

LOCAL COURT OF NEW SOUTH WALES**NEWCASTLE**

JURISDICTION: Civil (Federal)

PARTIES:

Plaintiff: FAIR WORK OMBUDSMAN

Defendant: NEWCASTLE BAKEHOUSE PTY LTD

Case No: 78112/09, 105995/09

Hearing Date: 16 October 2009

Date of Decision: 4 December 2009

Legislation: Fair Work Act 2009
Fair Work (Transitional Provisions and Consequential Amendments)
Act 2009

Magistrate: G J T Hart

Representation: Solicitor for the Plaintiff
Mr A Ball
DLA Phillips Fox
Solicitors

Counsel for the Plaintiff
Ms K Eastman

Solicitor for the Defendant
Mr M Unwin
Envoy Lawyers

Counsel for the Defendant
Mr J Wormington

REASONS FOR DECISION

- 1 The Plaintiff seeks the imposition of civil penalties against the Defendant company in respect of breaches summarised in the Plaintiff's written submissions as follows:-
- (a) Regulation 2.19.1(1) (failure to make records)*
 - (b) Regulation 2.19.4(2) (failure to keep records)*
 - (c) Regulation 2.19.5(1) (records not in a condition that allows a workplace inspector to determine entitlements)*
 - (d) Regulation 2.19.8(1) (record not containing prescribed general content)*
 - (e) Regulation 2.19.12(1) (record not containing prescribed content regarding leave)*
 - (f) Regulation 2.19.14(1) (record not containing prescribed content regarding termination of employment)*
 - (g) Regulation 2.19.18(1)(b) (failure to comply with request for records)*
 - (h) Regulation 2.19.20(1) (failure to issue payslips)*
 - (i) Regulation 2.19.20(2) (failure to issue payslips within prescribed time)*
 - (j) Regulation 2.19.20(3) (payslips not containing prescribed content)"*
- 2 The Defendant admits each of the contraventions. The originating Summons was filed in the Court Registry on 19 May 2009. On 28 August 2009, the solicitor for the Defendant lodged in the Court Registry a Reply in which the Defendant formally admitted the majority of the breaches listed in the Summons. The remaining breaches were the subject of admission by the Defendant shortly before the matter proceeded to hearing on 16 October 2009. As a consequence of the Defendant's decision to formally admit each of the breaches, the hearing of the matter on 16 October 2009, became a sentencing hearing rather than a hearing requiring the determination of matters going to liability.
- 3 The case for the Plaintiff relied upon the Affidavit of Inspector Rebecca Cummings dated 30 July 2009. Inspector Cummings also gave oral evidence and was cross-examined by Counsel for the Defendant. The Plaintiff also relied upon affidavits and witness statements provided by five former employees of the Defendant company. The Plaintiff relied upon the Affidavit of Janet Roper dated 6 April 2009, the Affidavit of Heather Dibley dated 6 April 2009 and the Affidavit of Rachel Williams dated 16 April 2009. Witness statements of Andrew McPherson dated 2 July 2009 and Todd Wilson dated 6 April 2009 were also relied upon. These Affidavits and witness statements were admitted into evidence by consent, and the five ex-employees were not required for cross-examination.

4 On behalf of the Defendant, two Affidavits were lodged by the Director of the company Mr David Tape, who supplemented his Affidavit evidence with oral evidence, and was cross-examined by Counsel for the Plaintiff.

5 It is not in dispute that the Defendant operates a cafe and bakery business in the Hunter Street Mall, Newcastle, and that the business operates on a seven day per week basis. It is not in dispute that the Director, Mr David Tape, has a hands-on role in the business which includes a managerial role including the recruitment of new staff, directing employees as to their duties, and personally handling payroll duties. The Director also was engaged in work in food preparation including baking work utilising his qualifications as a qualified baker, as well as serving customers and other general duties in the bakery and cafe business.

6 The Affidavit evidence of the five former employees is summarised in the Plaintiff's written submissions as follows:-

"PS9 In around late November/early December 2007, Ms Rachel Williams was employed as a manager of the bakehouse. She was employed to work full-time (with Sundays and Mondays off). She was required to perform a range of duties from serving customers, cleaning, waitressing and watching the shop and staff. Ms Williams says she was constructively dismissed around 4 August 2008. She complained to Mr Tape about why she had not been paid and requested a group certificate. She observed that Mr Tape did not maintain a wage book. She was aware that he transferred the employees' pay each week into bank accounts. She did not receive a pay slip. Ms Williams made a complaint to the Workplace Ombudsman on 15 August 2008.

PS10 Around 29 January 2008, Ms Heather Dibley commenced employment as a casual employee. Her duties involved serving customers. After working for 3 months, she was offered a full-time position, as 'second in charge' of the cafe. In July 2008, she confronted Mr Tape about her pay because it was not consistent. She recalled having to ask repeatedly for payslips and sometimes she would receive a 'bunch' of 3 at a time. She received no payslips after November 2008. In December 2008, Ms Dibley resigned. She has not received payment for her final week of work.

PS11 Around 22 July 2008, Mr Todd Wilson commenced employment as an apprentice baker. He was 16 years of age. When he commenced employment, there was no discussion about his wages and whether an award would apply to his employment. Mr Wilson made numerous verbal and written requests for payslips and information regarding his wages during his employment. He was not provided with payslips and was unaware of the gross amount he was paid, what hours he

was paid for and whether superannuation was paid. Mr Wilson reported that he experienced abuse and harassment during his employment. He ceased working for the Defendant on 4 February 2009.

PS12 In around late January 2009, Ms Janet Roper was employed to perform waitressing, cleaning and food/drink preparation. On 14 February 2009, Ms Roper resigned. During the short period she worked, she did not receive a payslip. She has not been paid for the second week she worked.

PS13 On 2 March 2009, Mr Andrew McPherson commenced employment with the defendant as a baker. He said there was no discussion about wages, any award coverage or a roster. He was not given any paperwork when he commenced work. He was expected to work 6 days per week and commence at 1.00 am. After working for a week, Mr Tape told him that he 'withheld one week's wages' from employees to 'protect himself in case somebody leaves'. Mr McPherson recalled that Mr Tape has a folder for each staff member in his office. He would hand out payslips for collection. He says that he checked the folder each week but received payslips on only three occasions during his employment. On 24 June 2009, Mr McPherson gave two weeks' notice of his resignation. Mr Tape told him that he would not get his pay unless he worked 3 weeks' notice. Mr McPherson queried his rate of pay. He was dissatisfied with Mr Tape's response and lodged a complaint with the Workplace Ombudsman. He has not been paid outstanding wages or accrued annual leave."

7 In relation to the above quotation, it should be noted that within paragraph 11, there is an allegation which is potentially highly prejudicial and is not relevant to the matters under consideration before the Court. That is the reference to a claim being made by Mr Wilson that he experienced abuse and harassment during his employment. Whilst the Defendant herein did not require any of the five former employees for cross-examination, and their Affidavit evidence in relation to issues before the Court is unchallenged, there is clearly no admission in relation to allegations of abuse and harassment. Such allegations are matters which may well require consideration and determination in another jurisdiction, and for the purposes of this Decision I disregard such allegations and make no findings whatsoever in relation to them.

8 The Plaintiff submits that the Defendant is guilty of ten separate breaches of the regulations, as described above, and with each contravention carrying a maximum civil penalty of \$5,500.00, the total maximum fine facing the Defendant is \$55,000.00. The Plaintiff submits that in each case a penalty at the higher end of the range would be appropriate. The Plaintiff submits that a significant general deterrence factor is required because the obligation upon an employer to keep proper time and wages records, to make

such information available to its employees in a timely fashion, and to facilitate investigations by the Plaintiff in its role as the regulating authority with statutory power to investigate complaints by employees, are fundamental to the legislative system. It is submitted that disregard of such obligations strikes at the capacity of the statutory authority to carry out the task set for it by the Parliament which is intended to ensure that a fair system operates in a fashion which protects the interests of employees, as well as the interests of employers.

- 9 Further, the Plaintiff submits that there is a need for a strong specific deterrence factor to be included in any penalty. It is submitted that the Court should find that the conduct of the Defendant was deliberate and showed blatant disregard for the Defendant's legal obligations over an extensive period of time of at least several years. Further, it is submitted that whilst the Defendant admits each of the contraventions, none of the admissions were made at an early stage, and some of them were made only a very short time before the hearing on 16 October 2009. It is submitted that the Defendant has shown no genuine contrition or remorse, and that on the evidence the Court would not be satisfied that the Defendant is unlikely to reoffend. In this regard, the Plaintiff also relies upon the demeanour of the Director, Mr Tape, in the witness box, and submits that Mr Tape displayed not only a complete lack of contrition and remorse, but also demonstrated in cross-examination that he had failed to take adequate steps to put in place an adequate payroll system which fully complied with the Defendant's legal obligations under the legislation. It was submitted that any steps taken by Mr Tape were very recent, namely occurring only a few weeks prior to the hearing on 16 October 2009, that they were inadequate and incomplete, and appeared to be steps taken only for the purposes of the litigation and not because of any genuine change of attitude on the part of the Defendant.
- 10 Mr Wormington of Counsel provided the Court with both written and oral submissions on behalf of the Defendant. Mr Wormington submits that after an examination of the wording of the ten contraventions and the allegations of fact relied upon by the Plaintiff, it would be inappropriate for the Court to find that ten separate offences have been committed.

- 11 The Defendant relies upon Regulation 2.14.5 which relevantly provides:-
- "(1) This Regulation applies if:*
- (a) the person commits two or more contraventions of a civil remedy provision of these Regulations; and*
 - (b) each contravention relates to the same action or course of conduct of the person.*
- (2) The contraventions are taken, for these Regulations, to be a single contravention of the civil remedy provision."*
- 12 Mr Wormington for the Defendant submits that when the course of conduct relied upon in relation to each of the ten counts is properly considered, the Court should find that the Plaintiff is seeking to have penalties imposed upon the Defendant more than once for the same conduct. On behalf of the Defendant it is submitted that, properly categorised, there are in fact three separate courses of conduct, rather than ten, and if the Court upholds that submission, the maximum total penalty facing the Defendant is not \$55,000.00 but \$16,500.00.
- 13 It is further submitted on behalf of the Defendant that these are matters which could have been dealt with by way of infringement notice only, and in such circumstances any penalties imposed on the Defendant would be significantly lower. On behalf of the Defendant, it is submitted that any penalties imposed by the Court should be at the low end of the range and should take into account the penalties available where matters are dealt with on an infringement notice basis rather than by way of prosecution before the Court.
- 14 On behalf of the Plaintiff, it is submitted that each of the ten offences before the Court constitute separate breaches under the Regulations, and in those circumstances, there are ten matters requiring sentencing. The Plaintiff submits that whilst the Defendant is clearly protected from multiple repeated offences by the provision of Regulation 2.14.5, the Court should not adopt the approach urged by Mr Wormington for the Defendant. For example, where the Defendant failed to provide a payslip to a particular employee for a specific pay period, that conduct constitutes an offence. Whilst the Defendant may have repeated that offence in every pay period for a year, the Plaintiff does not ask the Court to treat each contravention as a separate offence because of Regulation 2.14.5. Similarly, when the same conduct occurs in respect of other employees, the Defendant is

again entitled to the protection of Regulation 2.14.5 and the conduct of not issuing a payslip is to be treated as one offence and not as a separate offence in respect of each separate employee.

- 15 In relation to this issue, I accept the general thrust of the submissions made on behalf of the Plaintiff, but I am not satisfied that in this particular case, separate conduct can be identified so as to justify separate charges under Regulation 2.19.4(1) and 2.19.4(2). In my view, once the Defendant committed the breach in subsection 1 of failing to “make” records in respect of each of the employees, there was no further conduct which could be described as a failure to “keep” records, a separate offence under subsection (2). In some cases, the relevant facts may be that the employer initially makes records but subsequently destroys them, thereby being at risk of prosecution under subsection (2) but not under subsection (1). However, where there has been a breach of subsection (1) and the requisite records were never made, no additional conduct on the part of the employer can be identified to warrant a separate penalty in respect of subsection (2).

- 16 Mr Wormington of Counsel relies upon the authority of the High Court of Australia in *Pearce v the Queen* (1988) 194 CLR 610, where their Honours said:-

“To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just desserts.”

- 17 In this case, I am satisfied that the Plaintiff has identified nine specific failures on the part of the Defendant, but I can identify no separate conduct justifying the charge under Regulation 2.19.4(2). Consequently I find that there are nine separate offences to be considered, each with a maximum penalty of \$5,500.00, a total potential maximum penalty of \$49,500.00.

- 18 I reject the submission of Mr Wormington that I should take into account the fact that the prosecuting authority could have utilised infringement notices rather than issue a Summons and bringing these matters before the Court. It would be inappropriate in my view for the Court to ignore the prosecutorial discretion of the relevant statutory authority. Once the matter is brought before the Court by way of Summons, and liability is established, either by admissions or by a contested hearing, it only remains for the Court to carry out the sentencing task utilising well established sentencing principles. The authorities make clear that as part of that sentencing process, the Court should identify the maximum penalties set by the relevant legislation. In my view, the Court would be led into error if, instead of identifying the maximum penalties set by the legislation, it instead turned its attention to an entirely different range of penalties which might have had application if the Plaintiff had elected to exercise its discretion in a different fashion.
- 19 I turn now to the submissions made on behalf of the Defendant in relation to the various matters requiring the Court's consideration as part of the sentencing process. Mr Wormington's written submissions utilise a number of subheadings drawn mostly from the list of relevant considerations set out by his Honour Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. In my view, it is convenient to utilise the same subheadings within these Reasons for Decision.
- 20 **The Size of the Business Enterprise Involved**
- It was submitted on behalf of the Defendant that the business employed less than fifteen employees, indeed usually ten or eleven at any given time, and that in the last financial year there had been a gross turnover of \$700,000.00 with a profit of \$30,000.00.
- 21 The Court has not been provided with any financial records of the Defendant, independently audited or otherwise, and the only evidence before the Court is that provided by Mr Tape. In the absence of any documentary evidence in a form capable of being tested, I do not accept Mr Tape's claims as to the low profitability of the business. On the evidence before the Court, I do accept that the business was a relatively small one,

and that the size of the business would not justify the employment of specialist industrial relations staff.

22 I am not satisfied that the legislation requires the Court to treat breaches by small businesses as inherently less serious than those committed by larger corporations. In each case, it is necessary for the Court to consider all relevant factors.

23 It is reasonably clear that when a person starts a business which is a relatively small scale operation, they may well have initial difficulty coming to grips with the complexities of taxation law, occupational health and safety requirements, State industrial legislation, and Federal industrial legislation. These are all potentially complex areas of law and in the absence of surplus funds to obtain frequent legal and accounting advice, it is not unexpected that the person operating a small business, especially at the outset, will frequently find themselves in difficulties. In other words, even when such a business operator is conscientiously endeavouring to do everything in accordance with the relevant legislation, they will find it harder to comply than a large organisation which has the financial strength to employ specialist staff and, where necessary, engage external professional advisors whenever necessary.

24 However, in this case, I am not satisfied that the Defendant company was conscientiously endeavouring to meet its obligations. The evidence of Inspector Cummings, which I accept, is that endeavours were made by the Office of the Fair Work Ombudsman to provide information which would assist the Defendant in complying with its obligations under the legislation, and such attempts were consistently ignored or rebuffed. Further, the evidence of the former employees satisfies me that the Director of the Defendant, Mr Tape, displayed over a considerable period of time an arrogant disregard for the welfare of his employees, and for their right to be paid and otherwise treated in accordance with beneficial legislation specifically put in place to protect employees from such conduct.

25 **Whether or Not the Breaches were Deliberate**

The submissions made on behalf of the Defendant urge upon the Court the conclusion that the breaches were not deliberate and arose purely from the ignorance of the

Defendant, and in particular its Director, Mr Tape. There is no evidence before the Court which would support the conclusion that Mr Tape ever made an effort to ascertain his obligations under the legislation in relation to the keeping of records, the provision of payslips to staff, or matters relating to cooperation with authorised officers exercising power under the legislation to investigate complaints. Further, the evidence before the Court, and especially the evidence of Inspector Cummings, strongly supports the conclusion that Mr Tape rejected such information even when it was proffered.

26 In addition, it is clear from the evidence of the former employees that Mr Tape was frequently asked by members of his staff to provide payslips and in response payslips were either not provided at all, or were provided long after the pay periods in question, and were defective in any event.

27 In my view, the evidence supports the conclusion that the conduct of the Defendant was deliberate.

28 **Not Making Records Available**

Under this heading, Counsel for the Defendant submits that *"there was no advantage,, financial or otherwise, to the Defendant in failing to keep, or make available the prescribed records."* I reject that submission. On the contrary, the evidence of the five former employees suggests that the Defendant made it a regular practice to withhold a week's pay from each employee and then, frequently, refuse to pay the employee for that retained week at the end of the employment. Further, the evidence suggests that employees frequently worked overtime hours but were not paid overtime rates for such work, and that there was a failure on the part of the Defendant to pay sick leave and annual leave entitlements. Whilst the failure to maintain proper time and wages records may well make it extremely difficult for the underpayments to be calculated with precision, it may well be the case that the Defendant has underpaid employees thousands or even tens of thousands of dollars over the period that the business has been in operation. Consequently, the deliberate failure to maintain proper records is likely to have been motivated by the express desire to, firstly, hinder the employees in their endeavours to work out what they should have been paid in any particular pay period and,

secondly, make it difficult for the inspector to check the time and wages records for the purpose of investigating the complaints of employees. In those circumstances, I am satisfied that the Defendant had an obvious motive, namely the desire to escape detection for its unlawful treatment of employees over a period of time.

29 **The System in Place for Recording Employees' Times and Wages**

It is submitted on behalf of the Defendant that whilst the records which were kept were defective, it is not a case where no records at all were maintained. I accept this submission, but I am not satisfied that the existence of some records mitigates the seriousness of the offences to any great degree. The Director, Mr Tape, kept records at his home. Given his practice of not issuing payslips to employees with their pay at the end of each pay period, and his practice of keeping his records away from the business premises, the system he had in place was not only inadequate but deliberately secretive. Further, the evidence before the Court supplied by former employees, is that although they were invited to write down on the weekly roster any hours worked by them above and beyond the rostered hours, the Director, Mr Tape, had a practice of arbitrarily crossing out such entries thereby doctoring the record which his system was meant to provide. Given such conduct, it is difficult to give the Defendant much credit for the steps taken by Mr Tape to remove the rosters and glue them into an old diary kept at his home.

30 **The Nature and Extent of any Loss or Damage Sustained as a Result of the Breaches**

At paragraph 19 of the Defendant's written submissions, the following submission is made:-

"19 There has been no loss or damage suffered by any of the Defendant's employees since the business commenced operations in 2004. This is despite numerous complaints to the Fair Work Ombudsman by disgruntled employees. All payments to employees were made by direct deposit to their bank accounts, and the hours and days worked by each employee, including overtime, have been provided to the Fair Work Ombudsman. No proceedings have been commenced for the recovery of unpaid employee entitlements. This is because, in my submission, there are not any."

31 There is a strange irony in this particular submission. The irony is that for the Defendant to sustain the argument that all employees have been properly paid, the Defendant would need to have time and wages records to prove it. I accept the evidence of Inspector

Cummings to the effect that there are outstanding complaints which have not been resolved, and that such complaints have been difficult to investigate because of the lack of time and wages records which the Defendant was required to make and keep.

32 However, as indicated above, the evidence of former employees, or at least the five former employees who have given evidence in this case, would strongly suggest that the Defendant made a regular practice of failing to pay employees their legal entitlements under the relevant legislation and under the relevant industrial instruments.

33 **Whether There Has Been any Similar Previous Conduct by the Respondent**

I am satisfied that the Defendant has no prior offences. In those circumstances, it is appropriate for the Court, as part of the sentencing process, to extend to the Defendant the leniency which is normally afforded to a first offender.

34 **Whether Senior Management Were Involved in the Breaches**

It is clear in this case that the Director of the Defendant had a hands on role which included the direction of staff and control of all payroll matters. In those circumstances the conduct in question is clearly attributable to the most senior level of management within the Defendant company.

35 **Contrition, Corrective Action, Cooperation with Authorities**

It is submitted that the Defendant should be regarded as exhibiting contrition, and that the Court would take into account the admissions made by the Defendant, and would also take into account the corrective action which has occurred to improve the record keeping of the Defendant company.

36 The corrective steps which have been taken have occurred very recently, and appear to have been put in place largely in anticipation of the litigation, rather than at an early stage when the Defendant was first notified that it was in breach. Whilst the Defendant is clearly entitled to some discount for the admissions, such discount will be somewhat reduced by the fact that none of the admissions were entered at an early stage and some of them were entered virtually at the door of the Court.

37 Having observed Mr Tape's demeanour in the witness box when he gave sworn evidence, I find it difficult to conclude that contrition can be established. There was no attempt on the part of Mr Tape to take responsibility for the breaches, and he showed no trace of remorse for his failure to provide to his employees such basic entitlements as a regular payslip setting out in appropriate detail how their pay was made up. The evidence of the former employees is that they are still trying to ascertain whether any moneys were ever paid on their behalf into superannuation funds. Such evidence was entirely ignored by Mr Tape in his evidence.

38 **The Need to Ensure Compliance with the Minimum Standards by Provision of an Effective Means for Investigation and Enforcement of Employees' Entitlements**

Under this heading, it is submitted on behalf of the Defendant that notwithstanding the deficiency in the Defendant's recordkeeping, the Defendant complied fully with the Australian Fair Pay and Conditions Standard. As indicated above, the Defendant has a major difficulty with such an assertion. The former employees have given sworn evidence to the effect that they were regularly underpaid and exploited by the Defendant company. In response, the Defendant is unable to provide the time and wages records needed to establish such compliance. The Australian Fair Pay and Conditions Standard requires certain minimum standards in relation to annual leave. The Court has not been provided with any evidence that the Defendant kept annual leave records in respect of its employees. In the view of the Court, the Defendant can point to no evidence which supports the assertion that it complied fully with the Australian Fair Pay and Conditions Standard.

39 **The Nature and Extent of the Conduct which Led to the Breaches**

It is submitted on behalf of the Defendant that the breaches presently before the Court are "*technical in nature as opposed to fundamental*". I reject that proposition. If anything, cases such as this illustrate dramatically that recordkeeping provisions in the legislation and in the Regulations made thereunder, are fundamental to the establishment of a fair system of industrial relations where minimum standards are maintained and can be properly policed, and employees protected against exploitation by employers who are

motivated to act in such a fashion. At the same time, it should be noted that the maintenance of proper time and wages records can assist in protecting the genuine, conscientious and honest employer against the exaggerated or false claims of former employees. It is clear that the requirements are fundamental, and that compliance is for the benefit of all employers and employees with the exception of those who are motivated to seek to undermine the system.

40 **The Circumstances in which that Conduct Took Place**

The Defendant submits that the breaches arose out of the ignorance of the Defendant concerning its legal obligations. As indicated above, I have rejected that argument and I find that the conduct was in fact deliberate and intentional. Whilst the Defendant in these submissions denies the allegation made on behalf of the Plaintiff that the Defendant's breaches occurred in circumstances where its legal obligations had already been drawn to its attention, I have considered the evidence of Inspector Cummings, and accept both her Affidavit evidence and her oral evidence. Inspector Cummings was cross-examined in relation to these matters and I find that her evidence is unshaken by such cross-examination.

41 **Conclusion**

Having considered each of the above matters, I find that the offences are objectively serious in that they display a deliberate and intentional defiance of the fundamental requirements of the legislation, motivated to unfairly benefit the Defendant and to unfairly disadvantage the Defendant's employees. The offences were numerous and occurred over an extensive period of time during which the Defendant had ample opportunity to reconsider its approach.

42 In those circumstances, there is a need for a strong general deterrence in any penalty imposed by the Court, given that such fundamental breaches when defiant and deliberate, warrant the imposition of substantial penalties. Further, given my findings as to the lack of any genuine contrition or remorse, I cannot conclude that there is a low risk of this Defendant reoffending. The inadequate corrective action thrown together shortly before the hearing does not warrant the conclusion that this Defendant recognises the

seriousness of its conduct, or that it has a genuine desire to change its ways. In those circumstances, there is also a need for a significant specific deterrence factor to be included in any penalty imposed by the Court.

43 For the reasons given above, I find that there are nine offences before the Court, each of which carries a maximum penalty of \$5,500.00. The Defendant is a first offender, and in those circumstances, there is a need for some leniency to be afforded, and I do not regard these offences as warranting penalties at the maximum level. I do, however, conclude that a penalty of \$3,500.00 in respect of each of the nine offences is warranted. In that regard, I can indicate that I do not regard the offences as having varying seriousness. I regard the objective seriousness of each of the nine offences as equal. Before any discount is considered, the total fine to be imposed would be \$31,500.00.

44 There are two bases upon which there should be a consideration of the provision of a discount on the penalties imposed. As I indicated above, the Defendant is entitled to some discount given that admissions were made and as a consequence it was unnecessary for there to be a hearing as to liability. The admissions were not made at an early stage, and in the case of some of them, the admissions were made very late in the piece. I have no doubt that, as a consequence, the Plaintiff was put to some considerable expense which would have been obviated if the admissions had been made at an early stage. Nevertheless, the decision of the Defendant to make admissions and agree to the tender of the Affidavits and statements of the five former employees without requiring any of them to undergo the ordeal of cross-examination, is a relevant factor which mitigates in favour of the Defendant, and as a consequence, there should be a discount of 10% in acknowledgment of the utilitarian value of the admissions notwithstanding the fact that they were not made at an early stage. Such a discount reduces the total penalty to \$28,350.00.

45 In addition, this is an appropriate case for the Court to give consideration to the doctrine of totality. Whilst I have found that there are nine separate offences before the Court, it is undeniable that there is a relevant overlap in the conduct of the Defendant and that it would be unrealistic to treat these offences as being unrelated and distinct from each

other. In such circumstances, I propose to discount the penalties by 40% in acknowledgment of the doctrine of totality. Consequently, the total penalty to be imposed on the Defendant will be \$17,010.00, apportioned between the nine offences, and constituting a civil penalty of \$1,890.00 for each of the nine offences.

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

- 1 Within 28 days, the Defendant is to pay a civil penalty of \$1,890.00 in relation to each of the nine contraventions before the Court, a total of \$17,010.00;
- 2 The civil penalties are to be paid at the Registry of Newcastle Local Court, Bolton Street, Newcastle;
- 3 Upon receipt of the civil penalties in the Registry of the Court, the moneys are to be remitted to the Commonwealth Revenue Fund in accordance with the provisions of Section 841(a) of the Workplace Relations Act.

47 I publish my reasons for decision.

G J T Hart
Magistrate

4 December 2009