FEDERAL MAGISTRATES COURT OF AUSTRALIA

SMITH v A-MART ALL SPORTS PTY LTD (ACN 009 955 462) *[2008] FMCA 592*

INDUSTRIAL LAW – Admitted contraventions of *Workplace Relations Act 1996* – underpayments, in some cases no payments, of wages – considerations relevant to penalty

Workplace Relations Act 1996, ss.182, 185

Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick [2007] FCA 1080
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8

Applicant:	RAYMOND MURRAY SMITH
Respondent:	A-MART ALL SPORTS PTY LTD (ACN 009 955 462)
File number:	LNG 35 of 2007
Judgment of:	Burchardt FM
Hearing date:	29 April 2008
Date of last submission:	29 April 2008
Delivered at:	Melbourne
Delivered on:	8 July 2008

REPRESENTATION

Counsel for the Applicant:	Mr J.R.C. Zeeman
Solicitor for the Applicant:	Zeeman & Zeeman
Counsel for the Respondent:	Mr D.J. Staindl
Solicitor for the Respondent:	National Retail Association

THE COURT ORDERS THAT:

(1) The Respondent pay $26,400.00 for its admitted breaches of s.182 of the *Workplace Relations Act 1996* (Cth) ("the Act").

(2) The Respondent pay $26,400.00 for its admitted breaches of s.185 of the Act.

(3) The said sums be paid to the Consolidated Revenue Fund.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

LNG 35 of 2007

RAYMOND MURRAY SMITH
Applicant

And

A-MART ALL SPORTS PTY LTD (ACN 009 955 462)
Respondent

REASONS FOR JUDGMENT

1. A-Mart All Sports Pty Ltd ("A-Mart"), the Respondent, agrees that from 30 September 2005 until July 2006 its employees at its Hobart store were required to work either 30 minutes or 15 minutes before they started work for no pay and for between 15 and 30 minutes after they finished work also for no pay.

2. The same practice continued from September 2005 until December 2006 at A-Mart's Glenorchy store.

3. This conduct, which can be properly described as Dickensian or possibly something even more pejorative, is agreed by the parties to have contravened s.182 and s.185 of the *Workplace Relations Act 1996* ("the Act"). The issue the Court is required to decide is what penalties should be imposed for those two breaches of those two sections of the Act.

4. For the reasons that follow I have determined that A-Mart should pay a total of 80 per cent of the applicable maximum, namely, $26,400.00 in respect of each of the two contraventions.

Factual Background

5. It should be noted that there is no issue in this case about what I would describe as formal matters such as the appointment of the Applicant, Inspector Smith, the lawfulness of his application, and the incorporation of A-Mart.

6. As I have said, the only issue that has been live before me has been the quantum of the penalties to be imposed, together with a number of subsidiary but keenly contested arguments about some of the subsidiary facts.

7. It is quite clear from the evidence that a company known as Rowe and Jarman Pty Ltd ("Rowe and Jarman") had for some years operated a store at 50 Elizabeth Street, Hobart and another at 71 Main Road, Glenorchy.

8. From the evidence as a whole, and this is not contested although it is not within A-Mart's knowledge, it is quite clear that the practices to which I have already referred of forcing the employees to work for no pay were strictly adhered to by Rowe and Jarman.

9. Those practices, as is agreed, continued following the purchase by A-Mart of Rowe and Jarman on 30 September 2005.

10. Information about A-Mart has been provided in the affidavit of Tanya Absolon, the general manager - human resources, which shows that A-Mart is a national retailer of sporting goods with 79 stores and four warehouses across the country. It employs about 1600 employees on average, with up to 2500 in peak trading times.

11. It is common cause that A-Mart, upon the purchase of the Rowe and Jarman business, was required by the relevant Tasmanian Award, which later became a Notional Agreement Preserving State Awards in conjunction with the relevant provisions of the Act, to pay employees prescribed amounts of pay for the time they worked with, in relevant cases, a 20 per cent casual loading.

12. Self-evidently, the practice of requiring employees to attend for periods of time for which they were not paid at all necessarily breached those

instruments and it is for those reasons it is agreed that there has been contravention of s.182(1) and s.185(2) of the Act.

13. At this point it is appropriate to deal with two factual issues which occupied much of the proceeding. They are, first, the degree to which senior management at A-Mart was or was not involved in the contravening conduct and second, whether A-Mart's officers sought to obstruct the investigation of Inspector Smith by requiring a Mr Butterworth to change the evidence he was providing.

The Senior Management Issue

14. Both sides agree that the involvement of senior management was a potentially relevant consideration in the level of penalty that might be imposed. Significant amounts of evidence were adduced on this point.

15. The Applicant submitted that various members of management were aware that employees were required to perform unpaid work for the Respondent (paragraph 7.11 – Applicant's submissions).

16. The evidence does not seem to me to be sufficiently clear to establish that Mark Greig, formerly Rowe and Jarman's Australian sales manager, was aware of the practice of making employees work without being paid in a general way. I do, however, find that Mr Greig attended the meeting in July 2006 which occupied so much of the evidentiary time in this case. The issue of performing unpaid work was undoubtedly raised at that meeting and I note that the witnesses Ms Fraser, Ms Strauss and Mr Dare, all attested that Mr Greig was present.

17. What I am not certain of, however, is how much of the relevant conversations Mr Greig heard.

18. The meeting in July 2006 was described in a variety of ways, but taking the evidence as a whole I have formed the view that there was discussion about unpaid work at which certainly Ms Piarget and Mr Uphill were present. It is sufficient to say that in the ultimate while I think that Mr Greig was there, I cannot be satisfied that it is more probable than not that he heard the relevant portions of the

conversation to which I shall come, and therefore had active knowledge of forcing employees to work without pay.

19. This brings me to the meeting in July 2006. It is common cause that at this meeting an employee Mr Darcy raised, and it appears energetically, his complaint that he was being forced to work without being paid.

20. All employees agreed that Ms Piarget, who was a training officer employed for a relatively brief period of months, was taken aback by this.

21. Ms Strauss, who was a witness who had actually brought a claim through Inspector Smith against A-Mart said that Ms Piarget had said the practice should not continue. She was supported in this regard by Mr Butterworth, who as the evidence emerged took steps as manager of the Hobart store to stop the practice shortly thereafter.

22. In the circumstances without traversing the evidence of other witnesses which was to the like effect, or yet again other evidence which was perhaps slightly different, it seems clear beyond doubt that Ms Piarget must have said something which caused those witnesses to conclude that the practice ought not to continue.

23. The evidence of Mr Butterworth that Ms Piarget said the practice should stop and that he stopped it as a result of that information is compelling.

24. The greater area of difficulty arises as to what was said by Mr Uphill. Mr Uphill was described by Mr Pasten, a then and continuing employee, as being "My boss' boss."

25. Mr Uphill was clearly a person in a management position although there was some debate as to how senior he was.

26. I find that Ms Piarget in addition to saying something to the effect that the practice of unpaid work was inappropriate also said that she would get back to all concerned. This was the evidence of Ms Clarke who was called by A-Mart and whose evidence was otherwise favourable to it.

27. There were other witnesses who gave evidence to the same effect.

28. A number of witnesses gave what I find to be compelling evidence to the effect that, whether it was immediately after Ms Piarget's comments disavowing the practice or otherwise, Mr Uphill said to the meeting that this practice of unpaid work had always been in place and should continue. It is clear from the evidence that the practice had always been in place and I accept the evidence of Mr Dare that Mr Uphill had spoken to him in such terms previously. It is consonant with common sense that he might have repeated his remarks at the time. Furthermore, I found the witnesses who gave evidence to this effect believable and compelling. The demeanour of Ms Fraser and Ms Strauss in particular in this regard was compelling.

29. This was further reinforced by the fact that Mr Dare, who was transferred back to be the manager of the Glenorchy store shortly thereafter, give evidence that he continued the practice of compelling unpaid work. Mr Dare's conduct was not entirely satisfactory. He plainly lied to A-Mart when he said in 2006 that the practice of unpaid work had ceased when it had not done so.

30. Nonetheless, the fact is that if there had been unequivocal instruction from Mr Uphill and/or Mr Greig (if he were present) to stop the practice at the meeting in July 2006 taken in conjunction with Ms Piarget's observation, it is entirely improbable that Mr Dare would have felt it appropriate to continue the unpaid work practice.

31. In all the circumstances, I am satisfied that whatever Ms Piarget said that caused Mr Butterworth to cease the unpaid work practice, Mr Uphill said something that caused Mr Dare to continue it.

32. Given that Mr Greig, like Mr Uphill, was a prior Rowe and Jarman employee it is tempting to infer that Mr Greig likewise would have wished to continue the previous Rowe and Jarman practices. The fact is, however, that the evidence does not go so far as to show that Mr Greig either knew of these practices or encouraged them following the takeover by A-Mart.

33. Nonetheless as I find, Mr Uphill did continue to press the unpaid work practice following the A-Mart takeover and on any view he was a store manager's manager, not a person in the lower echelons of the company's organisation. This is a factor I have borne in mind in the

overall assessment of this matter, although I should emphasise that, for the reasons that follow later, it is not one of the more important ones.

Wrongdoing in relation to Mr Butterworth's Statement

34. Mr Butterworth sent two statements to Ms Absolon and both involved a measure of whiting out. The question is whether this arose because of misconduct so to speak by A-Mart or otherwise.

35. Mr Butterworth gave evidence as did Ms Knowles, but Ms Absolon was not able to be called although her affidavit was, subject to certain minor matters, received without objection.

36. It is clear that in April 2007 Mr Butterworth was contacted by Ms Absolon about the matters with which we are now concerned. Both the affidavits of Ms Absolon and Mr Butterworth are to this effect.

37. At Ms Absolon's request, Mr Butterworth produced a statement dated 4 May 2007. Mr Butterworth expressed various matters including that employees might work after 5.30 pm. It was opaque as to whether that obligation involved not being paid, although the inference was clearly there.

38. It should be noted that Mr Butterworth gave evidence that the words that inferred post 5.30 pm work in the statement as he sent it to Ms Absolon were:

> *"Between 5.30 pm to 6.00 pm depending on responsibilities (e.g. counter operator balancing till)"*

Were added after whiting out the words "and leave 30 minutes after the closing of the store".

39. He said that this was something he had done at the time he prepared that statement because he felt that the earlier version was wrong.

40. As I understand the evidence there was no suggestion that Ms Absolon or anyone else caused him to make that change. He made it of his own motion.

41. Following that statement, it appears that Mr Butterworth had a further conversation with Ms Absolon which lead Ms Absolon to the view that

employees were only not being paid for work performed before normal starting time and not also after normal finishing time.

42. Whether this conversation took place before or after the provision of the 4 May 2007 statement was a matter clouded in a certain degree of confusion. In the ultimate, I do not think that it matters.

43. For whatever reason Mr Butterworth was requested to and did provide a subsequent statement dated 18 May 2007. It is this document that is at the heart of the controversy as to whether A-Mart misconducted itself by trying to improperly get Mr Butterworth to change it.

44. While it is not entirely clear whether Mr Butterworth spoke to Ms Absolon both before and after his 4 May 2007 statement I do not think that it matters. On any view, he was requested to and did provide a further statement dated 18 May 2007. That statement initially included the words, according to him, "and also finish at 5.30 to close the store". Ms Knowles vividly denied, as Mr Butterworth asserted, that she had told him to delete those words.

45. When you look at all the documents it seems pretty clear that Mr Butterworth had a conversation with Ms Absolon. It is not clear whether or not he mentioned working late for no pay at that time.

46. Ms Knowles subsequently forwarded to Mr Butterworth a draft statement based on what Ms Absolon had told her that Mr Butterworth had said to her. That statement in draft was forwarded on 18 May 2007.

47. That latter draft statement from Ms Knowles, appended to her affidavit, is a little strange given the Respondent already had the statement of Mr Butterworth dated 4 May 2007.

48. I think it was a refinement by either Ms Absolon or Ms Knowles of what was taken from the earlier conversation between Ms Absolon and Mr Butterworth in the light of A-Mart's then need for a statement to respond to the investigation by Inspector Smith.

49. Mr Butterworth's second statement dated 18 May 2007 as I have said initially had a reference to working after closing time for no pay.

50. Contrary to the position contended for both by Ms Absolon and Ms Knowles, the earlier statement was not inconsistent with the latter one. The difference, to the extent that there was one, was that the second statement was unequivocal about the requirement to work unpaid after 5.30 pm whereas the earlier one arguably was not.

51. I think it is more probable than otherwise that Ms Knowles did ask Mr Butterworth to delete the reference to work after 5.30 pm.

52. What Ms Knowles said in her affidavit about this is at paragraph 7:

> *"I telephoned Mr Butterworth on 18 May 2007 and said words to the effect of what he said in his statement was different to what he had told Ms Absolon and asked him which version was correct. Mr Butterworth said words to the effect that it was mainly team members working opening shifts in the morning who worked unpaid hours before their shift. I then said words to the effect could he make that clear in his statement."*

53. In substance that is not wildly different to what Mr Butterworth now says. It is to be noted that even on Ms Knowles' version of the conversation Mr Butterworth did not expressly exclude people working after 5.30 pm unpaid.

54. In saying this I should make it clear that I accept entirely Ms Knowles' vivid denial that she intended to do anything wrong or to cause any misleading statements to be made. She said on her oath that she would have resigned rather than falsify evidence, or words to that effect, and I entirely accept her word in this regard. Her evidence was given in a compelling fashion and I entirely accept it.

55. Rather, I suspect that in the face of a lack of comprehension on the part of Ms Absolon prior to 18 May 2008 that the company's practices had involved not only unpaid work before start but also unpaid work after finish, an inquiry was pressed. The inquiry, not surprisingly, may have involved a desire to obtain a favourable response. Mr Butterworth was probably less exact in his language than he now says he was and the use of the phrase "take out the bit about working after 5.30 pm" that I find was said by Ms Knowles, was caused by the understanding, albeit flawed, of what Mr Butterworth was trying to say to her.

56. I appreciate that the evidence could on another view be taken to involve a deliberate obfuscation by the Respondent through Ms Absolon and Ms Knowles but approaching this matter on the basis that it is for the Applicant to make out his case, I am not satisfied that it is more probable than otherwise that Ms Absolon or Ms Knowles sought to do so.

57. As I have said and I think it appropriate to repeat, Ms Knowles' evidence that she had not deliberately sought to have Mr Butterworth change his evidence so as to improve it for the Respondent was compelling, and I accept it.

58. Although the position in respect of Ms Absolon is less clear (she did not give oral evidence) and although on one view she may well have had strong grounds for seeking to suppress evidence that was unhelpful, it would be grossly unfair to so find, given that the somewhat confused evidence on this issue is open to an interpretation either way.

59. As I have said and once again I am guilty of repetition, while both versions are open on the evidence I am not satisfied that it is more probable than otherwise that A-Mart misconducted itself in respect of the changed statements of Mr Butterworth even though in the main I accept Mr Butterworth's evidence.

Considerations as to Penalty

60. Having determined these two issues, which in my view took more time than they were worth, I turn now to consider the question of penalty.

61. Counsel for A-Mart conceded correctly that this is a serious case. Forcing employees, many of whom on the evidence were casual and/or very young, to work for nothing both before and after their allotted hours of paid work is conduct calling for the most severe condemnation. I have already referred to it as Dickensian, and that is not as I have said the most pejorative description one could give. Making people work for nothing is outrageous and totally at odds with acceptable behaviour.

62. It is difficult to imagine a work practice (excluding issues relating to physical violence) which could be more pernicious than requiring employees, as the price of obtaining paid employment, to work not insubstantial periods of time unpaid.

63. All the other considerations in this case in my view are wholly secondary to this primary consideration.

64. It is my view now reasonably well accepted that there are a number of matters to which the Court can have regard in this sort of proceeding. The observations made by Mowbray FM in *Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 have been adopted with approval by Tracey J in *Kelly v Fitzpatrick* [2007] FCA 1080, and appear to have met with approval subject to the cautionary remarks of Buchanan J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 ("*Ophthalmic Supplies*") at [91].

65. Here this was a large company with up to thousands of employees. Many of those are young and/or are casual employees with all the limitations of bargaining power that those conditions necessarily tend to imply.

66. I am prepared to find in the light of the cases in which I have been involved and those cases heard by other judicial officers that the retail industry in which A-Mart operates is particularly given to the employment of casuals or young people. It is important, and I would regard this as self-evident, that they be not abused, and more particularly, that they be paid for the work they do.

67. I accept the submissions of the Applicant that it is important that this large national retailer pay an appropriate penalty for its conduct.

68. More important however is the need for general deterrence. It is important that employers generally realise that practices of this sort, which one would hope be rare, are utterly unacceptable. I accept as counsel for the Applicant submitted that this is a serious case which should attract a penalty towards the top of the range.

69. Against that, however, there has been some measure of cooperation and contrition.

70. It is right as counsel for Mr Smith submits that the Respondent made no real acknowledgment of the full extent of its behaviour until the statement of agreed facts in April 2008.

71. Nonetheless, I need to bear in mind that the conduct was not initiated by A-Mart but merely continued a prior, albeit very unattractive practice of Rowe and Jarman

72. Furthermore I find that following the meeting in July 2006 at least sufficient was said by a representative (not it would appear an ongoing as it were tenured employee of the company) to cause the practice to cease at the Hobart store because that is what Mr Butterworth did.

73. Nonetheless more senior (if not very senior) staff of A-Mart knew about it and in my view actively fomented the continuation of the practice.

74. The submission by the Respondent to a statement of agreed facts saved a potentially substantial amount of trial time together with the cross-examination of perhaps a number of witnesses.

75. Nonetheless it was necessary for Inspector Smith to call a number of witnesses, all of whom according to my observation were young. I have accepted the evidence of those young witnesses and it should not have been necessary for them to be called and cross-examined.

76. It is to A-Mart's credit that it has sought to rectify underpayments. I accept that the process has been difficult in part and I accept that criticism does not attach to A-Mart because of the amount of time it has taken for the underpayments to be rectified.

77. I have been provided with an undertaking from A-Mart by which it has undertaken to finalise all underpayments on or before 13 May 2008 and I have no reason to doubt that that has been done. I note that underpayments are being rectified even for periods that fall outside the scope of these proceedings and which would not otherwise, at least arguably, be as susceptible to prosecution.

78. I do not propose to give an extra weighting to the penalties to be imposed because the practice itself extended beyond the periods covered by this proceeding.

79. I note that A-Mart has relevantly no prior convictions and that it has not been asserted that A-Mart has otherwise anything other than a good history as an industrial corporate citizen.

80. As I have already said, the emphasis upon the matters relating to the involvement of senior management and the alleged misconduct in respect of altering Mr Butterworth's statement in my view was overstated.

81. The critical thing in this case is the fact that employees were made to work without being paid over a not insubstantial period of time (relevantly to this proceeding from September 2005 till June 2006 (Hobart Store) and December 2006 (Glenorchy store)). It involved some 44 employees the subject of the proceeding, and underpayments of $41,235.50. Although the individual sums might be small there is no reason to suppose they were not important to what on any view would be lowly paid employees.

82. Additionally, and the evidence on this is quite clear, the employees resented, as they properly might, the imposition of unpaid work. The evidence shows that this work took place in an environment where the practice of unpaid work was strictly enforced, and I accept the overwhelming body of evidence to the effect that Mr Uphill had previously dismissed an employee for refusing to perform it. This was not on any view an attractive work culture.

83. Bearing in mind all the relevant considerations I think that this is a case calling for a severe penalty towards the upper end of those available. I think that a penalty of 90 per cent of the total is appropriate, but that the Respondent should receive a discount of 10 per cent for its, albeit relatively belated, cooperation in the production of the statement of agreed facts and otherwise. Ninety per cent less 10 per cent of that figure would produce a total of 81 per cent which I have rounded to 80 per cent.

84. I am required to and do take into consideration the totality principle as explained by the Full Court of the Federal Court in *Ophthalmic Supplies*. The figure of penalty that I am imposing, namely, $52,800.00 is in my view appropriate.

85. It should be borne in mind that while each of these contraventions reflects a course of conduct, that course of conduct touched a substantial number of employees.

I certify that the preceding eighty five (85) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 8 July 2008