FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v BERGES *[2010] FMCA 526*

INDUSTRIAL LAW – Underpayment of wages by employer – particular vulnerability as one employee disabled – five breaches and no elements of commonality – penalty hearing – factors to determine penalty.

Crimes Act 1914 (Cth)
Fair Work Act 2009 (Cth)
Fair Work Transitional Provisions and Consequential Amendments Act 2009 (Cth)
Federal Magistrates Court Rules 2001 (Cth)
Workplace Relations Act 1996 (Cth)

Cotis v Pow Juice Proprietary Limited [2007] FMCA 140
CPSU v Telstra Corporation [2001] FCA 1364
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Proprietary Limited trading as Pangaea Restaurant and Bar[1] [2007] FMCA 7
Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Trade Practices Commission v TNT Australia Propriety Limited [1995] ATPR 40, 161

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	ERICK BERGES
File Number:	BRG 1002 of 2009
Judgment of:	Burnett FM
Hearing date:	17 June 2010
Date of Last Submission:	17 June 2010
Delivered at:	Brisbane

[1] [2007] FMCA 7

Delivered on: 17 June 2010

REPRESENTATION

Counsel for the Applicant:

Solicitors for the Applicant: Clayton Utz

Counsel for the Respondent:

Solicitors for the Respondent: No appearance by or for the Respondent

ORDERS

(1) That the Respondent has in relation to Mr Nielsen's employment, pursuant to 728(1) of the *Workplace Relations Act 1996* (Cth) breached:

(a) section 182(1) of the *Workplace Relations Act 1996* (Cth);

(b) section 185(2) of the *Workplace Relations Act 1996* (Cth);

(c) clause 7.6 of the *Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002*, a Notional Agreement Preserving State Award;

(d) clause 5.4 of the *Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002*, a Notional Agreement Preserving State Award.

(2) That the Respondent has in relation to Mr Vukovich's employment, pursuant to 728(1) of the *Workplace Relations Act 1996* (Cth) breached:

(a) section 182(1) of the *Workplace Relations Act 1996* (Cth);

(b) section 185(2) of the *Workplace Relations Act 1996* (Cth);

(c) clause 6.4 of the *Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002*, a Notional Agreement Preserving State Award.

(3) That pursuant to section 719(1) of the *Workplace Relations Act 1996* (Cth), by way of section 728 of the *Workplace Relations Act 1996* (Cth), the respondent pay a penalty of $19,800 in respect of his involvement in the contraventions identified at paragraphs 1 and 2 above, as follows:

(a) $4,950 for a breach of section 182(1) of the *Workplace Relations Act 1996* (Cth).

(b) $4,950 for a breach of section 185(2) of the *Workplace Relations Act 1996* (Cth).

(c) $2,200 for a breach of clause 7.6 of the *Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002*, a Notional Agreement Preserving State Award.

(d) $3,850 for a breach of clause 5.4 of the Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002, a Notional Agreement Preserving State Award.

(e) $3,850 for a breach of clause 6.4 of the Hospitality Industry – Restaurant, Catering and Allied Establishment Award – South-Eastern Division 2002, a Notional Agreement Preserving State Award.

(4) That pursuant to section 841 of the *Workplace Relations Act 1996* (Cth) that the penalty be paid to the following persons and the Commonwealth Consolidated Revenue Fund in the following amounts:

(a) $10,793.13 to Mr Paul Nielsen;

(b) $4,073.18 to Mr Dallas Vukovich; and

(c) the remainder, payable to the Commonwealth Consolidated Revenue Fund.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

No. BRG 1002 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

ERICK BERGES
Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

Introduction

1. At the outset, I am satisfied that the respondent has intentionally not appeared today. He has been called, and enquiries have been made of the staff on the sixth level concerning any possibility of him having attended there this morning. There has been no appearance. I make that observation because a letter forwarded to him and served upon him identified level 6 as the place for appearance this morning. But, in any event, there has been no appearance at level 6.

2. The respondent was first served with material in respect of the application in late February. The return date for the application indicates that service occurred after the date of the first return date for the application. There was, of course, no appearance on the occasion of the first return. However correspondence was directed to him at an address known to be his. More recently on 2 June 2010, he was

personally served with further material which was to be relied upon in support of the application.

3. An affidavit of service of Gordon David Medley deposes to service of additional material, which was served in addition to the earlier material. The latter material included a letter from the Fair Work Ombudsman, notifying the respondent of the hearing today. As I have noted, it did indicate that the hearing was to take place on level 6. There has been a change of courts and the hearing today has taken place in a court on level 2, but as I have noted, inquiries reveal he has not appeared in either instance.

4. I am satisfied the respondent knew of the application and its return today, but has failed to appear. That is to some extent consistent with his failure to engage with both the Fair Work Ombudsman, as I will detail later. Likewise he has failed to engage with the court by complying with various directions issued in respect of which I am satisfied he has had adequate notice. He does not, in my view, intend to appear and in the circumstances it is appropriate to proceed to determine the application by operation of this court's rule 13.03A as I am permitted to.

Background

5. The application seeks the imposition of penalties for contraventions of the *Workplace Relations Act*. Section 719 of the Act enables a court, of which this is one, to impose a penalty in respect of breaches of applicable provisions by a person bound by that provision. An applicable provision is defined in section 717 to include a term of the Australian Fair Pay and Conditions Standard and Collective Agreements. The NAPSA may be enforced as if it were a collective agreement.

6. Subsection (2) of that section provides that where there are two or more breaches of an applicable provision committed by the same person and the breaches arose out of a course of conduct by the person, the breaches shall, for the purposes of section 719 of the Act, be taken to constitute a single breach of the applicable provision. The scheme provides further by section 727 to define civil remedy provisions,

which include breaches under section 719, and provides for the imposition of penalties.

7. So far as is relevant, it provides for the imposition of a 60 penalty unit penalty for an individual. Section 4(1) of the Act provides that a penalty unit has the same meaning as provided for in the *Crimes Act 1914*, which in section 4AA of that Act, provides a penalty unit to have a present value of $110. It follows that the maximum penalty that might be imposed by the court for each of the breaches alleged – at least so far as they concern this respondent, who is an individual – that is a maximum of $6,600 per breach.

8. I note that that maximum penalty was enforced during the whole of the relevant employees' employment. Since the commission of these contraventions there has been a change in the legislative landscape, with the repealing and passing of the *Fair Work Act 2009*. The *Fair Work Transitional Provisions and Consequential Amendments Act 2009* (the *Transitional Act*) states that the *Workplace Relations Act* continues to apply after 1 July 2009 in relation to contraventions of that Act that occurred before 1 July 2009, subject to any contrary intention in the Act itself. There is no contrary intention apparent so far as these proceedings are concerned.

9. The Transitional Act expressly provides that Parts VIA and VI of the *Workplace Relations Act*, which deal with the Workplace Ombudsman and workplace inspectors, have no application after 1 July 2009. This includes the provisions which appoint the Workplace Ombudsman as a workplace inspector, and provides the Workplace Ombudsman with standing in proceedings under the *Workplace Relations Act*.

10. However, in order to ensure that the continuation and completion of legal proceedings under the Act are unaffected the Transitional Act provides that an application that could have been made or continued by a workplace inspector in relation to conduct that occurred before 1 July 2009 may be continued after that date by a Fair Work inspector.

11. The Fair Work Ombudsman is a fair work inspector by virtue of section 701 of the *Fair Work Act*. The Fair Work Ombudsman is now taken to bring this proceeding, pursuant to section 719 of the *Workplace Relations Act* and the *Transitional Act*, and the court has the powers to

impose a penalty on the respondent by reason of section 727 of the *Workplace Relations Act*, pursuant to section 719, in respect of each of the breaches of the applicable provisions.

12. Dealing then with the facts relevant to this case: at all material times, a company, Picasso Pizza and Pasta Proprietary Limited, which has since been deregistered, was an employer within the meaning of that term provided for in the Act. It employed a Mr Paul Scott Nielson. Mr Nielson commenced employment with the company on 11 September 2006 on a casual basis. His employment concluded on 29 August 2007. It also employed a Mr Dallas Vukavic, who commenced employment on 3 September 2007 on a casual basis, with his employment concluding on 19 January 2008.

13. During the relevant periods of employment, each of Mr Nielson and Vukavic were bound by a notional agreement preserving the state award (NAPSA), namely the Hospitality Industry – Restaurant, Catering and Allied Establishments Award, South-Eastern Division 2002. Mr Nielson's duties were consistent with the classification of Kitchen Attendant Grade 1 under the NAPSA; see clause 5.1.2. Mr Vukavic's duties were consistent with the classification of Cook Grade 1 under the NAPSA; see clause 5.1.2. The respondent himself was at all material times the company secretary and sole shareholder of the employer, and appears to have had the ultimate responsibility for the management and decision making of the employer.

14. As I have noted, Mr Nielson commenced employment on 11 September 2006 and ceased on 29 August 2007, and Mr Vukavic commenced on the dates that I noted earlier. Throughout that time, Picasso was bound by the NAPSA. The NAPSA had come into operation pursuant to clause 31 of schedule 8 of the *Workplace Relations Act*. And pursuant to clause 34 of schedule 8 of the *Workplace Relations Act*, the terms of the award were taken to be the terms of the NAPSA.

15. Pursuant to section 182(1) of the *Workplace Relations Act*, Picasso was required to pay the employees – that is, Mr Nielson and Mr Vukavic, among others – a basic periodic rate of pay for each of the employee's guaranteed hours of work, pursuant to the APCS. Furthermore, pursuant to section 185(2), Picasso was also required to pay the named

employees casual loading in addition to their basic rates of pay, pursuant to the APCS, that loading being at least equal to the guaranteed casual loading percentage of that actual basic rate of pay. Subsection (3) of section 185 also provided that there was a guaranteed casual loading percentage payable under the APCS, and that was at a sum of 23 per cent.

16. Dealing first with the complaints of Mr Nielson: although he was employed from 11 September 2006, it appears that on 29 August 2007, Mr Nielson made a complaint to the Workplace Ombudsman regarding the underpayment of wages.

17. The evidence demonstrates that during that period, Mr Nielson worked for 846.25 hours and was paid sporadic payments which did not reconcile with the hours worked, and further, that he had agreed to receive a payment of $10 per hour. I note that although he commenced employment in August 2006, the contraventions are only alleged from between 27 November 2006 and 29 August 2007. This affords the respondent some benefit of the doubt in relation to difficulties the Workplace Ombudsman had confirming the hours actually worked by Mr Nielson, a factor which I will address later, but which to some extent bears upon the respondent's own omissions in assisting in the investigation conducted by the Ombudsman.

18. Throughout the relevant period, that is from 11 September 2006 until 1 December 2006, the appropriate periodic rate of pay to which Mr Nielson was entitled under the APCS was $12.97 per hour. From 1 December 2006 to 26 August 2007, that rate was $13.69. It follows by reason of the calculations undertaken and which are contained in the affidavit material, Picasso breached section 182(1), by failing to pay a sum which has been estimated at $7877.44, in respect of those matters.

19. So far as the casual loading is concerned, during that relevant period, Mr Nielson was entitled to casual loading for his employment. The casual loading was 23 per cent of the amounts which I have noted above, that is the $7877.44. In addition, Mr Nielson was also entitled to payments which did not reconcile with the hours worked. Those matters have been calculated and again are addressed in totals attached to the affidavit material. On the basis of those calculations, the

evidence indicates that the casual loading for each guaranteed hour worked resulted in an underpayment of a sum of $2323.95.

20. Furthermore, Picasso was obliged under the NAPSA to pay Mr Nielson for work done on public holidays at a rate of double-time and a half, with a minimum of four hours. On the evidence, the payments did not accord with his entitlements. On 26 January 2007, that is Australia Day, he was entitled to be paid a sum of $92.41 in addition to the payments made to him.

21. On 7 April, which is Easter Saturday, he was entitled to $112.95 in addition to that which was paid to him. On 25 April, that being ANZAC Day, he was entitled to $112.95 in addition to the sums that were paid to him. And on 11 June 2006, that is the Queen's Birthday holiday, he was entitled to a sum of $112.95 in additional to that which was paid to him. As a result of the underpayments in contravention of the NAPSA in respect to penalty rates for work performed on those days – those days being public holidays – there was an underpayment in the amount of $318.30.

22. Finally, there was a claim in respect of late work allowance. The NAPSA provided by clause 5.4 that Picasso was obliged to offer Mr Nielson a late work allowance for work between the hours of 10.00 pm and midnight. Again by reference to the records, it appears that there were underpayments in respect of late work allowances in the amount of $271.44. It follows that the evidence demonstrates that during his period of employment, Mr Nielson was underpaid a total of $10,793.13 in respect of casual hours worked, penalty rates on public holidays and the late night allowance.

23. So far as Mr Vukavic is concerned, the complaints relating to him relate to his basic periodic rate of pay, casual loading and overtime. So far as his basic periodic rate of pay is concerned: first, Mr Vukavic made his complaint on 1 February 2008 concerning his underpayment of wages. An examination of the wage records, coupled with Mr Vukavic's complaint to the Workplace Ombudsman, demonstrated that during the employment period, Picasso paid Mr Vukavic a flat rate of $15.80 gross for every hour worked.

24. Picasso was, in fact, required to pay Mr Vukavic a basic periodic rate of pay for each of his guaranteed hours of work, pursuant to the APCS, so far as the rates were concerned, he was entitled to receive between 3 September until 30 September 2007, a sum of $13.91 per hour, and from 1 October until 30 December 2007, $14.18 per hour. Mr Vukavic was not paid, however, for all of the week ending 18 November 2007. It follows that there was an underpayment in respect of base wages for that period in a sum of $765.72.

25. In addition to his base rate, he was also entitled to a casual loading. The casual loading was 23 per cent of the amounts to which he was otherwise entitled, which I have earlier outlined. The evidence is that Mr Vukavic was not paid the required casual loading for the weeks ending 9 September 2007, 16 September 2007, 23 September 2007, 30 September 2007, 7 October 2007, 14 October 2007, 21 October 2007, 28 October 2007, 4 November 2007, 11 November 2007, 18 November 2007, 25 November 2007, 2 December 2007, 9 December 2007, 16 December 2007, 23 December 2007 and 30 December 2007.

26. The underpaid sums were quantified in the material at $13,33.71. Mr Vukavic was also entitled to overtime, based upon an ordinary 38 hour week, or on an average of 7.6 hours per day. He was entitled to overtime where he worked in excess of 7.6 hours per day and/or in excess of 38 hours per week and/or outside the core hours of 5.30 am to 6.30 pm. In respect of overtime, he was entitled to be paid at time and a half for the first three hours and double time thereafter.

27. The evidence demonstrates that Picasso breached the NAPSA by failing to pay Mr Vukavic the prescribed overtime rates. Again, those sums have been quantified in the affidavit evidence at $1,973.75. It follows that during the period of his employment, Mr Vukavic was underpaid a total of $4,073.18 by his employer in respect of all casual hours worked – all standard hours, casual hours and overtime.

28. So far as the respondent is concerned in these contraventions, the evidence is that the respondent had the day-to-day control of the operations of Picasso and was clearly the operative and controlling mind of Picasso. He was the representative of Picasso with whom persons dealt with and were engaged with when they had dealings with

Picasso. He was the representative of Picasso; he responded to the underpayment allegations on Picasso's behalf.

29. He was aware of the fact that the two complainants in this case were engaged as casual employees. He was also the person who made decisions on behalf of Picasso, as to the basis upon which persons were engaged to perform work or would be engaged, the payments that would be made to persons engaged to perform work, the work to be performed and the time and manner and method of payment in respect of such work.

30. The evidence clearly indicates that the respondent was a person who was concerned in and actively aided, abetted, counselled or procured the omissions on behalf of the employer. He was clearly a person who, by reason of his conduct, was knowingly concerned in or party to each of the breaches of the applicable provisions by Picasso. It follows in my view that the evidence demonstrates that he was involved in each of the breaches of the applicable provisions by Picasso and should, therefore, be treated as having himself contravened the provisions and each of them, as is provided for by section 728 of the Act.

31. So far as the contraventions alleged are concerned, the contraventions alleged are breaches by each of the complainants, of section 182(1) of the *Workplace Relations Act*, section 185(2) of the *Workplace Relations Act*, breaches of clause 7.6 of the NAPSA and clause 5.4 of the NAPSA. Declarations are sought in respect of those breaches so far as they concern Mr Nielson. So far as Mr Vukavic is concerned, it is alleged that there are breaches of section 182(1) of the Act, 185(2) of the Act and by breach of clause 6.4 of the NAPSA.

32. In submissions made by the applicant, it is contended that the court ought adopt the following approach in determining the appropriate penalties to impose: first, it is submitted that the court should identify the separate contraventions involved. It is submitted that each separate obligation found in the NAPSA in relation to each employee gives rise to a separate contravention of a term of an applicable provision for the purposes of section 719, and the breach of the APCS constitutes, again, a separate breach of the APCS again each breach constitutes a separate contravention.

33. Secondly, to the extent that two or more contraventions have common elements, it is submitted that this should be taken into account in considering what is the appropriate penalty in all the circumstances for each contravention. It is conceded the respondent should not be penalised more than once for the same conduct, and the penalties imposed by the court should be an appropriate response to what the respondent did. This, it is correctly contended, is a task distinct from and in addition to the final application of the totality principle, which I will address in due course.

34. Thirdly, it is submitted the court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all the circumstances of the case. And then finally, having fixed the appropriate penalty for each group of contraventions or course of conduct, the court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches. The court, it is submitted, should apply an instinctive synthesis in making this assessment. This is what is known as an application of the totality principle.

35. Dealing then with the grouping of the contraventions: allegations and a single source of conduct; section 719(2) of the Act requires a court to consider two or more breaches of an applicable provision that arise out of a course of conduct to be taken to constitute one single breach of the applicable provision. It has been held in relation to this clause that where the breaches of a particular term arise out of the same course of conduct, even if they involve different employees, they must be treated as a single breach, see *Cotis v Pow Juice Proprietary Limited*[2].

36. Further, where there are breaches of two distinct terms of an industrial instrument, they are not to be treated as a single breach, even if they arise from one course of conduct; see *Mason v Harrington Corporation Proprietary Limited trading as Pangaea Restaurant and Bar*[3]. The applicant contends there are five distinct and separate breaches of the applicable provisions. First a breach of section 182 of the Act, by the employer failing to pay the correct basic periodic rate of pay under the APCS to each of Mr Nielson and Mr Vukavic.

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[2] [2007] FMCA 140
[3] [2007] FMCA 7

37. Second, a breach of section 185(2) of the Act, by failing to pay casual loadings pursuant to the APCS to Mr Nielson and Mr Vukavic. Third, a breach of section 7.6 of the NAPSA by failing to pay the public holiday penalty rate to Mr Nielson. Fourth, a breach of clause 5.4 of the NAPSA, by failing to pay the late work allowance to Mr Nielson. And fifth, a breach of clause 6.4 of the NAPSA, by failing to pay overtime to Mr Vukavic.

38. Factors relevant to the penalty: it is submitted that the assessment of penalties requires consideration of various factors. Those factors have been well-rehearsed previously and are commonly acknowledged as being set out in the decision of *(supra)*. In that decision, a number of considerations were articulated although the list is not exclusive.

39. They include the nature and extend of the conduct; the circumstances in which the conduct took place; the nature and extent of any loss or damage similar to previous conduct; whether the breaches were properly distinct or arose out of one course of conduct; the size of the company; the deliberateness of the breach; the involvement of senior management; the respondent's contrition, corrective action and co-operation with the enforcement authorities; ensuring compliance with the minimum standards, by providing effective means for investigation and enforcement of employee entitlements; and deterrence. As was noted in *Mason*, in adopting the observations of Burchett J in *Trade Practices Commission v TNT Australia Propriety Limited*[4]:

> *"It cannot be denied that the fixing of the quantum of a penalty is not an exact science. It is not done by the application of a formula, and within a certain range, Courts have always recognised that one precise figure cannot be incontestably said to be preferable to another."*

40. It is, in a sense, a matter of judicial art rather than science, which informs the penalty imposition process. In doing so, one should not overlook the principle object set out in section 3 of the Act, which particularly includes the need to provide and economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the Act, and to ensure compliance with minimum standards by providing effective means for investigation and

[4] [1995] ATPR 40, 161

enforcement of employee entitlements. As was noted by Mowbray FM in *Pangaea*, these provisions:

> *"...emphasise the importance of minimum standards, including minimum wages, and enforcement of those standards."*

41. This is further reflected in the magnitude of other penalties which have been fixed for breaches. In the case of a body corporate, this is set at a maximum of 300 penalty units, or $33,000 for each breach, and for an individual, 60 penalty units or $6,600 for each breach. Looking into the nature and extent of the circumstances in which this conduct took place, the matter of compliance with the APCS and the provisions of the NAPSA is important and should not be ignored by employers.

42. The conduct of the employer and the respondent in this instance was significant, because it related to two employees and occurred over a significant period of time. In relation to Mr Nielson, the conduct spanned 11 months, and in relation to Mr Vukavic, it spanned four months. There is nothing to indicate that the contraventions would not have continued had the employees not ceased their employment.

43. Matters were exacerbated, because Mr Nielson was paid sporadically and Mr Vukavic was, in fact, on one occasion not paid for one week. The amounts in question are significant; for Mr Nielson, the underpayment totals approximately $11,000, and for Mr Vukavic about $4,000. This is for employees who are at the bottom end of the employment scale and who are without, I think, argument, extremely vulnerable to loss of cash flow for living purposes.

44. Unquestionably in my view, the evidence demonstrates that these employees were disadvantaged by the respondent's behaviour. One aspect of the complaint which I particularly note concerns Mr Nielson. I note that Mr Nielson seems to have had a particular vulnerability. It was noted in an admission made by the respondent to Mr Bloom, by way of amelioration, that Mr Nielson was clearly disabled and had problems.

45. The manner in which that fact was conceded or noted by the respondent to Mr Bloom was in an attempt to ameliorate his behaviour, by creating the impression that his employment constituted some form of charity. In fact, the fact that Mr Nielson was so patently disabled

and suffering from difficulties as for it to be apparent to the employer, to my mind ought to have highlighted his general vulnerability and, indeed, should have called for the exercise of some degree of care in the part of the respondent, to avoid any risk of exploitation.

46. Dealing with the nature and extent of any losses: as I have noted, the underpayments total approximately $15,000. They are not insignificant. There is no evidence put before the court concerning the profitability of the enterprise involved, and so it is difficult to measure the overall significance of the underpayments against the commercial background of the enterprise involved. However, as I have earlier noted I consider these payments to be significant in the context of the employees, who suffered loss at the hand of the respondent.

47. There is no evidence of any previous contraventions on the part of the respondent or any entities associated with him. So far as a course of conduct is concerned, the applicant submits that each of the five contraventions constitutes a breach of five distinct applicable provisions; as such, five penalties ought to be imposed. I agree with the applicant's submission in this regard. There is clearly no element of commonality in each of these instances and each breach ought to be treated discreetly.

48. So far as the size of the business is concerned, there was no evidence provided by the respondent to assist with an estimate of that matter. The applicant submits, and I accept, that the employer in this instance was a relatively small entity. But irrespective of that fact, it does not absolve it of its legal responsibility to comply with the law in relation to the employment of its employees. As was noted by Tracey J in *Kelly v Fitzpatrick*:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards, and their employments rightly have an expectation that this will occur. When it does not, it will normally be necessary to mark the failure by imposing and appropriate monetary sanction. Such a sanction must be imposed at a meaningful level."*

49. Further, in another decision made in this court *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at 27, it was stated:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court's consideration of penalty."*

50. As I have noted, the size of the business is no excuse for non-compliance, and the penalty that I will impose takes authorities I have outlined above into consideration.

51. In terms of deliberateness, it was noted by Driver FM in *Cotis v MacPherson* at [17] that:

> *"In issue in this matter is whether the identified breaches were deliberate. I do not think that they were deliberate in the sense of Mr MacPherson setting out with an intention to breach the Workplace Relations Act. However, the facts compel the conclusion that Mr MacPherson was at least reckless in relation to the responsibilities of his company and himself as an employer. Mr MacPherson was made aware of some of the breaches by employees whilst the business was still in operation. He also acknowledged the breaches to the inspector, following the closure of the business, Mr MacPherson has no contest for the evidence provided by Mr Cotis."*

52. It is submitted on behalf of the respondent that the contraventions in this instance are, like *Cotis*, evidence of at least recklessness for the employer's statutory obligations. That matter is amplified by the evidence of the poor wage records maintained by the employer and by the wage rate, particularly in relation to Mr Nielson itself, which was well below that which would be regarded as acceptable, having regard to the minimum award, or what is generally accepted as the minimum award.

53. I am mindful in this instance that the respondent contends, at least in his statements to Mr Bloom, that he was in effect affording Mr Nielson some charity, but that, of course, that does not sit comfortably with the fact that the evidence shows Mr Nielson was employed on a very regular basis between five and six nights a week. On balance, one could readily infer that, indeed, this was more exploitive than it was charitable, but in any event, those matters do, in my view, bear to some extent on the issue of deliberateness. I do not think that this is a case where the respondent was necessarily reckless, but I do think that the

respondent had some general appreciation that, in this instance, what he was doing was outside the bounds of reasonableness.

54. So far as involvement of senior management is concerned, the respondent managed the day-to-day business of the employer, including the recruitment of employees. At the time he engaged Mr Nielson, he was aware of what he was being paid. And it was certainly the case that Mr Vukavic understood the respondent to be his manager. As the company secretary and sole shareholder of the employer, the respondent's involvement in the contraventions equates to that of senior management.

55. So far as contrition, corrective action and co-operation with the enforcement authorities are concerned, the applicant submits the respondent has not co-operated with the inspector and the inspectorate during the course of the investigation. I think that submission is well made. The evidence demonstrates the respondent has not complied with notices to produce, until ultimately threatened with the prospect of the matter being referred to the Director of Prosecutions.

56. There were difficulties with the employer's change of solicitor, which occasioned difficulties in the investigation. Ultimately, the records that were turned out have proven to be quite unsatisfactory, in terms of dealing with all the factors that might otherwise have been determined in this claim. To some extent, the respondent receives the benefit of the difficulties that he has in part been responsible for, in terms of the employer's co-operation with the enforcement authorities.

57. In terms of ensuring compliance with minimum standards, one of the principal objects of the Act emphasis the importance of an effective safety net of minimum terms and conditions of employment, together with effective enforcement of those minimum standards. The provisions concerning compliance at Part 14 of the Act provide one of the ways in which the Act seeks to give effect to that principal object.

58. The importance of that safety net factor, is reflected not only in the magnitude of the maximum penalties available in respect of breaches, but also in terms of the legislature's increase of those maximum penalties in August 2004. I have been referred to quite a number of authorities in the submissions prepared on behalf of the applicant

which deal with penalties that have been imposed in respect of these types of contraventions. I take those matters into account.

59. So far as specific and general deterrence is concerned, it is again well established that deterrence is a relevant factor in the imposition of penalty. There is in this instance, in my view, a need for both a specific and general deterrence. So far as specific deterrence is needed, it is required in order to deter the respondent from engaging in any further conduct of this kind in any future dealings with further employees.

60. There is, of course, no evidence to indicate whether or not he will engage in further conduct of this kind, but one can work on the premise that in any event, there ought be factored into any penalty a sum which would serve to effect that specific deterrent element. As was noted by Lander J in *Ponzio v B & P Caelli Construction Pty Ltd*[5]:

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend. The penalty therefore should be of a kind that it would be likely to act as a detriment, in preventing similar contraventions by like-minded persons or organisations. If a penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed, or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor when fixing the penalty.*

61. Likewise, Finkelstein J in *CPSU v Telstra Corporation*[6], made these observations:

> *Even if there be no need for the specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct.*

62. The applicant, in this instance, submits the court should have regard to the message that ought be sent to all employers in the community generally in respect of the underpayment of wages. It submits that the message should indicate clearly that underpayment of wages will not

[5] (2007) 158 FCR 543
[6] [2001] FCA 1364

be tolerated, particularly in relation to vulnerable employees. I accept that submission and think that it is well founded.

63. Having regard then to the matters that I have been directed to, I have come to the preliminary view that the following penalties reflect appropriate penalties in the circumstances.

64. In respect of the breach of section 182 of the *Workplace Relations Act*, by failing to pay the correct periodic rate of pay under the APCS scale, to both Mr Nielson and Mr Vukavic, there ought be imposed a penalty of 45 penalty units. In respect of the breach of section 185(2) of the *Workplace Relations Act* by failing to pay casual loading pursuant to the APCS to Mr Nielson and Mr Vukavic, there ought be an imposition of a penalty of 45 penalty units. In respect of a breach of section 7.6 of the NAPSA, by failing to pay the public holiday penalty rates to Mr Nielson, there ought be an imposition of 20 penalty units, and in respect of a breach of clause 5.4 of the NAPSA, by failing to pay late work allowances to Mr Nielson, an imposition of 35 penalty units. In respect of a breach of clause 6.4 of the NAPSA, by failure to pay overtime to Mr Vukavic, there ought be an imposition of 35 penalty units: in total 180 penalty units, or $19,800.

65. That brings me then to consider the totality principle. The applicant submits that in assessing the penalty, the appropriate course for the court is to assess the appropriate penalty for each separate contravention and then review the aggregate penalty and consider whether the aggregate penalty against the respondent is just and appropriate in all the circumstances. This is clearly the appropriate approach; that is, the approach endorsed, for instance, by Tracey J in *(supra)*, where his Honour noted:

> *"Another factor which must be taken into account in fixing the pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of penalties imposed is not such as to be oppressive or crushing. Different views have been expressed as to the manner in which the principle ought to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each result, or for each breach.*

> *The orthodox position, however, which I consider should be adopted is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches. This approach was recently described in the criminal context from which the totality principle is derived as "the orthodox, but not necessarily immutable practice" adopted by sentencing courts."*

66. It follows then, having regard to the determination which I have earlier expressed, on a preliminary basis in respect of each penalty, when one looks then at the totality of the conduct, I do not consider that an overall penalty of $19,800, would be oppressive or crushing in those circumstances, and it follows that the penalty in that quantum ought stand.

67. Having regard then to those findings; would you please draft up a minute of order dealing with the declarations in terms of paragraphs 48, 49, and the penalties in paragraph 50.

68. I will make an order, under section 841A of the Act that the penalty be paid to the following persons and to the Commonwealth Consolidated Revenue Fund in the following amounts: $10,792.13 to Mr Paul Neilson; $4073.18 to Mr Dallas Vukavic, and the balance to the Commonwealth Consolidated Revenue Fund.

I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of Burnett FM

Date: 20 July 2010