FEDERAL MAGISTRATES COURT OF AUSTRALIA

COTIS v OGGY PTY LTD T/AS GLORIA JEANS [2010] FMCA 289
REVESBY & ANOR

INDUSTRIAL– Penalty – aggravating and mitigating circumstances which affect the quantum of penalty and compensation order imposed.

Crimes Act 1914 (Cth), s.4AA
Workplace Relations Act 1996 (Cth), ss. 400(5), 407, 413, 719(1), 792(1), 807(1)(a), cl, 43
Restaurants, & c Employees (State) Award

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Cotis v Oggy Pty Ltd t/as Gloria Jeans – Revesby & Ors [2009] FMCA 21
Jones v Hanssen Pty Ltd [2008] FMCA 291
Kelly v Fitzpatrick (2007) FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union [2008] FCAFC 170
Sharpe v Dogma Enterprises Pty Ltd (2007) FCA 1550

Applicant:	KATE ELIZABETH COTIS
First Respondent:	OGGY PTY LTD T/AS GLORIA JEANS REVESBY
Second Respondent:	ROBERT OGNENOVSKI
Third Respondent:	SILVANA OGNENOVSKI
File Number:	SYG2000 of 2007
Judgment of:	Lloyd-Jones FM
Date of Last Submission:	1 March 2009
Delivered at:	Sydney
Delivered on:	28 April 2010

REPRESENTATION

Counsel for the Applicant:	Mr R Crow
Solicitors for the Applicant:	Blake Dawson
The Respondents:	Mr R Ognenovski and Mrs S Ognenovski appeared as self-represented litigants

ORDERS

(1) Oggy Pty Ltd pay a penalty pursuant to s.719(1) and cl.43 of Schedule 8 of the *Workplace Relations Act 1996* (Cth) for contravention of applicable provisions of a Notional Agreement Preserving State Awards, set in the sum of $24,750.00.

(2) The first, second and third respondents pay a pecuniary penalty pursuant to s.407 of the *Workplace Relations Act 1996* (Cth) for contravention of s.400(5) of the Act. Oggy Pty Ltd pay $29,700, Mr Ognenovski pay $5,940 and Mrs Ognenovski pay $5,940.

(3) The first, second and third respondents pay compensation pursuant to s.413 of the *Workplace Relations Act 1996* (Cth) for any loss or damage suffered by Ms Shalindar Adams set at $1,000 each.

(4) The first respondent to pay a pecuniary penalty pursuant to s.807(1)(a) of the *Workplace Relations Act 1996* (Cth) for contravention of s.792(1) of the Act set at $29,700.00.

(5) The first respondent pay an amount to Ms Shalindar Adams as compensation for any damage suffered by her pursuant to s.807(1)(b) of the *Workplace Relations Act 1996* (Cth) as a result of the first respondent's contravention of s.792(1) of the Act set at $798.69.

FEDERAL MAGISTRATES COURT OF AUSTRALIA ATSYDNEY

SYG2000 of 2007

KATE ELIZABETH COTIS
Applicant

And

OGGY PTY LTD T/AS GLORIA JEANS REVESBY
First Respondent

ROBERT OGNENOVSKI
Second Respondent

REASONS FOR JUDGMENT

The proceedings

1. In the judgment delivered on 29 January 2009 in *Cotis v Oggy Pty Ltd t/as Gloria Jeans – Revesby & Ors* [2009] FMCA 21; the orders in respect to penalty and compensation made were:

> *9. The applicant to file submissions in respect of penalties and compensation by 20 February 2009.*
>
> *10. The respondents to file any submissions in reply to the use of penalties and compensation by 20 March 2009:*

2. In my judgment delivered on 29 January 2009, I set out the aggravating and mitigating circumstances which would affect the quantum of penalty and compensation order imposed on both Oggy Pty Ltd ("Oggy") t'as Gloria Jeans and Mr & Mrs Ognenovski. However, I did not specify the quantum in relation to penalties in compensation orders.

I invited the parties to provide written submissions in respect of these issues before finalising those amounts. In my decision, I have determined that Oggy and Mr & Mrs Ognenovski had contravened the *Workplace Relations Act 1996* (Cth) ("the Act") and that penalty and compensation orders would be imposed on those parties.

3. The invitation for written submissions does not constitute any progression of these proceedings and was intended merely to constitute and aid to me in quantifying the specific penalties applicable. I note that a creditor's meeting on 21 January 2009 resolved that Oggy Pty Ltd was to be voluntarily wound up with Mr Mitchell Ball and Mr John Kukulovski being appointed as liquidators of Oggy. I will refer to the impact of this occurrence on the penalties and compensation below.

4. The factors relevant to the imposition of penalty under the Act were considered by His Honour Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59].

5. These can be effectively summarised as:

   a) the nature and extent of the conduct which led to the breaches;

   b) the circumstances in which the conduct took place;

   c) the nature and extent of any loss sustained as a result of the breaches;

   d) whether there has been similar previous conduct by the respondent;

   e) whether the breaches were properly distinct or arose out of one course of conduct;

   f) the size of the business enterprise involved;

   g) whether or not the breaches were deliberate;

   h) whether senior management involvement was involved in the breaches;

   i) whether the party committed the breach had exhibited contrition;

j) whether the party committed the breach had taken corrective action;

k) whether the party committing the breach had cooperated with the enforcement authorities;

l) a need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employees' entitlements; and

m) the need for specific and general deterrent.

6. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) FCA 1080 at [14] where His Honour stated:

> *[14] 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 for investigation and enforcement of employee entitlements and*

• *The need for specific and general deterrence.*

The parties accepted that these considerations should guide the exercise of my discretion in the present proceeding.

7. See also *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231 per Branson J at 232 and *Jones v Hanssen Pty Ltd* [2008] FMCA 291 at [6]. Some caution has been expressed in using this summary as while it is a convenient checklist it does not prescribe or restrict matters which may be taken into account in the exercise of the Court's discretion: *Sharpe v Dogma Enterprises Pty Ltd* (2007) FCA 1550 at [11]; *Australian Ophthalmic Supplied Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 per Buchannan J at [91]; *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* [2008] FCAFC 170 per Branson J and Lander JJ at [57]-[58].

Factors relevant to penalty and compensation – nature & extent of conduct which led to breaches

Breach of the provisions of the NAPSA by Oggy

8. The judgment at [17] found that Ms Adams at no time during her employment was the subject to provisions of an AWA. Consequently, any underpayments would constitute a breach of the relevant NAPSA. The judgment at [18]-[20] established that Ms Adams was underpaid by Oggy for the duration of her employment. I found that Ms Adams was ultimately paid a sum of $300.77 on 28 January 2008 in respect of these underpayments and that this payment was an omission by Oggy Pty Ltd of underpayment.

9. Significantly, the payment to Ms Adams was only made after the issue of two breached notices by Inspector Cotis on 13 February 2007, a final notice of breach on 13 March 2007, proceedings being filed by the underpayment in respect of Ms Cotis and the proceedings being listed for directions on five occasions and being set down for final hearing.

10. The payment of these outstanding monies by Oggy occurred almost a year after the first breached notice was issued by Inspector Cotis and more than six months after proceedings had commenced. The impact of such a delay in payment is magnified by the fact that the employee owed the payment with only eighteen years of age.

11. On the material placed before the Court it is apparent that at no stage did Oggy or its officers attempt to inform themselves of the pay rates applicable to Ms Adams' employment. Rather, Oggy set an arbitrary rate of pay of $12.27 per hour without considering the applicability of common penalty rates such as those that apply on Saturday and Sunday. Oggy's breach of the NAPSA is wilful, given the magnitude of resources available to Oggy to determine their rates of pay. For example, the Federal Government's Workplace Authority website was an available resource for this information.

Breach of s.400(5) of the Act by Oggy and Mr and Mrs Ognenovksi

12. The duress applied by Oggy, Mr and Mrs Ognenovski in respect of Ms Adams' AWA involves several distinct acts all of which constitute contravention of the Act. The evidence established that:

    a) Ms Adams was given little or no opportunity to negotiate the terms of her employment (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at [52]);

    b) Ms Adams was threatened by Mr Ognenvoski with a reduction in (or elimination of) her working hours if she did not sign the AWA (Affidavit of Ms Adams affirmed 27 June 2007 at [31] – Exhibit "A1": Affidavit of Ms Cotis affirmed 13 August 2007 at [16]-[17] – Exhibit "A3"). Ms Adams' rostered hours were reduced upon her refusal to sign the AWA (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at at [54]);

c) Ms Adams felt intimidated by Mr and Mrs Ogenovski (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at 48]);

d) Mrs Ognenovksi in cross examination admitted that she had "badgered" Ms Adams to return the signed AWA (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at [48]); and

e) Ms Adams was effectively placed in a position by Oggy, Mr Ognenvoski and Mrs Ognenovksi whereby she was confronted with the proposition that:

it's the AWA or your job. (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at [55)

13. Ms Adams' sworn testimony was that Mr and Mrs Ognenovski made misleading misrepresentations to her in their attempt to apply duress. Ms Adams recalls as stating words to the following effect:

the government has given this away to you.

14. Ms Adams also recalls Mrs Ogenovski as stating words to the following effect:

because of the new John Howard IR laws we have to get everyone to sign the AWA's.

15. These acts engaged in by Oggy, Mr and Mrs Ognenovski are particularly reprehensible in light of Ms Adams particularly vulnerable position. At the time of the contravention, Ms Adams was only 18 years (Exhibit "A1" at paragraph [50]; *Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at [54]), was only in her second job (Exhibit "A1" paragraph [50]; *Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors* [2009] FMCA 21 at [54]) and had only been working at Oggy for approximately two months.

Breach of s.792(1) of the Act by Oggy

16. I found that Ms Adams had her working hours reduced and subsequently her employment terminated, on the basis of her refusal to return an AWA (*Cotis v Oggy Pty Ltd t/as Gloria Jeans Revesby & Ors*

[2009] FMCA 21 at [54] and [62]) and this constituted a breach of s.792(1) of the Act).

17. The affidavits of Mr Ogenovksi (Exhibit "R4", paragraph 39 and Mrs Ognenovski, Exhibit "R3", paragraph 19) both admitted to this prejudicial treatment of Ms Adams without displaying any contrition. The affidavit of Mr Ogenovski (Exhibit "R4", paragraphs [39]-[41]) in his account of the relevant facts demonstrates a blatant breach of s.792(1).

> *Shalindar was not listed on the roster for the following week being that commencing 15 May 2006. This was because she had still not returned the second AWA, which by this stage, had become very urgent.*
>
> *With every shift Shalindar worked from 26 April whenever I saw her she was asked where the outstanding second AWA was and reminded that she had to bring it in but she never did so, and never gave any indication what alternative courses she proposed.*
>
> *I was regularly saying to Shalindar words to the effect "Have you brought the AWA back". Shalindar would respond words to the effect: "No I haven't".*

18. The reduction in Ms Adams' hours and the ultimate termination of her employment was particularly reprehensible given Ms Adams had no other income. Other aggravating factors regarding Oggy's conduct included the fact that Ms Adams was in a particularly vulnerable position and of a particularly young age. Ms Adams was not in a strong position to stand up for her legal entitlement and was significantly affected by the loss of income caused by Oggy's conduct.

Factors relevant to penalty and compensation – loss or damage suffered as result of conduct

Breach of NAPSA

19. I acknowledge that Oggy ultimately rectified its breach of the payment provisions of the NAPSA. However that rectification of breach only occurred after a significant period of time being in the vicinity of twelve months.

Beaches of ss.400(5) and 792(1) of the Act

20. The reduction of Ms Adams' rostered hours and the ultimate termination of her employment caused Ms Adams a significant loss and breach of s.400(5) and 792(1) of the Act. In the six week period from the week ending 5 March 2006 to the week ending 9 April 2006 Ms Adams' actual working hours per week averaged 29.6 hours. On the 19 April 2006 Mr and Mrs Ogenovski held a meeting with Oggy employees regarding the signing of the second AWA. Ms Adams' rostered hours of work, and consequently pay, in the weeks following this meeting were significantly reduced. In the five week period between the week ending 16 April and 14 May the average hours worked per week was reduced to 22.7 hours, the difference being a reduction of 6.9 hours per week for the final five weeks. For the five weeks after 10 April 2006 Ms Adams suffered an estimated loss of approximately $429.87 (6.9 hours x 5 weeks x $12.46) hourly rate under the *Restaurants, & c Employees (State) Award* by the reason for the reduction in her rostered hours.

21. Ms Adams was unemployed between 14 May and 22 May 2006 as a result of her termination. This also caused her a loss in income. Based on the weekly hours Ms Adams was accustomed to work before 11 April 2006 there was a loss of one weeks' income total approximately $368.82 (29.6 hours x $12.46). The total loss estimated to have been suffered in financial terms by Ms Adams was therefore $798.69.

22. I acknowledge that this amount is necessarily an estimate given the printout of the computer weekly time reports kept by Oggy were sometimes unclear and amended by hand. I accept that the calculations are based on averages and the nature of casual employment. Ms Adams records this loss in her affidavit (Exhibit "A1", paragraph 40 where she states:

> *This resulted in a big drop in my income and as a result I had difficulty meeting my weekly personal expenses including car expenses, petrol cost, boarding, and mobile bills. I was not studying or working elsewhere. I was not working at the café. I had a lot of idle time during the week and felt upset with myself. I felt that this had put a strain on my relationship with my friends and family.*

Factors relevant to penalty and compensation – deliberate nature of breaches

Breach of the NAPSA

23. As was the case in *Mason v Harrington Corporation Pty Ltd* (supra), the NAPSA in this matter contained clear provisions for weekend penalty rates. In such circumstances it is difficult to accept, that without evidence, that the breaches in relation to the NAPSA were by mistake or oversight (*Mason v Harrington Corp* (supra) at [40])

24. Mr and Mrs Ognenovski indicated to the Court that they had been assisted by Enterprise Initiatives Pty Ltd in respect of the introduction of AWA's into their business. However, they did not provide any documentary evidence or sworn testimony identifying relevant advice provided to them by that organisation to explain why the mistaken payments occurred.

Breach of s.400(5) and s.792(1) of the Act

25. The application to Ms Adams, the reduction of her hours and the ultimate termination of her employment, was a product of deliberate conduct of Oggy and Mr and Mrs Ogenovski.

Factors relevant to penalty and compensation – senior management were heavily involved in the breaches

26. The conduct of Oggy which gave rise to the relevant breaches was engaged in by Mr and Mrs Ogenovksi who were listed as directors and secretaries of Oggy (Affidavit of Kate Elizabeth Cotis – Exhibit "A3", Annexure "M") (*Mason v Harrington Corp Pty Ltd* (supra) at [41]-[43]; see [5h] above).

Factors relevant to penalty and compensation – lack of contrition

27. Neither Mr nor Mrs Ognenovski have expressed or demonstrated any regret, contrition or remorse for their contravening conduct. (*Mason v Harrington Corp Pty Ltd* (supra) 44-49; see [5i] above).

Factors relevant to penalty and compensation – taking of corrective action

28. Other than repaying Ms Adams for Oggy's breach of the terms of the NAPSA, Mr and Mrs Ognenovski have not taken any corrective action to rectify their breaches for the loss suffered by Ms Adams as a result of those breaches *Mason v Harrington Corp Pty Ltd* (supra) 44-49; see [5j] above).

Factors relevant to penalty and compensation – general and specific deterrence

29. The imposition of penalties acts as a warning to other employees and reinforces the seriousness of which courts treat breaches of similar nature. The need for general deterrence is especially high in industries that employ low paid labour. There is a significant need in this case for penalties to have a specific deterrent effect on each of the respondents. The breaches in this case were not technical but were substantial contraventions of both 'duress' and 'freedom of association' provisions of the Act (*Mason v Harrington Corp Pty Ltd* (supra) at [51]-[55] see [5m] above.)

Factors relevant to penalty and compensation – whether breaches arose out of one course of conduct.

30. The breaches in this matter invoked several distinct acts:

    a) The contravention of the various provisions of the NAPSA cannot be said to be related to the duress applied to Ms Adams, or her dismissal. The contravention of the NAPSA arose from a reckless or wilful disregard of the applicable penalty rates as opposed to any other conduct However, all of the contraventions of the NAPSA which arose continuously throughout Ms Adams' employment arose from a common course of conduct and I will therefore treat those breaches as a single breach under the totality principle: *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 per Graham J at [46]).

b) The conduct of Oggy, Mr Ognenovksi and Mrs Ognenovski in applying duress to Ms Adams in respect to her AWA involves several distinct acts.

c) Oggy's breach of s.792(1) of the Act is partially related to the duress breaches engaged in by Mr and Mrs Ogenovski. Given that both breaches appeared to have arisen from the fact that Ms Adams would not sign an AWA. Nevertheless the principle conduct which gave rise to the s.792(1) breach being Ms Adams' dismissal is distinct from the conduct which gave rise to the duress breaches.

Penalty

31. Taking into consideration the factors set out above, I am satisfied that Oggy, Mr Ognenovski and Mrs Ognenovski, engaged in a serious contravention of the NAPSA, ss. 400(5),792(1) of the Act. In respect of the NAPSA, although the sum is only $300.77, there are serious and significant aggravating factors which demonstrate the seriousness for the breach. The lack of regret, contrition or remorse for the contravening conduct provides a compelling reason for me to impose a specific deterrent on Oggy, Mr Ognenovski and Mrs Ognenovski.

32. In respect of the breach of the NAPSA by Oggy I will apply a 25% discount to the maximum penalty on the basis that the breach of the NAPSA by underpayment was subsequently rectified after notification and the commencement of these proceedings. Consequently, Oggy's penalty is set at $24,700. In respect of the breach of s.400(5), I will set the penalty for all three respondents at 90% of the maximum penalty. Consequently Oggy's penalty is set at $29,700 , Mr Ognenvoski's penalty is set at $5,940 and Mrs Ogenovski's penalty is set at $5,940.

33. In respect of the breach of s.792(1) of the Act by Oggy I set the penalty at 90% of the maximum penalty. Consequently Oggy is required to pay the penalty of $29,700.00.

34. Oggy is to pay Ms Adams compensation set at $798.69. This penalty is the jointly and severable responsibility of Oggy, Mr Ognenvoski and Mrs Ognenvoski. Further pursuant to s.413 each respondent is to pay Ms Adams $1,100.00.

I certify that the preceding thirty-three (33) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM

Associate:

Date: 28 April 2010