LOCAL COURT OF NEW SOUTH WALES

NEWCASTLE

JURISDICTION:	Civil (Federal)
PARTIES:	
Plaintiff:	FAIR WORK OMBUDSMAN
Defendant:	BAVARIAN HOSPITALITY GROUP PTY LTD
Case No:	78158/09
Hearing Date:	19 October 2009 (Newcastle)
Date of Decision:	8 December 2009
Legislation:	Workplace Relations Act 1996
Magistrate:	G J T Hart
Representation:	Solicitor for the Plaintiff Ms L Andelman Office of the Fair Work Ombudsman Solicitor for the Defendant Mr N Chadwick Chadwick Workplace Law Counsel for the Defendant Mr R Warren

REASONS FOR DECISION

1 By way of Summons filed 26 June 2009, the Defendant is charged with a breach of Section 182(1) of the Workplace Relations Act. The breach is admitted by the Defendant, and was admitted at an early stage.

2 As a consequence of a high level of cooperation between the Defendant and the Plaintiff, the Court is provided with a comprehensive Agreed Statement of Facts which has shortened and simplified these proceedings to a significant degree.

3 The Agreed Facts document, which became Exhibit 1 in the proceedings, is in the following terms:-

*"**Introduction***

*SF1 The Applicant is a Fair Work Inspector with the Fair Work Ombudsman (formerly known as the Workplace Ombudsman), appointed under section 701 of the Fair Work Act 2009 (Cth) ("**FW Act**").*

SF2 The Respondent is and was at all relevant times:

(a) a company incorporated under the provisions of the Corporations Act 2001 (Cth);

(b) able to be sued in and by its corporate name and style; and

*(c) a 'constitutional corporation' within the meaning of that phrase as defined in Section 4 of the Workplace Relations Act 1996 (Cth) ("**WR Act**").*

*SF3 Between October and November, 2008, Inspector David Price ("**the Inspector**") conducted an investigation of the Respondent's business to ensure compliance with the WR Act.*

SF4 At all material times, Inspector Price was duly appointed as an Inspector pursuant to subsection 167(2) of the WR Act.

The Respondent's employees

SF5 Between 7 November 2008 and 14 November 2008, the Respondent employed 124 fulltime employees, 37 part-time employees and 250 casual employees.

SF6 Between 1 October 2007 and 17 November 2008, the Respondent employed a fluctuating number of employees.

*SF7 Between 1 October 2007 and 17 November 2008, the Respondent and the employees who were the subject of the investigation by the inspector ("**the Employees**") were bound by one of the following workplace agreements (together referred to as the ("**Agreements**":*

*(a) Lowenbrau Keller Workplace Agreement 2006 ("**Lowenbrau Agreement**");*

*(b) The Argyle Centre Workplace Agreement 2007 ("**Argyle Agreement**");*

*(c) Bavarian Bier Cafe Workplace Agreement 2006 ("**Bavarian Agreement**");*

*(d) Bavarian Bier Cafe (O'Connell St Back of House) Workplace Agreement 2006 ("**O'Connell BOH Agreement**"); and*

(e) *Bavarian Bier Cafe (O'Connell St Front of House) Workplace Agreement 2006 (**"O'Connell FOH Agreement"**).*

SF8 *Between 1 October 2007 and 17 November 2008, each of the Employees was employed in one or more of the following restaurants operated by the Respondent:*

(a) *Lowenbrau Keller;*
(b) *Uberbar;*
(c) *Bavarian Bier Cafe in Manly Wharf, York Street, O'Connell Street, Entertainment Quarter or Parramatta; and*
(d) *Argyle Centre.*

The relevant industrial instrument

SF9 *Between 27 March 2006 and 17 November 2008, the WR Act provided for the establishment of the Australian Fair Pay and Conditions Standard (**"AFPCS"**) and a relevant Australian Pay and Classification Scale (**"APCS"**).*

SF10 *Prior to 27 March 2006 the Employees of the Respondent were covered by the provisions of the Restaurant &c Employees (State) Award.*

SF11 *The work performed by the Employees fell within the coverage and the classifications of the Restaurant &c. Employees (State) Award operating as a Notional Agreement Preserving a State Award (**"NAPSA"**) under the WR Act. Accordingly, and pursuant to Section 204 of the WR Act, each of the Employees' minimum rates of pay was covered by the APCS.*

SF12 *From 27 March 2006 under Section 208 of the WR Act, the pay rate and classification provisions of the NAPSA were taken to be a preserved APCS.*

SF13 *The agreements operated to the exclusion of the NAPSA.*

SF14 *Pursuant to subsection 172(2) of the WR Act, the AFPCS prevails over terms of the Agreements to the extent that the AFPCS is more favourable to the Employees.*

SF15 *On 1 October 2007, and on 1 October 2008, the Australian Fair Pay Commission increased the APCS such that the rates of pay in the Agreements fell below the AFPCS.*

SF16 *Pursuant to subsection 182(1) of the WR Act, the Employees were entitled to be paid a basic periodic rate of pay for each of their guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to each of them under the APCS.*

Contravening conduct

Failure to pay rate at least equal to APCS basic periodic rate of pay

SF17 *The Respondent failed to pay the Employees the basic periodic rate of pay prescribed under the APCS during the period 1 October 2007 to 17 November 2008, resulting in underpayments to the employees identified as being underpaid.*

SF18 *In accordance with the AFPC the Employees were entitled to the following hourly rates of pay between 1 October 2007 and 30 September 2008:*

(a) *Grade 1 Restaurant Employee $16.70*
(b) *Grade 2 Restaurant Employee $17.24*
(c) *Grade 3 Restaurant Employee $18.05*
(d) *Grade 4 Restaurant Employee $18.64*
(e) *Grade 5 Restaurant Employee $19.73*
(f) *Grade 6 Restaurant Employee $21.01*
(g) *Grade 7 Restaurant Employee $21.64*

SF19 In accordance with the AFPC the Employees were entitled to the following hourly rates of pay between 1 October 2008 and 17 November 2008:

(a) Grade 1 Restaurant Employee $17.39
(b) Grade 2 Restaurant Employee $17.93
(c) Grade 3 Restaurant Employee $18.735
(d) Grade 4 Restaurant Employee $19.32
(e) Grade 5 Restaurant Employee $20.41
(f) Grade 6 Restaurant Employee $21.70
(g) Grade 7 Restaurant Employee $22.37

SF20 Under the Agreements, the Employees were paid the hourly rates of pay for ordinary hours of work between 1 October 2007 and 17 November 2008 as set out in the attachments to the Summons:

(a) Lowenbrau Agreement (see attachment 1);
(b) Argyle Agreement (see attachment 2);
(c) Bavarian Agreement (see attachment 3);
(d) O'Connell BOH Agreement (see attachment 4); and
(e) O'Connell FOH Agreement (see attachment 5).

SF21 The Agreements expressed rates of pay which were lower than the rates set out in paragraphs 18 and 19 above, meaning that the Respondent failed to pay the Employees at the correct rate of pay between 1 October 2007 and 17 November 2008.

Amount of underpayments

SF22 As a result of the difference in rates of pay referred to in paragraphs 18 and 19 above, and the rates of pay set out in the Agreements, the Employees were underpaid a total amount of ***$334,023.***

SF23 The Employees were individually underpaid the amounts listed in attachment 6 to the summons.

Investigation and attempts to secure compliance

SF24 On 28 October 2008 the Inspector attended the premises of the Lowenbrau Keller and handed to Randolph Gabler, the then Assistant Manager, a Request for Records document. Annexed and marked 'Attachment A' is a copy of the Request for Records documents.

*SF25 On or about 29 October 2008, the Inspector telephoned John Thacker ('**Mr Thacker**') Chief Financial Officer, in relation to the request for records. Mr Thacker informed the Inspector that the Administration Manager would contact the Inspector to set up a meeting.*

*SF26 On 30 October 2008, Marie Mansell ('**Ms Mansell**'), Administration Manager telephoned the Inspector and arranged a meeting for 7 November 2008.*

SF27 On 7 November 2008, the Inspector and another officer, Sarah King, from the Workplace Ombudsman, attended the Respondent's head office. The Inspector advised the Respondent that the purpose of the Workplace Ombudsman's random audits is to check compliance and educate employers about their obligations under the WR Act. At the meeting, the Respondent provided the Workplace Ombudsman with a number of documents. The documents included time, wage and payroll records in respect of the Employees.

*SF28 At this meeting, the Inspector reviewed the relevant records and advised the Respondent that underpayments had occurred. Mr Thacker and Ms Mansell, on behalf of the Respondent, agreed to calculate and rectify underpayments owing to the Employees. The Workplace Ombudsman followed up this meeting with a letter dated 10 November 2008. A copy of the Workplace Ombudsman's letter is annexed and marked '**Attachment B**'.*

SF29 On and from 10 November 2008, the Respondent corrected the rates being paid to its employees.

SF30 On 17 November 2008 the Inspector received an email from Ms Mansell containing current payslips for the Employees showing that their rate of pay had been rectified.

SF31 After further correspondence between the parties, on 16 January 2009 Inspector Price received from Ms Mansell underpayment calculations in the amount of $172,436.99 in respect of those 'active' employees employed by the Respondent as at that date. That same day, Inspector Price confirmed that the calculations were satisfactory and advised the Respondent that they could proceed with the payments. Inspector Price also advised Ms Mansell that the Workplace Ombudsman was issuing a Breach Notice against the Respondent.

SF32 On 19 January 2009 the Respondent received from the Workplace Ombudsman a Breach Notice dated 16 December 2009 (sic). The Breach Notice:

(a) stated that the Bavarian Hospitality Group Pt Ltd's Employee Collective Agreements have failed to meet the basic periodic rate of pay from the first pay period commencing on or after 1 October 2007 and 1 October 2008;

(b) provided 14 days for the Respondent to advise the Workplace Ombudsman of the actions taken to rectify the breaches;

(c) advised that if action was not taken to rectify the identified breach, the Workplace Ombudsman may take legal action to recover the outstanding amounts;

(d) advised that, in respect of prosecution by the Workplace Ombudsman, to avoid such an action being taken you (the Respondent) must respond to the Notice in writing by 30 January 2009.

*A copy of the Breach Notice is annexed and marked '**Attachment C**'.*

SF33 On 29 January 2009 the Inspector received a phone call from the Respondent's former solicitor, Meg McNaughton, requesting an extension to pay current employees until 6 February 2009 and an extension for former employees until 27 February 2009. The Inspector agreed to the request for the extension sought for and on behalf of the Respondent.

SF34 The Respondent calculated back pay owing to each employee (including former employees) using an independent software consultant. In addition, the Respondent engaged an external auditor to independently confirm the scope and accuracy of the Respondent's calculations concerning back pay.

SF35 Once calculations owing to all employees had been finalised, the Respondent sent letters to 1018 current and former employees requesting that details be provided to the Respondent about where monies owing could be deposited.

*SF36 On 25 February 2009 Inspector Price received via express post confirmation of payments made to former and current employees. A copy of the spreadsheet of payments made are annexed and marked '**Attachment D**', '**Attachment E**', '**Attachment F**' and '**Attachment G**'.*

The Respondent's conduct

SF37 The Respondent has adopted a cooperative approach to the Workplace Ombudsman's investigation and audit.

SF38 The underpayments were identified arising from an audit undertaken by the Workplace Ombudsman, not as a result of a complaint being made against the Respondent by an employee.

SF39 According to the Workplace Ombudsman's systems, no complaints have been made against the Respondent.

SF40 Although the alleged breach affected approximately 1018 employees of the Respondent, the underpayments arose out of the one course of conduct.

SF41 The alleged breach arose because the Respondent failed to pass the Australian Fair Pay Commission Pay increases of 1 October 2007 and 1 October 2008 onto its employees. The Respondent engaged a solicitor to draft employee collective agreements and believed that the pay rates did not have to be increased for a three year period once the agreements were lodged with the Workplace Authority. Therefore, the underpayments arose from a mistake rather than being deliberate.

SF42 The underpayments amounted to an average underpayment of $328 per employee over a fourteen month period.

SF43 The Employer has rectified all underpayments and has corrected the current pay rates payable to employees and rectified superannuation contributions payable to employees' funds and payroll tax. Therefore, the alleged breach will not have a continuing impact on the Employees.

Admission of breaches

SF44 The Respondent admits the contraventions alleged in paragraph 20 of the Summons. The Respondent rectified the underpayment of $334,023 in full between 4 February 2009 and 25 February 2009, with the exception of $33,062 being unclaimed monies. The Applicant has confirmed that payment was received by the Employees. The Respondent is in the process of completing documentation in order to submit the unclaimed monies to the Collector of Public Monies."

4 The primary course for the Court, in sentencing, is to consider the objective seriousness of the offence. I note that the contravention resulted in the underpayment of approximately 1,000 employees. Further, I note that the dollar value of the underpayments when totalled comes to approximately $334,000. Without further consideration, such statistics might suggest that the contravention before the Court is a more significant one than the majority of cases coming before this Court. Closer consideration leads to the opposite conclusion.

5 I am satisfied that by a proper application of Section 719(2) of the Workplace Relations Act, there is a single contravention before the Court. Further, when the total underpayment is averaged across the approximately 1,000 employees affected, the

average underpayment is slightly more than $300 per person. The underpayments range from over $3,000 in some cases down to $4 or $5 in other cases.

6 Of greater significance than the statistical or mathematical data, is an examination of the conduct of the Defendant which resulted in the contravention. I note the Statement of Agreed Facts as well as the affidavit material tendered in evidence on behalf of the Defendant company. It is clear that the Defendant is a relatively large business enterprise. It is clear that the Defendant has the resources to employ specialist managerial staff including staff who are tasked with the role of administration of the Defendant's payroll, which carries with it responsibility for ensuring that all employees receive at least the minimum legal requirements provided under the relevant legislation. The evidence before the Court is that management staff of the Defendant took the step of engaging an outside solicitor, specifically for the task of advising the Defendant in relation to its obligations, and assisting in the preparation of collective agreements which the Defendant wished to put in place following the receipt of relevant legal advice.

7 It is acknowledged by the Defendant that it received and acted upon incorrect advice in relation to the relationship between collective agreements and the minimum standards set by the legislation as amended from time to time. The evidence establishes that at the time the collective agreements were put in place, the minimum rates of pay described in the agreements were above and therefore not in conflict with the minimum standards set by the legislation. Relying on the legal advice it had obtained, the Defendant acted on the basis that the rates of pay set in the collective agreements could operate for a period of three years without adjustment. Thereafter, some of the rates of pay described in the collective agreements fell behind the relevant Australian Pay and Classification Scale when, on 1 October 2007 and 1 October 2008, Australian Fair Pay Commission pay increases came into effect and were not passed on to employees of the Defendant. It is clear that the contravention did not occur as a consequence of any deliberate action on the part of the Defendant, calculated to avoid the Defendant's legal obligations or to deliberately underpay its employees. That is conceded by the Plaintiff. Nor is this a case where an employer is in breach because of some reckless indifference to its obligations under the legislation. On the contrary, the evidence clearly establishes that the Defendant

employed diligent management staff who took their responsibilities in these matters very seriously, and, faced with major legislative change operating from 27 March 2006, they took the prudent precaution of seeking independent legal advice from a solicitor who was understood to have an appropriate background as an employment law specialist.

8 Having considered the affidavit evidence tendered on behalf of the Defendant, I am left with no doubt that this Defendant would have unhesitatingly complied with its legal obligations if the legal advice it had received had drawn to the Defendant's attention the fact that, whilst the collective agreements may have provided for three year terms, it would still be necessary for the company to check the Australian Pay and Classification Scale throughout that period to ensure that the wages paid to its employees did not fall below that minimum standard as adjusted from time to time.

9 My view of the general diligence of the Defendant is reinforced by the evidence concerning the conduct of the Defendant from the time Inspector Price of the Fair Work Ombudsman's Office conducted his random audit of the Defendant's time and wages records. The Defendant displayed appropriate cooperation from the outset, immediately providing all time and wages records for examination in a form which made a prompt audit possible, and thereafter in taking corrective action, on a significant scale, to recalculate all wages owing, all group tax owing, all superannuation owing, and all workers' compensation premiums owing, and to remit these moneys to the appropriate recipients. To date, there is only a sum of approximately $30,000 which has not been paid to the former employees because locating them has so far been impossible. Given the nature of the industry and its popularity as a source of casual employment for backpackers from around the world, this appears to be a remarkably good achievement.

10 The Plaintiff's submissions suggest that this is an offence which warrants a penalty in the middle to low range. On behalf of the Defendant, it is submitted that after considering the objective seriousness of the offence, as well as the subject matters which mitigate in favour of the Defendant, the Court would conclude that only a nominal penalty is required.

11 In her written submissions, Ms Andelman for the Plaintiff, submits:-

> *"6(a) Because of the size of the Defendant, the size of the underpayment and the need for general deterrence in the hospitality industry, in which the Defendant operates, this is not a case in which a nominal penalty only should be imposed.*
>
> *(b) It is submitted that the breach, in all the circumstances disclosed above, assessed against the range of considerations appropriate for the Court to apply, and given the relevance of general deterrence, are at the mid to low end of seriousness of offences of this kind contemplated by the WR Act. The Plaintiff recommends that a penalty in the mid to low range be imposed in this matter."*

12 In his written submissions, Mr Warren of Counsel for the Defendant, submits:-

> *"9 This is a most unusual case. It arose out of a random visit to the Defendant's premises by Inspector Price, it did not arise out of any complaint or concern held by an employee. The Defendant believed it was following sound legal advice in applying the terms of collective industrial agreements which had been filed in accordance with the Act. At no stage has the Defendant attempted to deliberately avoid its obligations as an employer. Further, it complied with all requests made of it by Inspector Price, promptly applied the appropriate Australian Pay and Classification Scale to its current employees and embarked on a comprehensive programme to ensure that over 1,000 current and former employees were made aware of their entitlements and were paid such entitlements. It is clear from the Statement of Agreed Facts and evidence before the Court that the threat of legal action to recover outstanding underpayment of wages made in the Plaintiff's 'Standard Form' breach notice, received on 19 January 2007 was entirely unnecessary. The Defendant had, by that date, commenced correction action for present and future employees and was in the process of calculating, in preparation to pay, over $330,000 in back payments."*

13 Having considered the evidence before the Court, and the very helpful submissions of both Ms Andelman and Mr Warren, I am of the view that this is a case which warrants the imposition of a penalty which includes a factor for general deterrence, but that, given the conduct of the Defendant, requires no specific deterrent factor. Further, I am satisfied that the general deterrence factor need not be significant in all of the circumstances. Whilst I can readily accept the submission of Ms Andelman that the hospitality industry is one in which there is a relatively high degree of contraventions of the legislation, and that it is important for general deterrence that a message be sent throughout the industry, there is in my view a danger that the imposition of a substantial penalty upon a diligent defendant caught out in a random audit, may in fact send a message which is counterproductive. Here the Defendant has a large number of employees and maintained appropriate time and wages records and adopted diligent practices including obtaining

advice as to its legal obligations. If there is to be no reward for such diligence when the Defendant is before the Court, the message to the industry might be that the diligent employer will be dealt with in a similar fashion to the employer who acts deliberately or with reckless indifference to the rights and welfare of their employees.

14 I have indicated above a number of subjective matters which mitigate strongly in favour of the Defendant. It is unnecessary for me to discuss them further in any significant detail. It is clear that the Defendant was immediately cooperative with Inspector Price in relation to the audit and investigation process, and that attitude of cooperation has continued with the proceedings themselves as evidenced by the comprehensive Statement of Agreed Facts. The steps taken by the Defendant to undertake corrective action has been diligent and impressive, and given the use of outside contractors to speed up the process, there has obviously been some considerable expense associated with that activity. The relevant admissions which made a liability hearing unnecessary were made at a very early stage. I am satisfied that the Defendant displays appropriate remorse and contrition, notwithstanding the submission made by the Plaintiff that the Defendant has failed to apologise separately to its employees and former employees. The conduct of the Defendant indicates that whilst the mistake flowed from the provision of incorrect or incomplete legal advice, the Defendant, as employer, accepts the ultimate responsibility to ensure that its employees are properly paid and as soon as the error was detected, it took all appropriate steps to redress the earlier mistake. I regard that conduct as demonstrating that the Defendant takes responsibility for the contravention, and that it has appropriate contrition and remorse.

15 The Defendant has been in operation for some time, and has a large workforce. There is no record of any previous contravention. I regard this as an excellent industrial record. Further, I note that Inspector Price was given immediate access to the time and wages records dealing with over 1,000 employees, and only one contravention was detected. It must be said that the Defendant is entitled to have its general diligence and compliance with the legislation taken into account as part of the sentencing process.

16 The maximum penalty under the legislation for this offence is $33,000. Clearly, a penalty in the high range is reserved for offences that are particularly serious and warrant the imposition of very substantial penalties. This is not such a case as is clearly acknowledged by the Plaintiff. However, notwithstanding the submissions made on behalf of the Plaintiff, I do not regard the contravention before the Court as warranting a mid range penalty.

17 Having considered the objective seriousness of the offence, as well as the subjective matters which mitigate in favour of the Defendant, I am of the view that whilst the requirement for general deterrence makes a nominal penalty inappropriate, this is clearly a low range offence, notwithstanding the quantum of the underpayments which flowed from the single error. In my view, the appropriate penalty for this offence is $5,000. Further, given the admissions made by the Defendant at a very early stage, there should be a substantial discount of 25% in acknowledgement of such early admissions. Consequently, the civil penalty will be reduced to $3,750.

18 The Court finds that:-

1 The Defendant contravened subsection 182(1) of the Workplace Relations Act 1996 by failing to pay the employees the basic periodic rate of pay set out in the Australian Pay and Classification Scale derived from the Restaurant etc Employees (State) Award.

19 The Court orders that:-

1 The Defendant pay a civil penalty of $3,750 for its contravention of Section 182(1) of the Act in relation to the employees.

2 The civil penalty is payable at the Registry of the Local Court, Bolton Street, Newcastle, within 28 days.

3 Upon receipt in the Registry, the civil penalty is to be paid into the Commonwealth Revenue Fund pursuant to Section 841(a) of the Workplace Relations Act 1996.

20 I publish my reasons for decision.

G J T Hart
Magistrate

8 December 2009