FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v BUNDY MARKET MEATS PTY LTD (ACN 106 533 171) *[2009] FMCA 994*

INDUSTRIAL LAW – Workplace Relations – admitted contraventions of *Workplace Relations Act 1996* – consideration of matters relevant to penalty.

Workplace Relations Act 1996, ss.182(1), 235(2), 719(1), 719(6)
Federal Meat Industry (Retail and Wholesale) Award 2000, clause 21

Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick [2007] FCA 1080
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Klousia v TKM Investments Pty Lid & Anor [2009] FMCA 208

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	BUNDY MARKET MEATS PTY LTD (ACN 106 533 171)
Second Respondent:	CHRISTOPHER JAMES POSKITT
File Number:	BRG213 of 2009
Judgment of:	Jarrett FM
Hearing date:	7 October 2009
Date of Last Submission:	7 October 2009
Delivered at:	Brisbane
Delivered on:	8 October 2009

REPRESENTATION

Counsel for the Applicant:	Ms Moody
Solicitors for the Applicant:	Clayton Utz
Counsel for the First Respondent:	No Appearance
Solicitors for the First Respondent:	
Counsel for the Second Respondent:	No Appearance
Solicitors for the Second Respondent:	

ORDERS

(1) The name Fair Work Ombudsman be substituted for the present name of the applicant The Workplace Ombudsman.

I DECLARE THAT:

(2) The first respondent has, by failing to pay employee Daniel Lines (the employee) the minimum wages, annual leave, annual leave loading and superannuation to which he was entitled, contravened:

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

(b) section 235(2) of the WR Act;

(c) clause 21 of the Federal Meat Industry (Retail and Wholesale) Award 2000 (the Award); and

(d) clause 27.11 of the Award.

(3) The second respondent has, by reason of s.728(1) of the WR Act, in respect of the employee contravened:

(a) section 182(1) of the WR Act;

(b) section 235(2) of the WR Act;

(c) clause 21 of the Award; and

(d) clause 27.11 of the Award.

I ORDER THAT:

(4) Pursuant to section 719(6) of the WR Act, the first respondent pay to the employee the sum of $4,426.23, together with interest thereon calculated at the rate of 6.5 per cent per annum from 24 October, 2007 until the date of payment.

(5) Pursuant to section 719(1) of the WR Act, the first respondent pay a penalty of $52,000 in respect of the contraventions identified at paragraph 2 above, and which may be broken down as follows:

(a) $13,000 for its contravention of section 182(1) of the WR Act;

(b) $13,000 for its contravention of section 235(2) of the WR Act;

(c) $13,000 for its contravention of clause 21 of the Award;

(d) $13,000 for its contravention of clause 27.11 of the Award.

(6) Pursuant to section 719(1) of the WR Act, the second respondent pay a penalty of $10,000 in respect of the contraventions identified at paragraph 3 above, and which may be broken down as follows:

(a) $2,500 for his contravention of section 182(1) of the WR Act;

(b) $2,500 for his contravention of section 235(2) of the WR Act;

(c) $2,500 for his contravention of clause 21 of the Award;

(d) $2,500 for his contravention of clause 27.11 of the Award.

(7) The penalties payable by the first and second respondents referred to in paragraphs 5 and 6 above be paid to the Commonwealth Consolidated Revenue Fund by 4.00 pm on 8 November, 2009.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG213 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

BUNDY MARKET MEATS PTY LTD (ACN 106 533 171)
First Respondent

CHRISTOPHER JAMES POSKITT
Second Respondent

REASONS FOR JUDGMENT

1. This is an application for the imposition of penalties on the respondents pursuant to the *Workplace Relations Act* 1996. It arises against the following background facts, which are taken from the statement of agreed facts filed by the parties on 11 September, 2009.

2. The first respondent is a registered proprietary company limited by shares. The directors of that company are the second respondent and one Helen Margaret Stevens. It is presently the subject of strike-off action by ASIC, however such action has been placed in abeyance pending the finalisation of these proceedings.[1] The second respondent is an undischarged bankrupt.[2] I accept the applicant's submissions that the second respondent's bankruptcy does not preclude me from hearing and determining this application.[3]

3. The first respondent owned and operated retail butcher shops from premises located at:

   a) Shop 2, Bundaberg Plaza, Maryborough Street, Bundaberg, Queensland (the Plaza Store); and

   b) Shop 48, Hinkler Central, Maryborough Street, Bundaberg, Queensland under the registered business name Hinkler Fine Meats (the Hinkler Store).

4. In the year after he left grade 12, Mr Daniel Lines was engaged by the first respondent for the purposes of undertaking an apprenticeship in butchery. On 31 August, 2006 the first respondent and Mr Lines entered into a "Training Contract" to record the terms of Mr Lines' apprenticeship.

5. The training contract was a "training contract" for the purposes of the *Vocational Education, Training and Employment Act* 2000 (Qld) (the VETE Act). Mr Lines' apprenticeship was an "apprenticeship" for the purposes of the VETE Act.

6. Mr Lines' employment was also subject to a federal award, namely the *Meat Industry (Retail and Wholesale) Award* 2000. The first respondent was a respondent to the Award by virtue of its membership of the Australian Meat Industry Council. The first respondent was an "employer" within the scope of clause 5.2 of the Award.

7. The Award is a "pre-reform Award" as that expression is defined in s.4 of the WR Act insofar as it is an instrument which had effect after the "reform commencement" under Item 4 of Schedule 4 of the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).

8. Item 39 of Mr Lines' training contract provides that Mr Lines was employed by the first respondent on a full time basis to work 38 ordinary hours per week.

9. The parties agree that the minimum terms and conditions of Mr Lines' employment with the first respondent were relevantly prescribed by:

   a) the Award;

   b) a Preserved Australian Pay and Classification Scale; and

c) the Australian Fair Pay and Conditions Standard (AFPCS).

10. Between 31 August, 2006 and 24 October, 2007 Mr Lines was employed by the first respondent as a full time apprentice butcher pursuant to the training contract. Initially Mr Lines was predominantly employed in the Plaza Store where his duties included, amongst other things:

a) cleaning;

b) breaking beef;

c) making sausages;

d) completing window displays; and

e) crumbing product.

11. Later, Mr Lines predominantly worked in the Hinkler Store.

12. On or about 24 October, 2007 Mr Lines' employment was terminated on account of the closure of the Hinkler Store. Mr Lines was initially informed of the first respondent's decision to close the Hinkler Store, and of the consequential termination of his employment, by Kathleen Morrison, another apprentice who worked with Mr Lines and employed by the first respondent.

13. On termination of his employment, Mr Lines did not receive any payment from the first respondent with respect to:

a) underpayments of wages owed by the first respondent to Mr Lines which had accumulated during his employment;

b) unpaid annual leave;

c) unpaid annual leave loading; and

d) superannuation for the period of his employment with the first respondent.

14. The parties agree that there are a number of provisions of both the Award and the WR Act which were relevant to Mr Lines' employment, and to the termination of that employment.

15. Section 182(1) of the WR Act provides that if:

> *(a) The employment of an employee is covered by an Australian Pay and Classification Scale (APCS); and*
>
> *(b) the employee is not an APCS piece rate employee;*
>
> *the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro rated for part hours) that is at least equal to the basic periodic rate of pay (the guaranteed basic periodic rate of pay) that is payable to the employee under the APCS.*

16. The parties agree that for the purposes of s.182 of the WR Act, Mr Lines' employment was covered by an Australian Pay and Classification Scale, and Mr Lines was not an APCS piece rate employee.

17. In respect to annual leave entitlements, ss.232, 234 and 235 of the WR Act relevantly provide:

> *232* ***The guarantee***
>
> *(1) For the purposes of this Division, annual leave means leave to which an employee is entitled under this subdivision.*
>
> *All employees to whom this division applies*
>
> *(2) An employee is entitled to accrue an amount of paid leave, for each completed 4 week period of continuous service with an employer, of 1/13 of the number of nominal hours worked by the employee for the employer during that 4 week period.*
>
> *234* ***Annual leave - accrual, crediting and accumulation rules***
>
> *Accrual*
>
> *(1) Annual leave accrues on a pro rata basis.*
>
> *235* ***Annual leave - payment rules***
>
> *(1) if the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee must be paid at a rate for each hour (pro rated for part hours) of the employee's untaken accrued annual leave that is no less than the rate that, immediately before that time, is the*

employee's basic periodic rate of pay (expressed as an hourly rate).

18. Clause 27.11 of the Award relevantly provides:

> ***27.11 Annual leave loading***
>
> *An employee before going on annual leave, will receive a loading of 17.5% calculated on the appropriate classification rate. In the case of a shift worker the employee will be paid the greater of the shift loading or the 17.5% annual leave loading.*
>
> *27.11.1 An employee and the employer may agree to defer payment of the annual leave loading in respect of single day absences, until at least 5 consecutive annual leave days are taken.*
>
> *27.11.2 No annual leave loading is due for periods of leave paid out for less than one year.*
>
> *27.11.3 An employee whose employment is terminated for malingering, inefficiency, neglect of duty or misconduct or who leaves the employment of the employer shall not be entitled to the loading prescribed in this clause.*

19. Clause 21 of the Award relevantly provides as follows:

> ***21. Superannuation***
>
> *The following sets out the conditions under which superannuation is to be implemented by the employers bound by this award.*
>
> ***21.1 The Fund***
>
> *For the purpose of this clause, all references to the fund shall mean:*
>
> *21.1.1 The Australian Meat Industry Superannuation Trust established and governed by a trust deed dated 11 July 1986 as may be amended from time to time and includes any superannuation scheme which may be made in succession thereto.*
>
> *21.1.2 The Meat Industry Employees' Superannuation Fund established and governed by a trust deed dated 4 April 1981, amended from time to time, and includes any superannuation scheme which may be in succession thereto.*

21.1.3 Such other superannuation scheme established and conforming to the Commonwealth Government's operational standards for occupational superannuation funds as at 1 July 1987 and agreed to by the Unions as at 3 November 1988 or otherwise approved by the Commission.

21.1.4 ***Choice of Funds***

21.1.4(a) Providing each fund set out in 21.1.1 and 21.1.2 of this award remains an approved and complying superannuation fund, each employee upon engagement shall be given information regarding both funds and within one month shall nominate either fund as the fund to which the employer contribution shall be paid.

21.1.4(b) Employees employed as at the dale of making of the Award, shall be given information regarding both funds set out in 20.1.1 and 20.1.2 and shall within 3 months nominate either fund as the fund to which the employer contribution shall be paid.

21.1.4(c) The employer shall pay to the trustees of the Fund thus nominated on behalf of each employee who is a member of such approved fund a contribution in accordance with the requirements of this award.

21.1.4(d) A respondent employer shall contribute to the fund in respect of each employee such contributions as required to comply with the Superannuation Guarantee (Administration) Act 1992 and the Superannuation Guarantee Charge Act 1992 as amended from time to time.

21.1.4(e) All contributions and employee advice detail shall be forwarded monthly 10 the appropriate fund.

21.1.4(f) All contributions shall be clearly identified on the employee's pay slip.

20. The first respondent was required to make payment of 9% superannuation on Mr Lines' ordinary time earnings pursuant to the *Superannuation Guarantee (Administration) Act* 1992 (Cth) and the *Superannuation Guarantee Charge Act* 1992 (Cth).

21. Section 6 of the SGA Act defines "ordinary time earnings" in relation to an employee as meaning:

> *(a) the total of*
>
> > *(i) earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of his or her employment:*
> >
> > > *A. a payment in lieu of one year's sick leave;*
> > >
> > > *B. an unused annual leave payment, or unused long service leave payment, within the meaning of the Income Tax Assessment Act 1997; and*
> >
> > *(ii) earnings consisting of over-award payments, shift loading or commission; or*
>
> *(b) if the total ascertained in accordance with paragraph (a) would be greater than the maximum contribution base for the quarter - the maximum contribution base.*

The Underpayments

Wages

22. Pursuant to s.182(1) of the WR Act, the first respondent was obliged to pay to Mr Lines a "basic periodic rate of pay" for each of his "guaranteed hours", such rate being at least equal to the basic periodic rate of pay which was payable under the preserved APCS.

23. In accordance with Mr Lines' training contract and the Award, Mr Lines' "guaranteed hours" for the purposes of s.182 of the WR Act were 38 ordinary hours per week.

24. The "basic periodic rate of pay" which Mr Lines was entitled to be paid under the preserved APCS was:

    a) from 31 August, 2006 to 30 November, 2006 - $7.61 per hour;

    b) from 1 December, 2006 to 28 February, 2007 - $6.38 per hour;

    c) from 1 March, 2007 to 30 September, 2007 - $8.77 per hour; and

d) from 1 October, 2007 to 24 October, 2007 - $8.92 per hour.

25. During Mr Lines' employment, the first respondent failed to pay Mr Lines a "basic periodic rate of pay" for each of his "guaranteed hours" which was at least equal to the basic periodic rate of pay prescribed by the preserved APCS. The underpayments are set out in Part B of Annexure A to the Statement of Claim filed by the Applicant in this Court on 31 March, 2009. I will not repeat that detail.

26. The parties agree that the first respondent owes Mr Lines the sum of $1,272.92 (gross) for unpaid wages.

Annual Leave

27. In accordance with section 232 of the WR Act, Mr Lines was entitled to accrue an amount of paid annual leave for each completed 4 week period of continuous service with the first respondent of 1/13th of the number of nominal hours worked by him during each 4 week period.

28. Section 234(1) of the WR Act provides that Mr Lines was entitled to accrue annual leave on a pro rata basis and section 235(2) of the WR Act provides that he was entitled to be paid an amount on termination of his employment for his accrued untaken annual leave at the applicable basic periodic rate of pay.

29. Immediately prior to the termination of his employment Mr Lines' basic periodic rate of pay was $8.92 per hour and he had 140.37 hours of accrued but untaken annual leave.

30. The first respondent failed to pay Mr Lines any amount with respect to accrued annual leave upon termination of his employment. The parties agree that the first respondent owes Mr Lines the sum of $1,252.15 (gross) for unpaid annual leave.

Annual Leaving Loading

31. Clause 27.11 of the Award provides that Mr Lines was entitled to be paid an amount on termination of his employment equal to 17.5% of his accrued untaken annual leave.

32. The first respondent was obliged to pay Mr Lines an amount of $292.12 for annual leave loading on termination of Mr Lines' employment. The first respondent has failed to do so.

33. The parties agree that the first respondent owes Mr Lines the sum of $219.12 (gross) for unpaid annual leave loading.

Superannuation

34. At the commencement of his employment, Mr Lines informed the first and second respondents that he nominated InTrust Super as his complying superannuation fund.

35. The first respondent was required to pay to Mr Lines' superannuation fund an amount equal to 9% of Mr Lines' ordinary time earnings in accordance with clause 21 of the Award and the SGA Act and SGC Act.

36. The first respondent has failed to pay any amount of superannuation to Mr Lines' superannuation fund.

37. The parties agree that the first respondent owes Mr Lines the sum of $1,682.04 for unpaid superannuation contributions.

The Breaches

38. The first and second respondents admit that the first respondent has, by the conduct described above, breached:

    a) section 182(1) of the WR Act;

    b) section 235(2) of the WR Act;

    c) clause 21 of the Award; and

    d) clause 27.11 of the Award.

39. The first and second respondents admit that, as a consequence of the breaches, the first respondent owes Mr Lines the sum of $2,744.19 (gross) for unpaid wages, annual leave and annual leave loading, and further that an amount of $1,682.04 is payable by the first respondent

to Mr Lines' superannuation fund for unpaid superannuation contributions.

40. The applicant and respondents agree that in addition to those sums Mr Lines is entitled be paid by the first respondent an amount of interest thereon at a rate of 6.5 percent per annum from 24 October, 2007 until the date of payment.

41. The parties agree that for the purposes of assessing penalties there are four identifiable breaches:

a) failure to make full payment of wages;

b) failure to make payment of accrued but untaken annual leave on termination;

c) failure to make payment of annual leave loading on termination; and

d) failure to make payment of superannuation.

The Second Respondent

42. The second respondent managed Mr Lines' employment at both the Plaza Store and Hinkler Store and:

a) conducted Mr Lines' pre-employment interview;

b) either jointly with Ms Stevens or on his own made the offer of employment to Mr Lines;

c) either jointly with Ms Stevens or on his own determined the terms and conditions under which Mr Lines was employed;

d) supervised Mr Lines during his employment and was aware of the underpayments.

43. During Mr Lines' employment, Mr Lines sought external advice from Wageline in relation to the underpayments of wages and both he and his parents brought the underpayments to the second respondent's attention. Despite this, the second respondent did not take steps to

rectify the underpayments during Mr Lines' employment with the first respondent.

44. In or about December, 2007 Mr Lines commenced employment at the Melbourne Hotel in Bundaberg. The second respondent was a patron of that establishment.

45. In or about late January, 2008 during one of Mr Lines' shifts at the Melbourne Hotel, the second respondent spoke with Mr Lines in relation to the underpayments. The second respondent indicated to Mr Lines that he was ignoring the calls of the Workplace Ombudsman in relation to this matter in the belief that the matter would "go away".

46. On a subsequent occasion, again during one of Mr Lines' shifts at the Melbourne Hotel, the second respondent spoke with Mr Lines indicating that the applicant had contacted him and told him that Mr Lines was claiming money for annual leave and superannuation. During that discussion, the second respondent proposed a payment plan whereby he would give Mr Lines $100 per week.

47. Despite this, at no time did the second respondent acknowledge or speak with the applicant about the proposed payment plan or any other matter in connection with this proceeding.

48. The second respondent agrees that he:

a) did for the purposes of s.782(2)(a) of the WR Act, aid, abet, counsel and/or procure the first respondent's contraventions of ss.182(1) and 235(2) of the WR Act; and

b) was, for the purposes of s.728(2)(c) of the WR Act, knowingly concerned (directly or indirectly) in the first respondent's contraventions of ss.182(1) and 235(2) of the WR Act; and

c) was "involved in" the first respondent's contraventions of ss.182(1) and 235(2) of the WR Act such that he is deemed to have also contravened those provisions pursuant to ss.728(1) of the WR Act.

These Proceedings

49. On or about October, 2007 Mr Lines made a complaint against the first respondent to the Queensland Department of Industrial Relations claiming underpayments for wages and superannuation.

50. By letter of referral dated 20 November, 2007 Mr Lines' complaint was referred to the applicant because the Department of Industrial Relations (Qld) did not have jurisdiction to deal with Mr Lines' claim.

51. The applicant wrote to the first respondent c/- the second respondent by letter dated 26 November, 2007 giving an opportunity to the first respondent to resolve the matters arising from Mr Lines' complaint in respect to wages, annual leave and superannuation.

52. Numerous subsequent attempts were made by the applicant to contact the respondents to secure voluntary compliance with the relevant provisions including the issuing of Breach Notices.

53. The respondents did not make any payments in response to the applicant's request for voluntary compliance.

54. On 31 March, 2009 after finalising its investigation, the applicant filed these proceedings.

55. As of today, Mr Lines has still received no payment from either respondent.

56. The approach to be taken when determining the imposition of a penalty appears not to be in dispute. The applicant referred me to the non-exhaustive list of relevant factors summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59] and endorsed by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. Those factors are:

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

    b) the circumstances in which that conduct took place;

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

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

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

f) the size of the business enterprise involved;

g) whether or not the breaches were deliberate;

h) whether senior management was involved in the breaches;

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

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

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

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

m) the need for specific and general deterrence.

57. I accept that given the facts it is more likely than not that the breaches now admitted would have continued had the first respondent not decided to terminate Mr Lines' employment. That is to say, Mr Lines would have continued to receive an underpayment of his wages. It is clear that the first respondent, with the second respondent's concurrence acted with complete disregard to its statutory obligations.

58. I accept that there is no evidence that the respondents ever sought to understand their obligations under the WR Act or the Award when Mr Lines was initially employed. There was no apparent misapprehension of their obligations.

59. I accept that at the time of and during the period of his employment, Mr Lines was a vulnerable employee with limited experience of both work and his legal entitlements. He had left school only months before his employment with the first respondent. That is a significant factor to

consider when assessing the quantum of penalty. Moreover, it is relevant to the penalty to be imposed upon the second respondent because he admits his involvement in the first respondent's contraventions. He has advanced no reason for the first respondent's breaches. His statements to Mr Lines' to the effect that he was ignoring the relevant industrial inspectors bespeaks a notable indifference to the first and second respondent's obligations, and Mr Lines' rights, under the WR Act.

60. I accept the submission that the amount of the underpayment represents a significant sum to Mr Lines given his age, lack of previous work experience, and the modest wage to which he was entitled as an apprentice. It is of considerable significance that neither the first nor the second respondent has made any attempt to rectify the underpayments. Mr Lines remains out of pocket.

61. I take into account that there is no evidence of any prior similar conduct by either respondent and that they are entitled to be treated as first time contravenors.

62. Although the first respondent is the subject of a strike-off application by ASIC and the second respondent is an undischarged bankrupt they are not matters which, in my opinion bear heavily upon the penalty to be imposed. As Tracey J opined in *Kelly v Fitzpatrick* (2007) 166 IR 14:

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

63. Similarly, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27-29] Driver FM remarked:

> *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 a Court's consideration of penalty.*

64. Other authorities carry statements to similar effect[4].

65. The respondents have adduced no evidence that the breaches of the WR Act were inadvertent. I accept that the breaches were most likely deliberate given that the breaches were brought to the attention of the respondents while Mr Lines remained employed, but nonetheless remained unaddressed.

66. At all material times the second respondent was a director and secretary of the first respondent. He had the responsibility for the day to day operations of the first respondent's business. He was a decision maker. Moreover, the second respondent agrees that he was knowingly concerned in the first respondent's contraventions of ss.181(1) and 235(2) of the WR Act.

67. There is no evidence of contrition by the respondents. Nor is there any evidence from the respondents explaining the underpayments.

68. I accept that the respondents have demonstrated a poor attitude towards their statutory obligations, and the role of the applicant as an enforcement agency. That attitude is evidenced by:

a) their failure to take any corrective action at any stage of these proceedings;

b) the second respondent's broken promise to Mr Lines to repay him at a rate of$100 per week;

c) the respondents' conduct in initially ignoring calls from the applicant; and

d) failing to respond to Breach Notices issued by the applicant to the first respondents.

69. I accept that the applicant has been required to undertake significant work incurring expenditure of time and money in order to locate the second respondent to effect service and attempt to communicate with him.

70. Neither of the respondents has filed a Response in these proceedings, although they did cooperate by admitting liability and signing the Agreed Statement of Facts. I accept, however, that such conduct is not evidence of contrition on the part of the respondents.

71. Compliance with minimum standards is important. Again, in *Kelly v Fitzpatrick* (2007) 166 IR 14 at 20 Tracey J said:

> *One of the principal objects of the Act is the maintenance of a safety net of minimum terms and conditions of employment and effective enforcement of the obligations imposed by Awards and other industrial instruments. To this end the Act makes provision for the investigation of alleged breaches where it is established that breaches have occurred. As already noted, those penalties were significantly increased by parliament in 2004.*

72. Both general and specific deterrence have roles to play in the process of fixing an appropriate penalty. I accept that specific deterrence is important in this case because:

a) there has been no demonstration of contrition or remorse on behalf of either respondent;

b) there is no evidence that the respondent's did anything to alleviate the breaches or their consequences when they were brought to the second respondent's attention; and

c) there is evidence that the respondent's, and in particular the second respondent, was actively avoiding the responsibilities cast upon the first respondent by the WR Act, even after the breaches were brought to his notice.

73. As to general deterrence, Driver FM pointed out in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [31]:

> *The penalty must reflect the need for general deterrence in the respondent's industry. The need for general deterrence is high in industries where young, low paid workers are engaged.*

74. This is such a case.

75. Section 714(4)(a) of the WR Act prescribes that the maximum penalty in the case of an individual is 60 penalty units, and for a body corporate 300 penalty units. Section 4(1) of the WR Act provides that "penalty unit" has the same meaning as in the Crimes Act 1914 (Cth). Section 4AA of the Crimes Act defines "penalty unit" to be $110. Thus, the maximum penalty that may be imposed for breach of a term of an award is $6,600 by an individual and $33,000 by a body corporate.

76. There are four separate breaches by each of the respondents. Accordingly, the maximum total penalty that the Court may impose in this matter is $132,000 in relation to the first respondent and $26,400 in relation to the second respondent.

77. I intend to assess a penalty in respect of each of the four breaches by the first respondent and then to aggregate those penalties to determine whether the totality principle demands that the penalty be reduced.

78. I fix on a penalty for each of the four breaches by the first respondent of $13,000 per breach. In my view these are serious breaches committed in relation to a vulnerable employee. There is no remorse or contrition by the first respondent and no steps taken to remedy the breaches. The admission of liability has come late in the life of this matter and for the reasons expressed by O'Sullivan FM in *Klousia v TKM Investments Pty Lid & Anor* [2009] FMCA 208 at [49] to [52] in apply no discount for the admission of liability. The aggregate penalty therefore is $52,000. In the circumstances of this case, that aggregate penalty seems to me to be appropriate for this company.

79. I fix on a penalty for each of the four breaches by the second respondent of $2,500 per breach. Again, in my view these are serious breaches committed in relation to a vulnerable employee. There is no remorse or contrition by the second respondent and no steps taken to remedy the breaches. For the reasons I have expressed above, no discount for the admission of liability is appropriate. The aggregate penalty therefore is $10,000. In the circumstances of this case, that aggregate penalty seems to me to be appropriate for this individual.

I certify that the preceding seventy nine (79) paragraphs are a true copy of the reasons for judgment of Jarrett FM

Associate: S. Haysom

Date: 8 October 2009

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[1] This fact is not contained in the Statement of Agreed Facts, but having regard to the affidavit of Christy May Miller filed by leave on 7 October, 2007, it is not controversial.
[2] This fact is not contained in the Statement of Agreed Facts, but having regard to the affidavit of Christy May Miller filed by leave on 7 October, 2007, it is not controversial.
3 *Cotis v Macpherson* [2007] FMCA 2060 at [6] to [10]
4 *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508; *PKJUand Others v Vista Paper Products Pty Ltd and Another* (1994) 127 ALR 673; *Colis v MacPherson* [2007] FMCA 2060 at [12]