meet outstanding obligations (Liu Affidavit, paragraph 23, Annexure U).”*

10 Having considered the evidence provided to the Court on behalf of the Applicant, I am satisfied that the Second Respondent was, in respect of each of the five contraventions committed by the First Respondent herein, a person who was involved in the contravention of the civil remedy provision in accordance with Section 728 of the legislation. In relation to the five contraventions, the Court’s findings are as follows:-

1 The Second Respondent, during the period from 2 August 2006 to 16 October 2006, was involved in and by operation of Section 728 of the Workplace Relations Act 1996 (Commonwealth) (**Act**), breached subsection 182(1) of the Act, being a term of the Australian Pay and Classification Standard from a Notional Agreement Preserving a State Award (**NAPSA**) derived from Part B,

Table 3 of the Clerical and Administrative Employees (State) Award (**Award**) in relation to the employment of Ms Maria Tsaoucis.

- 2 The Second Respondent, during the period from 27 March 2006 to 16 October 2006, was involved in and by operation of Section 728 of the Act, breached subclause 34(2), Subdivision C, Schedule 8 to the Act, being preserved entitlements to annual leave and annual leave loading on termination of employment under the NAPSA derived from Clause 14 of the Award in relation to the employment of Ms Maria Tsaoucis.
  - 3 The Second Respondent, during the period from 27 March 2006 to 16 October 2006, was involved in and by operation of Section 728 of the Act, breached subclause 34(1), Subdivision C, Schedule 8 to the Act, being underpayment of pay in lieu of notice of termination of employment under the NAPSA derived from Clause 27.1 of the Award in relation to the employment of Ms Maria Tsaoucis.
  - 4 The Second Respondent, during the period from 27 March 2006 to 16 October 2006, was involved in and by operation of Section 728 of the Act, breached subclause 34(1), Subdivision C, Schedule 8 to the Act, being underpayment of superannuation derived from Clause 32 of the Award in relation to the employment of Ms Maria Tsaoucis.
  - 5 The Second Respondent, was involved in and by operation of Section 728 of the Act, breached subclause 34(1), Subdivision C, Schedule 8 to the Act, being non compliance with the issuing of a Certificate of Service derived from subclause 27.2 of the Award in relation to the employment of Ms Maria Tsaoucis.
- 11 In his decision of 3 March 2008, his Honour, Magistrate Miller, discussed in some detail from page 11 onwards, the question of the appropriate penalty to be imposed on the First Respondent herein, Neophone Pty Limited, including the relevant applicable principles guiding the Court's exercise of discretion as to penalty. In this case, the Second Respondent was at all material times the director, owner and operator of the First

Respondent and was essentially the person whose conduct governed and determined the conduct of the First Respondent. The First Respondent was the alto ego of the Second Respondent. Having carefully considered the detailed discussion found in the decision of his Honour, Magistrate Miller, I adopt, with respect, his analysis of the relevant principles applying to the Court's sentencing task.

12 For the purpose of sentencing, it is important for the Court to keep in mind the maximum penalty available under the legislation when considering the objective seriousness of an offence, and the appropriate penalty to be imposed. When sentencing the First Respondent herein, his Honour Magistrate Miller, was dealing with five breaches, each of which carried a maximum penalty of \$33,000.00. In the case of the Second Respondent who now comes before the Court, the legislation provides that the maximum penalty for each breach is 60 penalty units rather than 300 penalty units which applies in the case of an incorporated entity. This means that the maximum penalty for each breach is \$6,600.00 rather than \$33,000.00.

13 The Court is advised that in approximately April 2008, the Second Respondent elected to depart Australia on an overseas trip. As far as the Court is aware, he has not as yet returned to Australia. Whether the Second Respondent left Australia for an overseas holiday or whether he left to undertake work overseas is unclear. Both possibilities have been suggested to the Court without evidence to support either proposition. In any event, it is clear that the Second Respondent elected to leave Australia in circumstances where he was fully aware of the fact that Ms Maris Tsaoucis was owed money as a consequence of her employment by his company, and in circumstances where he was aware that these proceedings were on foot. His failure to return to Australia and participate in these proceedings would suggest a complete lack of any contrition or remorse on the part of the Second Respondent. In my view that is an appropriate factor to take into account as part of the sentencing process.

14 I find that the appropriate penalties for each of the breaches is as follows:-

- (a) Payment of wages - \$3,500.00.
- (b) Annual leave - \$3,000.00.

- (c) Superannuation - \$3,000.00.
- (d) Payment in lieu of notice - \$2,500.00.
- (e) Failure to provide certificate of service - \$2,000.00.

15 The above five penalties total \$14,000.00. Whilst each is a separate breach, there is clearly an element of overlap between the breaches which warrants an application of the principle of totality. In my view, the penalty in each case should be reduced by 20% bringing the aggregate of the five penalties to \$11,200.00. These will be apportioned as follows:-

(a)	Payment of wages	\$2,800.00
(b)	Annual leave	2,400.00
(c)	Superannuation	2,400.00
(d)	Payment in lieu of notice	2,000.00
(e)	Failure to provide Certificate of Service	<u>1,600.00</u>
		<u>\$11,200.00</u>

16 **Application under Section 841(b)**

The Applicant herein seeks an order to the effect that any part of the penalty ordered to be paid by the Second Respondent, to the extent that it does not exceed \$10,436.17, be paid to the employee, namely Ms Maris Tsaoucis, in accordance with the discretion provided to the Court pursuant to Section 841(b). On the evidence before the Court, it is clear that orders made by his Honour Magistrate Miller in March 2008 requiring the former employer, Neophone Pty Limited, to make payments of restitution to Ms Tsaoucis, have not been complied with and are not likely to ever be complied with. The evidence before the Court is that the corporate vehicle utilised by the Second Respondent herein has gone into liquidation and is being wound up or has already been wound up. In those circumstances, it is appropriate in my view for the Court to exercise the discretion provided under Section 841(b) and order that the relevant sum be paid to the employee with the balance of the penalty being paid to the consolidated revenue fund of the Commonwealth of Australia.

17 Consequently, the orders of the Court are as follows:-

- 1 Within 28 days hereof, the Second Respondent herein, Alexander Trousov, is to pay to Maria Tsaoucis, the sum of \$10,436.17 pursuant to Section 841(b) of the Act.
- 2 The Second Respondent herein, Alexander Trousov, is to pay to the Court within 28 days on behalf of the consolidated revenue fund of the Commonwealth of Australia the sum of \$763.83.

G J T Hart  
Industrial Magistrate

14 October 2008