FEDERAL MAGISTRATES COURT OF AUSTRALIA

COTIS v OGGY PTY LTD t/as GLORIA JEANS – [2009] FMCA 21
REVESBY & ORS

INDUSTRIAL LAW – Breach of a notional agreement preserving state awards – claim of underpayment of wages – claim of duress in connection with AWA – breach of freedom of association provisions.

Acts Interpretation Act 1901 (Cth), s.8
Crimes Act 1914 (Cth), s.4AA
Workplace Relations Act 1996 (Cth), ss.167(2), 170VD, 170VN ,400(5), 400(6), 407, 413, 719(1), 728, 779, 782, 785, 792(1), 793, 807, 809, 826(2), 841, Sch.8, cl.43
Workplace Relations Amendment (Work Choices) Act 2005(Cth)
Workplace Relations Amendment (Transitional to Forward with Fairness Act) 2008 (Cth)

Australian Services Union v Electrix Pty Ltd (1999) 93 IR 43
Bishop v Ropolo Services Pty Ltd (2006) 153 FCR 357
Brobbel v Darrell Lea Chocolate Shops Pty Ltd [2008] FMCA 714
Canturi v Sita Coaches Pty Ltd; Napoli v Sita Coaches Pty Ltd (2002) 116 FCR 276
Cotis (Office of Workplace Services) v Pow Juice Pty Ltd [2007] FMCA 140
Granada Tavern v Smith [2008] FCA 646
Jordan v Mornington Inn Pty Ltd 166 IR 33; *Granada Tavern v Smith* [2008] FCA 646
Maritime Union of Australia v Geraldton Port Authorities (1999) 93 FCR 34
Schanka v Employment National (Administration) Pty Ltd 92 IR 464
Seymour v Saint-Gobain Abrasives Pty Ltd (2006) 161 IR 9

Restaurants, & c Employees (State) Award
Shop Employees (State) Award

Applicant:	KATE ELIZABETH COTIS
First Respondent:	OGGY PTY LTD T/AS GLORIA JEANS - REVESBY
Second Respondent:	ROBERT OGNENOVSKI

Third Respondent:	SILVANA OGNENOVSKI
File number:	SYG 2000 of 2007
Judgment of:	LLOYD-JONES FM
Hearing date:	23, 24 June 2008
Delivered at:	Sydney
Delivered on:	23 January 2009

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.

THE COURT DECLARES:

(1) The first respondent has contravened applicable provisions of a Notional Agreement Preserving State Award.

(2) The first, second and third respondents have contravened s.400(5) of the *Workplace Relations Act 1996* (Cth) by applying duress to Ms Shalindar Adams in connection with the Australian Workplace Agreement.

(3) The first respondent has contravened s.792(1) of the *Workplace Relations Act 1996* by dismissing Ms Shalindar Adams.

THE COURT ORDERS:

(4) The first respondent 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.

(5) 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.

(6) 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.

(7) 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.

(8) 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* as a result of the first respondent's contravention of s.792(1) of the Act.

(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.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2000 of 2007

KATE ELIZABETH COTIS
Applicant

And

OGGY PTY LTD T/AS GLORIA JEANS - REVESBY
First Respondent

And

ROBERT OGNENOVSKI
Second Respondent

And

SILVANA OGNENOVSKI
Third Respondent

REASONS FOR JUDGMENT

1. The primary issue that the Court is required to deal with in this case is whether:

   a) A penalty order is to be made against the respondents in respect of the underpayment under s.719(1) and cl.43 of Schedule 8 of the *Workplace Relations Act 1996* (Cth) ("the WR Act").

   b) An order be made against each respondent in respect of applied duress to an employee in connection with an AWA contrary to

s.400(5) in relation to the employee within the meaning of s.728 of the WR Act.

c) The conduct of the respondents constituted:

i) a dismissal or threatened dismissal for a prohibited reason in contravention of s.792(1)(a) of the WR Act;

ii) an injury or threatened injury to an employee's employment for a prohibited reason in contravention of s.792(1)(b) of the WR Act.

iii) an alteration or threatened alteration to the position as an employee to her prejudice for a prohibited reason in contravention of s.792(1)(c) of the WR Act.

iv) a refusal or threatened refusal to employ an employee for a prohibited reason in contravention of s.792(1)(d) of the WR Act.

d) The second and third respondents were involved in any contravention with the first respondent if they:

i) aided the contravention, or

ii) were in any way by act of omission directly or indirectly knowingly concerned in or part to a contravention; or

iii) conspired with the first respondent to effect the contravention in breach of s.728 of the WR Act.

e) Any conduct engaged in by the second and third respondents (being directors and officers of the first respondent) should also to be taken to have been engaged in also by the first respondent in breach of s.826(2) of the Act.

Background

2. There is no issue in this case in respect to the formal matters such as the incorporation of the first respondent, the role of the second and third respondents as directors of the first respondent, the appointment of the applicant, inspector Cotis and her powers to properly bring these

proceedings. In setting out the following background material I have either paraphrased or quoted directly from the written submissions submitted by Mr Crow. I have not made direct attribution as this will make the summary unwieldy and the information is provided to assist in the understanding of the nature of the application but not to establish any evidentiary point.

3. Kate Elizabeth Cotis is employed by the Workplace Ombudsman, formerly the Office of Workplace Services, and is a workplace inspector appointed under s.167(2) of the WR Act. In or about June 2006 the Workplace Ombudsman received a letter from a person named Christine Adams which contained allegations against the owners of a Gloria Jeans café in Revesby in relation to the employment of her daughter, Shalindar Adams ("Ms Adams"). The letter attached a Wages and Conditions Claim Form completed by Ms Adams as well as other documents. Inspector Elizabeth Goodall was assigned to investigate the allegations made by Christine Adams and Ms Adams. Ms Cotis as the Senior Workplace Inspector assisted in the investigation.

4. Ms Adams was employed by the first respondent to work at Gloria Jeans café – Revesby ("Gloria Jeans") from on or about 24 February 2006 until on or about 14 May 2006. Ms Adams was offered employment as a casual employee after an interview with the second respondent on or about 21 February 2006. During the interview, there was no discussion about Ms Adams' rate of pay and it is in dispute whether Ms Adams was shown or provided with a copy of the Australian Workplace Agreement (AWA) which was being introduced by the respondents. Ms Adams started working for the first respondent a few days after the interview on or about 24 February 2006.

5. Ms Adams was asked to sign an AWA by the third respondent (first AWA) a few weeks after she started working at Gloria Jeans. The rate of pay expressed in the first AWA was $12.27 per hour. On or about 13 March 2006 Ms Adams signed the first AWA and returned it to the third respondent. An AWA made under the WR Act as it existed prior to its amendment by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (pre-reform Act), had no effect until it had been filed with the Employment Advocate: s.170VD and s.170VN of the pre-

reform Act. It is common ground that the first AWA was never filed by the first respondent with the Employment Advocate, and, accordingly, never took effect.

6. During her employment with Gloria Jeans, Ms Adams worked rostered hours as she was advised by the respondents from week to week. Ms Adams performed duties including making coffee, directly serving customers, taking orders from customers, receiving money, heating and toasting pre-made sandwiches and other food such as pies, re-stocking shelves, rotating stock, taking deliveries of bread, milk and other food and doing general cleaning.

7. On or about 11 April 2006 the second and third Respondents convened a staff meeting, which was attended by Ms Adams. During the meeting, the second and third respondents handed new forms of AWA's to Ms Adams and other staff present at the meeting ("the second AWA"). The second AWA specified a rate of $12.00 per hour. It is alleged that the second and third respondents informed the employees (including Ms Adams) at the meeting that they "won't be given any more shifts" if they did not sign the second AWA.

8. On 26 April 2006 the third respondent telephoned Ms Adams and had a discussion with her about her failure to return the signed second AWA. Ms Adams told the third respondent that she was dissatisfied with the rate of pay specified in the second AWA.

9. By 28 April 2006 Ms Adams noticed that her rostered hours had been reducing. She claims she had not requested this. On 8 May 2006, Ms Adams was preparing to attend work on a rostered shift when she received a telephone call from a person identified as Kym, the employee manager of Gloria Jeans. Ms Adams was told by Kym that the second and third respondents had asked her to tell Ms Adams that she was "not to come in".

10. Ms Adams did not sign the second AWA or return it to the respondents. After the week ending 14 May 2006, the respondents did not roster Ms Adams for any shifts at all. This ended her employment with Gloria Jeans. It is common ground that the respondents did not roster Ms Adams for any further shifts because she did not return the second AWA.

11. The second and third respondents were at all relevant times, the sole owners and operators of the first respondent. The first respondent therefore acted at all times through the second and third respondents. The second and third respondents are directors of the first respondent, Oggy Pty Ltd. The respondent is the franchise of Gloria Jeans – Revesby, but there is nothing before the Court in respect of this relationship nor is there any evidence of what interest or assistance is provided by the franchisor in respect to the operation of the franchise.

These proceedings

12. The application in these proceedings was filed on 28 June 2007 and seeks a declaration that:

> *1. the First Respondent has contravened applicable provisions of the Restaurants, & c Employees (State) Award operating as a Notional Agreement Preserving State Awards;*
>
> *2. In the alternative to order 1, the First Respondent has contravened applicable provisions of the Shop Employees (State) Award as a Notional Agreement Preserving State Awards;*
>
> *3. Not pressed*
>
> *4. Not pressed*
>
> *5. The First Respondent, Second Respondent and Third Respondent have contravened section 400(5) of the Workplace Relations Act 1996 by applying duress to Ms Shalindar Adams in connection with an Australian Workplace Agreement;*
>
> *6. The First Respondent has contravened section 792(1) of the Workplace Relations Act 1996 by dismissing Ms Shalindar Adams, injuring Ms Shalindar Adams in her employment, altering the position of Ms Shalindar Adams to her prejudice, and/or refusing to employ Ms Shalindar Adams for the sole or dominant reason that she was entitled to benefit of an industrial instrument;*

13. and an order that:

> *7. the First Respondent pay a penalty pursuant to section 719(1) and clause 43 of Schedule 8 of the Workplace Relations Act 1996 for contravention of applicable provisions of the Restaurants, & c Employees (State) Award operating as a Notional Agreement Preserving State Awards;*

8. in the alternative to order 7, the First Respondent pay a penalty pursuant to section 719(1) and clause 43 of Schedule 8 of the Workplace Relations Act 1996 for contravention of applicable provisions of the Shop Employees (State) Award operating as a Notional Agreement Preserving State Awards;

9. Not pressed

10. Not pressed

11. the First Respondent, Second Respondent and Third Respondent pay a pecuniary penalty pursuant to section 407 of the Workplace Relations Act 1996 for contravention of section 400(5) of the Act;

12. the First Respondent, Second Respondent and Third Respondent pay compensation of such amount as the Court considers appropriate pursuant to section 413 of the Workplace Relations Act 1996 for any loss or damage suffered by Ms Shalindar Adams resulting from the contravention of section 400(5) of the Act;

13. the First Respondent pay a pecuniary penalty pursuant to section 807(1)(a) of the Workplace Relations Act 1996 for contravention of section 792(1) of the Act;

14. The First Respondent pay an amount to Ms Shalindar Adams as a compensation for any damage suffered by her pursuant to section 807(1)(b) of the Workplace Relations Act 1996 as a result of the First Respondent's contravention of section 792(1) of the Act; and

15. any other order that the Court considers appropriate.

Evidence

14. The applicant in these proceedings tendered the following evidence:

a) (Exhibit "A1") – affidavit of Shalindar Carol Adams affirmed 27 June 2007 (first affidavit of Ms Adams);.

b) (Exhibit "A2") – affidavit of Shalindar Carol Adams affirmed 20 November 2007 (second affidavit of Ms Adams);

c) (Exhibit "A3") – affidavit of Kate Elizabeth Cotis affirmed 14 August 2007 (first affidavit of Ms Cotis)

d) (Exhibit "A4") – affidavit of Kate Elizabeth Cotis affirmed 22 November 2007 (second affidavit of Ms Cotis);

e) (Exhibit "A5") – photocopy of facsimile of Oggy Pty Ltd to Enterprise Initiatives with copy of signature page of Ms Adams' first AWA;

f) (Exhibit "A6") – "Australian Workplace Agreement Information Statement for Employees".

15. The respondents filed the following materials:

a) ("Exhibit R1") - Resume of Shalindar Adams;

b) ("Exhibit R2") – employment application form for Ms Adams completed 7 March 2006;

c) ("Exhibit R3") – affidavit of Silvana Ognenovski affirmed 18 October 2007 (first affidavit of Mrs Ognenovski);

d) ("Exhibit R4") – affidavit of Robert Ognenovski affirmed 18 October 2007 (first affidavit of Mr Ognenovski)

16. Oral evidence was given and cross examination of Ms Cotis, Ms Adams, Mrs Ognenovski and Mr Ognenovski occurred.

Consideration

Underpayment

17. The first AWA was not lodged and the second AWA was not signed by Ms Adams and therefore at no time during her employment was she subject to the provisions of an AWA and consequently:

a) prior to 27 March 2006, covered by the terms of the Restaurants, & c., Employees (State) Award (Restaurants Award), or alternatively, the Shop Employees (State) Award (Shops Award), being awards made under the provisions of the Industrial Relations Act 1996 (NSW) ; and

b) on and after 27 March 2006, covered by the terms of the Restaurants Award operating as a Notional Agreement Preserving State Awards (NAPSA), or alternatively, the State Award operating as a NAPSA: (Schedule 8, Part 3 Division 1, cl.43 - WP Act)

18. Under either the Restaurants Award or the Shops Award, Ms Adams was underpaid by the respondents. If the Restaurants Award applied to Ms Adams, then she was underpaid the amount of $275.84 in respect of her work on Saturdays and Sundays, $85.97 or which represents underpayment for the days worked on or after 27 March 2006 (Exhibit A3, paragraphs 34-36). Alternatively if the Shops Award applied to Ms Adams, then she was underpaid by an amount of $300.77 in respect of her work on weekdays, Saturdays and Sundays, $105.38 of which represented underpayment for the days worked on or after 27 March 2006 (Exhibit A4, paragraphs 17-20).

19. On or about 23 January 2008, the respondents through their legal representatives, D Stanefska & Associates, forwarded a payment to Ms Adams in the amount of $300.77. As a result of this repayment the applicant no longer seeks orders under s.719(6) and cl.43 of Schedule 8 of the WR Act for the first respondent to pay to Ms Adams an amount under the Restaurants Award or the Shops Award.

20. I accept the submission made by Mr Crow that this late payment by the respondents is an admission by the respondents that they underpaid Ms Adams and contravened the applicable provisions of a NAPSA. The applicant maintains its claim for a penalty order to be made against the respondent in respect of the underpayment under s.719(1) and cl.43 of Schedule 8 of the WR Act. As a consequence of the admission made by the respondent, I am satisfied that s.719(1) of the WR Act has been breached by the respondent and I find accordingly.

21. Section 719(5) of the WR Act provides that, in the case of a body corporate such as the respondent, the maximum penalty for a breach and applicable provision is 300 penalty units. Section 4(1) defines "penalty unit" as having a meaning given by s.4AA of the *Crimes Act 1914* (Cth). That section relevantly provides that in the law of the Commonwealth, unless a contrary intention appears, a penalty unit is $110. Thus, in this case the maximum penalty for a breach of an

applicable provision is $33,000. Under s.841 of the WR Act any pecuniary penalty imposed by the Court, other than a penalty for an offence, maybe ordered to be paid in part or in whole to the Commonwealth or to a particular organisation or person. In this situation the penalty should be paid to the Commonwealth.

22. In *Cotis (Office of Workplace Services) v Pow Juice Pty Ltd* [2007] FMCA 140 at [48]-[51] I considered the matters that should be taken into account when determining whether a specific mode of conduct called for the imposition of a penalty and the relevant quantum. I will not repeat those considerations here but will apply those principles.

23. The respondents by making the late payment to Ms Adams dispensed with the need for a hearing as to whether breaches had occurred but it only did so on 23 January 2008 despite the early attempts to secure voluntary compliance. Exhibit A3 sets out the steps taken by Ms Cotis to achieve this compliance:

> *37. As a matter of policy, the Workplace Ombudsman always attempts at first instance to secure voluntary compliance by employers in relation to breaches of the Workplace Relations Act 1996 (Cth) and industrial instruments. A prosecution is only commenced where all efforts to secure voluntary compliance from the employer have been exhausted.*
>
> *38. On 13 February 2007 I issued a breach notice to Oggy Pty Ltd in relation to the underpayment of Ms Adams. Annexed to my affidavit and marked Annexure H is a copy of that breach notice.*
>
> *39. A new breach notice was reissued to Oggy Pty Ltd later on that same day after I found out that Ms Adams was eighteen years of age at the time she was employed by Oggy Pty Ltd, and not 19 years of age. Annexed to my affidavit and marked Annexure I is a copy of the new breach notice.*
>
> *40. On 13 February 2007 I also sent a facsimile to Mr Ognenovski and Mrs Ognenovski setting out the wages rate summary I had used to determine the amount of the underpayment. Annexed to my affidavit and Annexure J is a copy of that facsimile.*

24. Despite the issue of a final notice on 13 March 2007 and a number of subsequent telephone discussions with Mr Ognenovski there was no

compliance and consequently on 28 June 2007, Ms Cotis commenced the present proceedings.

25. The rate of pay which was applied to Ms Adams was not derived from any relevant industrial instrument. The rate set was simply a construct of the respondents. There was no basis under either the WR Act or the pre-reform Act for the respondents to believe that an AWA could be effective without the written agreement of the relevant employee and without the agreement being lodged with the Employment Advocate. Despite this, for the entire period of her employment Ms Adams was paid at a rate nominated in the first or second AWA neither of which had any effect.

26. Ms Adams was an eighteen year old with limited work experience having had one previous brief period of employment with McDonalds and can therefore be regarded as genuinely vulnerable and at risk of exploitation in her employment. The amount of underpayment for the admitted breach totals $300.77. Superficially this may not appear to be a large amount. However, Ms Adams only worked on a casual basis and the breach was over a relatively short period of time. The respondents have not previously been found in breach of s.719 but it is relevant that the respondents have only been operating this Gloria Jeans outlet for a period of four months, and another Gloria Jeans outlet at Crows Nest for approximately six months.

27. I note the submissions made by Mr Ognenovski from the bar table that the respondents were relying on advice obtained from the law firm Enterprise Initiatives Pty Ltd which describes itself as a multi-disciplinary workplace management consultancy and law firm. That organisation claimed specialisation in providing "holistic and integrated employment-related services and advice that delivers greater performance". However, there is no evidence before the Court as to the nature of this advice and any defect that it may have contained. Alternatively, the advice may have contained the correct information but the Ognenovski's may have failed to ensure that each step had been complied with. There was clearly a misunderstanding in either the advice or its application as a number of essential steps required to implement AWA's were not complied with such as the failure to provide the "Information Statement for Employees" with the

distribution of the first AWA's. Further a mistaken belief existed in respect to the filing of the signed AWA's with the Office of the Employment Advocate.

28. A further consideration when determining the quantum of penalty is that this breach occurred at the time of the introduction of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) legislation. Although it is claimed that AWA's were introduced to all employees after obtaining advice from enterprise initiatives, it appears to have proceeded without the full understanding or compliance with the Act. No detailed evidence or supporting submissions were made by the respondents to explain the implementation process. Despite the desire to implement and gain any benefit by the use of the AWA, the employer still has the obligation to ensure each employee is correctly remunerated. These mitigating factors are diluted by the respondents' subsequent behaviour in failing to rectify the error and demonstrating a willingness to ensure voluntary compliance. I am satisfied that the respondents were provided with adequate opportunity to rectify the underpayment when brought to the attention by the inspectors, Goodall and Cotis. In the circumstances I believe the penalty for the breach of s.719 should apply and reserve the matter of penalties for further submissions.

Duress

29. The Court notes that references in s.400 to an AWA were replaced with the reference to an Individual Transitional Employment Agreement by Items 84 and 85 in Part 3 of Schedule 1 of the *Workplace Relations Amendment (Transitional to Forward with Fairness Act) 2008* (Cth) which is Act 8 of 2008 receiving assent on 20 March 2008 and came into effect on 28 March 2008. Section 400(5) prohibits the application of duress to an employee "in connection with" an AWA. The concept of duress involves the illegitimate application of pressure: *Schanka v Employment National (Administration) Pty Ltd* 92 IR 464 at [43]; *Canturi v Sita Coaches Pty Ltd; Napoli v Sita Coaches Pty Ltd* (2002) 116 FCR 276 at [38]-[43].

30. What is illegitimate is a question of fact to be decided in the circumstances of the particular case: *Canturi v Sita Coaches Pty Ltd;*

Napoli v Sita Coaches Pty Ltd (supra) at [43]. Illegitimate pressure including unlawful threats or pressure amount to unconscionable conduct. It can also include unlawful conduct in relevant circumstances: *Maritime Union of Australia v Geraldton Port Authorities* (1999) 93 FCR 34 at [367]. The issue is whether the conduct is unconscionable, not whether it was unlawful other than in the circumstances of a breach in relation to s.400(5). The requirement to enter into an AWA does not need to be an issue for duress to arise: *Bishop v Ropolo Services Pty Ltd* (2006) 153 FCR 357 at [21]. Neither is it an essential element for a contravention of s.400(5), for the will of the employee to be actually overborne: *Granada Tavern v Smith* [2008] FCA 646 at [75].

31. These proceedings were commenced on 28 June 2007 which is before the commencement of these amendments and can be maintained by reason of s.8 of the *Acts Interpretation Act 1901* (Cth). The applicant seeks orders under the WR Act against each respondent in respect of their breach of s.400(5) for the duress to Ms Adams in connection with an AWA or the contravention of s.400(5) in relation to the employment of Ms Adams within the meaning of s.728 of the WR Act.

32. Section 400(6) of the WR Act has the effect that a person does not apply duress for the purposes of sub-section 5 merely because a person requires another person to make an ITEA (formerly AWA) as a condition of engagement other than in circumstances described in sub-section 6A. That provision did not exist when Ms Adams commenced employment with the respondents on 24 February 2006. This provision was first introduced by the *Work Choices* legislation which took effect on 27 March 2006 when Ms Adams was already an employee.

33. There are a number of cases where an employee has been told that if you do not sign the AWA, their job is at risk: *Australian Services Union v Electrix Pty Ltd* (1999) 93 IR 43; *Canturi v Sita Coaches Pty Ltd; Napoli v Sita Coaches Pty Ltd* (supra); *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34; *Schanka v Employment National (Administration) Pty Ltd* (1999) 92 IR 464; *Bishop v Ropolo Services Pty Ltd* (2006) 153 FCR 357; *Brobbel v Darrell Lea Chocolate Shops Pty Ltd* [2008] FMCA 714; *Jordan v Mornington Inn Pty Ltd* 166 IR 33; *Granada Tavern v Smith* [2008] FCA 646.

34. The evidence as to when Ms Adams was informed that she would be employed under an AWA is in dispute between the parties. Mr Ognenovski submits that it was during the job interview but this is denied by Ms Adams. Ms Adams says that the first time she knew her rate of pay was when she received her first pay slip and denies having been told about an AWA at all at the interview. When Mr and Mrs Ognenovski were interviewed by Inspector Cotis and Goodall on 21 August 2006 they claimed that Ms Adams was advised about her pay and AWA at the time of her initial job interview. They alleged that it was their practice to raise these issues at the time of the initial interview. Mr Ognenovski describes it as the basic format of this interview of which he has conducted between 70-100 (Transcript 24 June 2008, p.16).

35. What is not in dispute is that Ms Adams commenced employment on or about 24 February 2006 without any documentation in respect to her employment conditions. In Mr Ognenovski's affidavit (paragraph 10) he states:

> *On or about 3 March 2006 I presented Shalindar with the Australian Workplace Agreement (the first AWA)...*
>
> *The reason why it was not provided to her until then was as she was still in training and we had to verbally agree with her that she wanted to stay on before presenting the AWA to her.*

36. Evidence surrounding this issue is inconsistent. Ms Adams in her affidavit and in cross-examination maintains that she was not shown an AWA at her initial job interview. While Mr and Mrs Ognenvoski in their meeting with Inspector Goodall and Cotis state:

> *We show them a copy and what they would be paid and ask if they agree to it.*

37. The evidence contained in Mr Ognenovski's affidavit that claimed he provided Ms Adams with an AWA on or about 3 March is inconsistent and does not conform to the practice or standard proceeding as they described to the inspectors.

38. The affidavit of Mr Ognenovski (paragraph 10) asserts that the reason why an AWA was not provided to her initially was that she was still in training. There is no mention in that paragraph or anywhere else in the

affidavit regarding any further agreement with Ms Adams as to whether she wanted to continue her employment or converse about any related topic. There is no evidence that there was any sign of uncertainty emulating from Ms Adams about her wish to stay which might have warranted that approach. The reason given by Mr Ognenvoski for the delay in providing the AWA is not plausible.

39. In the first affidavit of Ms Adams (paragraph 14) she indicated that she thought about the AWA for about a week, then signed it and returned it to Mrs Ognenovski on or about 13 March 2006. There is an issue between the parties as to whether it was the 13 March 2006 or 30 March 2006 and both parties adhere to their recollections. Irrespective of this, the signing of an AWA could not have been a condition of engagement if it was first raised with an employee approximately two or two and a half weeks after the employment commenced. However, the letter which was given to Ms Adams with the first AWA, dated 3 March 2006, contains the following statement:

> ***Please sign where indicated below to indicate your acceptance of this offer of employment with Oggy Pty Ltd.***

40. Consequently at some time in the vicinity of two weeks after commencing employment Ms Adams was provided with a letter containing an offer of the very employment that she already had.

41. The first AWA was signed by Ms Adams but was not lodged and therefore was not effective. The second AWA was given to Ms Adams at the meeting on the evening of 11 April 2006. In the first affidavit of Ms Adams to the following at [31]:

> *31. After handing out the AWA's, Mr Ognenovski said to us words to the following effect:*
>
> > *These are the new AWAs I need you to sign. If anyone does not sign them, they won't be given any more shifts.*
> >
> > *There's a new café Java Lava that has just opened down the road and we are in competition with them. We might not be as busy as before so you will be the first ones to be put off if you don't sign the AWA.*
>
> *Mrs Ognenvoski said to us words to the following effect:*

Because of the new John Howard IR laws, we have to get everyone to sign these AWAs.

Mr Ognenovski also said words to the effect of:

It's a little bit less money because it was too late to lodge the first AWA so we have to make this new one. The government has given this AWA to you. Unfortunately you get less money but if you don't like it you can leave.

42. Then at paragraph [33]:

I find that Mr Ognenovski and Mrs Ognenovski made it very clear at that meeting that I (and the other employees) did not have any other choice but to sign the new AWA if I (and the other employees) wanted to continue working at the café. Mr Ognenovski and Mrs Ognenovski also created the impression that it was the government's fault and that they had no option.

43. Mr Ognenvoski in his affidavit sets out his version of the meeting as follows:

16. A meeting was held of all staff of Gloria Jeans on 11 April 2006. Among other things, there was a discussion about a new competitor, "Java Lava" which had just opened down the road. I otherwise deny the allegations in paragraph 31 of Shalindar's affidavit.

17. At the end of the meeting we asked the four new staff meetings, including Shalindar to stay behind for a few minutes. It was explained to them that a new AWA needed to be introduced as the earlier ones were lodged out of time. Copies of these new AWA's were handed out to these four staff, together with fresh copies of the information statement, ...

18. At the end of the meeting I said to these four staff:

These are the new AWA's. I need you to read them and get them back to me with them within the next couple of weeks. If you have any problems or questions, please ask me or Silvana.

19. The rate of pay under the earlier AWA was $12.27 per hour. The minimum hourly rate under the second AWA was lower than it had been under the former AWA, the minimum having dropped down to $12.00 to an hour. However, I say to those attending words to the effect:

Although the minimum rates are lower than under the old AWA we will still pay you all at the original, higher, rate of pay.

44. Mrs Ognenovski was present at this meeting and in her affidavit makes the following observation:

> *11. As to the allegation set out in paragraph 31 of Shalindar's affidavit I deny Robert said words to the effect:*
>
> *a) if anyone doesn't sign them, they won't be given any more shifts; or*
>
> *b) you will be the first ones to be put off if you don't sign the AWA or*
>
> *c) It's a little bit less money and in this regard the reverse was true as I heard Robert actually say words to the effect: You will not be on less money; or*
>
> *d) Unfortunately you get less money but if you don't like it then you can leave.*
>
> *12. I recall Robert saying to the new staff at the meeting words to the effect:*
>
> *If there are any problems with the AWA, just give us a call.*

45. The second affidavit of Ms Adams which was prepared after she had the opportunity to review the contents of both the affidavits of Mr Ognenovksi and Mrs Ognenovski indicates that she adheres to her earlier version of the conversation at the meeting.

46. The interview of Mr and Mrs Ognenvovski conducted by Inspector Goodall was noted in Ms Cotis' first affidavit at paragraph 16(l). The following exchange is recorded:

> *Inspector Goodall: Were staff told that if they didn't sign the new AWA they wouldn't get any shifts?*
>
> *He/she said: Not at that meeting they weren't but following the meeting yes. One week, a couple of weeks later Shalindar was refusing to sign the AWA even after signing the first agreement because she didn't agree with it. We informed her that they were the conditions under which we employed our staff and if she didn't give it back to us we wouldn't be able to give her shifts. We*

basically told her that we wouldn't be offer any more shifts until she brought it back to us.

47. I note that the affidavits of Mr and Mrs Ognenovski were both prepared and affirmed after the first affidavit of Inspector Cotis had been filed. Mr Ognenovski and Mrs Ognenovski deny Ms Cotis' account of the conversation recorded at 16(l) of her affidavit. Although the evidence as to when Mr Ognenovski indicated that if Ms Adams did not sign the AWA she would not get any more shifts differs.

48. Ms Adams in her first affidavit and in sworn testimony before the Court indicated that she felt intimidated and did not have the opportunity to negotiate. Mrs Ognenovski in her cross examination acknowledged that she had badgered Ms Adams to return the signed AWA. Mrs Ognenovski said that she spoke to Ms Adams on a number of occasions about the signing of the AWA and that Ms Adams was constantly concerned about losing 27cents per hour.

49. The evidence given by Ms Adams and that of Mr Ognenovski and Mrs Ognenovski conflicts in respect to the content of various conversations and the relevant time those discussions allegedly occurred. However, Ms Adams lost shifts after Mrs Ognenovski's repeated attempts to convince her to sign the AWA had failed. In paragraph 45 of Ms Adams' first affidavit contains a conversation she had with Mr Ognenovski on 14 May 2006. During the conversation Mr Ognenovski is recorded at saying:

Silvana made it quite clear that if you didn't sign the AWA that you would get no shifts.

50. Mr Crow relies upon and has made submissions in respect to the following issues in support of the claim that the respondents apply duress to Ms Adams:

a) the offer of the same job in an existing employment relationship;

b) the reduction in entitlements or opportunity;

c) the denial of any opportunity to negotiate the terms and conditions of employment;

d) a significant power disparity in negotiations; and

e) the threat of "it's the AWA or your job".

51. The making of an AWA offer to an existing employee in the same job is a significant factor: *Schanka & Ors v Employment National (Administration) Pty Ltd* (supra) at [102]; *Bishop v Ropolo Services Pty Ltd* (supra) per Madgwick J at [26]. Ms Adams as an existing employee of the first respondent had an expectation that her conditions of employment would not be materially inferior. Ms Adams was continuing in the same job but was required to do so under an AWA which excluded entitlements of weekend penalty rates, and which provided that her pay rate for ordinary hours was to be reduced from $12.27 to $12 per hour. The option to continue her employment on the previous arrangement was not an option available to her. Consequently, the AWA reduced entitlements or opportunities for an existing employee because there were numerous reductions or disadvantages under the AWA compared with the entitlements under the Shop Award being loss of penalty rates for work on weekends.

52. Although the evidence is conflicting I am satisfied that Ms Adams was given little or no opportunity to negotiate the terms and conditions of employment that was to be regulated by the AWA such as the continuing employment under the State Award. The reduction and ultimate loss in allocated shifts to her shows that only an AWA would govern a further employment offer.

53. A significant power disparity existed between the parties. The respondents had complete power to determine rostering and cancelling Ms Adams' shifts. As a casual employee Ms Adams' income was dependent on being continuously rostered for work each week.

54. Ms Adams was a vulnerable employee as she was eighteen years of age and employed in her second job. Ms Adams' rostered hours were reduced. The threat to reduce (and actually reduce) an employee's rostered shifts unless they signed an AWA amounts to duress: *Granada Tavern v Smith* (supra); *Jordan v Mornington Inn Pty Ltd* (supra). Ms Adams claims that she felt intimidated by the third respondent when the third respondent telephoned her and asked her to sign and return the AWA; and this should be taken into account: *Bishop v Ropolo Services Pty Ltd* (supra) at [44].

55. Ms Adams was in effect, denied the exercise of freewill in these circumstances. If Ms Adams wanted to continue to work at Gloria Jeans she had to sign the AWA. The conduct that the respondents engaged in was effectively "it's the AWA or your job" and conduct of this nature is unconscionable: *Australian Services Union v Electrix Pty Ltd* (supra).

56. Mr Ognenovski in his oral submissions indicated to the Court that he and his wife were new to the business at that time. They had spent approximately four months together and previously six months at a Gloria Jeans store in Crows Nest. He stated that they relied upon their legal advisors, Enterprise Initiatives, to draft and set up the AWA's, to give legal advice in relation to pay rates and any other industrial issues when it related to employees. Mr Ognenovski stated that it was their belief at the time that the AWA was effective from the date that it was verbally approved or signed by the employee. So in the circumstances where an employee agreed to sign, they believed they were permitted from that date to pay that employee in accordance with the terms of the AWA. Mr Ognenovski acknowledges that they subsequently found out much later that this was not the case and that the document was of no effect until it had been actually lodged. At the time that Ms Adams signed and accepted the first AWA they believed that her acceptance of the AWA was the effective instrument covering the employment with their company. When the first AWA was not accepted they issued a second AWA.

57. Section 407 of the WR Act provides that the maximum penalty for a breach of s.400(5) is 60 penalty units in the case of an individual and 300 penalty units in the case of a body corporate. Section 4(1) defines "penalty unit" as having the meaning given by s.4AA of the *Crimes Act 1914* (Cth) with the penalty unit being $110. Thus, in this case the maximum penalty for a breach of the applicable provision is $6,600 in the case of an individual and $33,000 in the case of a body corporate. This is a pecuniary penalty for contravention of a civil remedy provision.

58. I find that the respondents breached s.400(5) of the WR Act. I accept that Mr Ognenovski and Mrs Ognenovski were operating in a small business environment which was relatively new to them employing

staff under AWA's was also relatively new to them. At this time the legislation governing employment contracts and associated AWA's was changing significantly and substantially. I accept that the respondents were relying on legal advice from a firm claiming speciality in the area of employment. It is unclear as to whether elements of that advice were defective or that the respondents did not fully comprehend the advice or overlooked significant parts of it. It is perhaps unfortunate that the knowledge about the manner and nature of this advice was not placed before the Court to be considered in these proceedings. Had it been so it may have been clearer in identifying where the confusion as to the contents and operation of this advice or alternatively the failure to adhere to it.

59. In considering the appropriate quantum of penalty I have had regard to the following matters:

a) the objects of the WR Act, particularly in respect to deterrence of both the contravener and the public generally;

b) the consequences of the contravening conduct;

c) The size and financial resources of the contravener and the size of the prescribed penalty;

d) the reliance on third party pay advice;

e) the level of co-operation with the offices of the Workplace Ombudsman; and

f) the level of contrition and willingness to rectify the contravention.

60. Taking these matters into account I formed the view that a breach of s.400(5) has occurred and I will reserve the matter of penalty and compensation for further submissions.

Breach of Freedom of Association

61. Part 16 of the WR Act applies to the conduct of the respondents by reason of ss.782, 785(1)(a), 785(1)(e), 785(1)(f). The Restaurants Award and the Shops Award which have become Notional Agreements Preserving State Awards (NAPSA's) are "Industrial Instruments" within

the meaning of s.779(1) of the WR Act. The applicant claims that the respondents engaged in the following conduct:

a) telling employees (including Ms Adams) that they must sign an AWA or they would not be given any further shifts;

b) Ms Adams' shifts on 8 May 2006;

c) reducing her rostered shift hours generally; and / or

d) failing to roster her for any shifts after the week ending 14 May 2006 was carried out for the sole or dominant reason that Ms Adams was entitled to the benefits of the terms of the NAPSA's constituted by either the Restaurants Award or Shops Award which provided her benefits which the AWA would have denied her. This is a prohibited reason under s.793(1)(i) of the WR Act which states:

Prohibited reasons

(1) Conduct referred to in subsection 792(1) or (5) is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned::

(i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or

62. In Mr Crow's written submissions he identifies the conduct of the respondent that constituted the breach as:

a) a dismissal or threatened dismissal of Ms Adams for a prohibited reason in contravention of s.792(1)(a) of the WR Act;

b) an injury or threatened injury to Ms Adams in her employment for a prohibited reason, in contravention of s.792(1)(b) of the WR Act;

c) an alteration or threatened alteration to the position of Ms Adams as an employee to her prejudice for a prohibited reason, in contravention of s.792(1)(c) of the WR Act; and

d) a refusal or threatened refusal to employ Ms Adams as an employee for a particular reason, in contravention of s.792(1)(d) of the WR Act.

Section 809 of the WR Act presumes that the respondents had that reason and places the onus on the respondents to displace the presumption: *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 161 IR 9. It is submitted that the respondents made no attempt to displace the presumption required by s.809. The affidavits of the second respondent (paragraph 39) and the third respondent (paragraph 19) clearly state that they ceased to employ Ms Adams because she failed to sign and return the second AWA. I am satisfied that the evidence reviewed above positively establishes the prohibited action of the respondents.

63. Section 807 of the WR Act empowers this Court to make orders in relation to the contravention of a civil remedy provision of this part. This may include:

a) an order imposing a pecuniary penalty on the defendant;

b) an order requiring that the defendant pay a specific amount to another person as compensation for damages suffered by the other person as a result of the contravention; and

c) a other order that the Court considers appropriate.

Section 807(2) sets the maximum pecuniary penalty under s.807(1)(a) as 300 penalty units for corporate bodies and 60 penalty units for individuals. I am satisfied that the breach occurred and reserve the matter of penalty for further submissions.

Involvement of second and third respondents in contravention by the first respondent – section 728 of the WR Act

64. Section 728 states:

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

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

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

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

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

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

65. The second and third respondents were at all relevant times, the sole owners and operators of the first respondent: affidavit of Robert Ognenovski (paragraph 2); affidavit of Silvana Ognenovski (paragraph 2). Oggy Pty Ltd (ACN 110 444 936) was incorporated in NSW on 10 August 2004. The company is an Australian Proprietary Company limited by shares. Robert Ognenovski and Silvana Ognenovski are the two directors and both hold the position of Company Secretary. Two ordinary shares have been issued with a total paid up value of $2. One share is held by each of the directors. The registered office is with an accounting practice in Bankstown (first affidavit of Ms Cotis, Annexure "M").

66. Mr Crow submits that the first respondent acted at all times through the second and third respondents. No evidence was led by the respondents to challenge this proposition. I am satisfied that the evidence before the Court clearly establishes the involvement of the second and third respondents in conduct which constitutes the underpayment, AWA duress and breach of Freedom of Association provisions.

67. The first respondent acted at all times through the second and third respondents. The second and third respondents were at all times the guiding force of the first respondent and any contravention within the meaning of s.728 of the WR Act in respect to the issues ventilated in this matter were directly attributable to the second and third respondents. Correspondingly the conduct engaged in by the second and third respondents being directors and officers of the first respondent should be taken to have been engaged in also by the first respondent: s.826(2) of the WR Act. I reserve the matter of penalties

and compensation to be paid by the respective respondents for further submissions. The liability for penalties and the payment of compensation between individuals and the corporate body is substantial and significant. I invite the further submissions to address this issue.

I certify that the preceding sixty-seven (67) paragraphs are a true copy of the reasons for judgment of Lloyd-Jones FM.

Associate:

23 January 2009