CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION:	Civil (Federal)
PARTIES:	
Applicant:	FAIR WORK OMBUDSMAN (formerly WORKPLACE OMBUDSMAN)
Respondent:	CHRISTOPHER BRAMLEY
Case No:	88795/08
Hearing Date:	1 June 2009
Date of Decision:	1 September 2009
Legislation:	Workplace Relations Act 1996, S719, S728
Magistrate:	G J T Hart
Representation:	Solicitor for the Applicant Ms L Andelman Office of the Fair Work Ombudsman Solicitor for the Respondent Mr D Morris Morris Legal Solicitors

REASONS FOR DECISION

1 The Applicant herein seeks the imposition of penalties upon the Respondent pursuant to S728 of the Workplace Relations Act. It is not in dispute that between April 2006 and April 2007, the Respondent was the manager of Midway Motor Inn, Coffs Harbour, and that during that period, two employees of the business were underpaid in respect of a number of provisions of the relevant industrial instrument, and that accordingly, the employer, Experienced Ventures Pty Ltd, was in breach of the legislation.

2 Given the admissions and concessions made by the Respondent, the matter comes before the Court for sentencing. The relevant background facts and circumstances are substantially agreed between the Applicant and the Respondent. This agreement is embodied in a detailed Statement of Agreed Facts provided to the Court at the hearing. The Statement of Agreed Facts is in the following form:-

*"**Introduction***

*SF1 The Plaintiff is the Workplace Ombudsman, a statutory appointee of the Commonwealth, and a duly appointed workplace inspector, pursuant to subsections 166D(1) and 167(1A) of the Workplace Relations Act 1996 (Cth) ('**WR Act**'). The Plaintiff has standing to bring these proceedings.*

*SF2 Experienced Ventures Pty Ltd ('**the Employer**')acted as trustee for the Midway Unit Trust, and carried on business as the 'Midway Motor Inn Coffs Harbour' at 209 Pacific highway Coffs Harbour, New South Wales in the period 1 July 2005 to April 2007. The Employer was deregistered by ASIC on 13 April 2007.*

*SF3 Mr Christopher Bramley, the First Defendant, was the manager of the Midway Motor Inn, Coffs Harbour from April 2006 until April 2007 ('**the relevant period**'), and was during that time involved in the day to day management and operation of the business.*

SF4 The director of the Employer during the relevant period, Ms Leonie Bramley, is the wife of the First Defendant.

*SF5 The Employer engaged Ms Karren Ann Osland and Ms Paula Jean MacDonald (collectively '**the Employees**') to assist in the performance of duties in the business of Midway Motor Inn.*

SF6 In February 2007 the Workplace Ombudsman received complaints from the Employees, in relation to underpayment of a number of employment entitlements. An investigation was subsequently conducted by Workplace Inspector Jason Rhodes, leading to this prosecution.

The Industrial Instrument

*SF7 At all material times the 'Midway Motor Inn Coffs Harbour' was a named employer respondent to the Federal Motel, Accommodation and Resorts Award ('**the Federal Award**') as per Schedule A of that Award.*

SF8 *On and from the commencement of the Workplace Relations Amendment (Work Choices) Act 2005 on 27 March 2006 the Federal Award operated and had effect as a pre-reform Award.*

SF9 *The First Defendant maintains that during the relevant period he was unaware of the Midway Motor Inn's respondency to the Federal Award, and considered the applicable award to be the NSW Motel, Accommodation and Resorts Award* ***('the State Award').***

The employment of the Employees

SF10 *On or about 21 December 2004, Ms Karren Ann Osland, commenced casual employment as a room attendant at the Midway Motor Inn Coffs Harbour.*

SF11 *On or about 1 November 2005, Ms Paula Jean MacDonald commenced casual employment as a room attendant at the Midway Motor Inn Coffs Harbour.*

SF12 *By virtue of the work performed by the Employees and the operation of clause 4.7.2(b) of the Federal Award, the Employees were entitled to be classified and paid as 'Hospitality Services – Grade 2' employees.*

SF13 *From April 2006, the First Defendant acted in the role of Manager of the Employer. The First Defendant directed the Employees as to their hours of work and duties. The First Defendant was responsible for paying the Employees.*

SF14 *Ms MacDonald ceased attending work on 5 January 2007. She did not provide a formal resignation.*

SF15 *Ms Osland resigned from her position with the Employer on 27 February 2007.*

Contravening conduct

Underpayment of Wages – Contravention of APCS

SF16 *From 27 March 2006 under section 208 of the WR Act, the pay and classification provisions of the Federal Award became a preserved Australian Pay and Classification Scale* ***('APCS').***

SF17 *In accordance with the applicable APCS the Employer was required to pay the Employees for all ordinary time worked from Monday to Friday, at the following hourly rates:*

- ***$17.31*** *from 27 March 2006; and*
- ***$18.21*** *from 1 December 2006*

SF18 *In the relevant period the Employees were instead paid a rate of* ***$15.92*** *per hour for ordinary time worked from Monday to Friday, in breach of section 182(1) of the WR Act.*

SF19 *For reference, $15.92 was the ordinary casual adult rate payable to 'Hospitality Services Grace 1' Employees under the Federal Award in the period 23 June 2004 to 24 June 2005.*

SF20 *The Federal Award and the State Award have mirror provisions relating to classifications. In the relevant period the APCS rates derived from the State Award were equivalent to the APCS rates derived from the Federal Award.*

SF21 *Further, in breach of section 182(1) of the WR Act, the Employees were not paid for each hour actually worked. The Employees were instead paid on an 'allocated time basis' developed by the Second Defendant, and later continued and refined by the First Defendant.*

SF22 *Under this system the Employees were paid only for the period allocated by the Defendants to clean the accommodation, regardless of the hours actually worked.*

The time allowed per room varied upon the type of accommodation and the number of cleaning staff. For example, under the revised system implemented by the First Defendant, the Employees were allocated 20 minutes per room for a single, double or twin room; 30 minutes per room for a family room or villa; and 12 minutes per load of laundry. The allocated time would be divided by the number of cleaners where more than one room attendant serviced the same room. The First Defendant implemented this system to promote efficiency.

SF23 *As a result of the Employer's breaches of section 182(a) the Employees were underpaid.*

Underpayment of Weekend Rates – Contravention of the Award

SF24 *The Award requires employers bound by it to pay casual employees at 150% of the ordinary time rate for all work done on a Saturday, and 200% of the ordinary time rate for all work done on a Sunday (Clause 13.2.2(b)).*

SF25 *During the relevant period the Employees regularly undertook work on a weekend.*

SF26 *In accordance with clause 13.2.2(b) of the Federal Award the Employer was required to pay the Employees for work undertaken on a weekend at the following hourly rates:*

From 27 March 2006 –

- ***$20.77** on a Saturday; and*
- ***$24.23** on a Sunday.*

From 1 December 2006 –

- ***$21.85** on a Saturday; and*
- ***$25.49** on a Sunday.*

SF27 *During the relevant period the Employer instead paid the Employees a rate of **$19.11** per hour for worked (sic) on a Saturday, and **$22.29** per hour for worked (sic) on a Saturday, in breach of its obligations under the Federal Award.*

SF28 *As a result of the Employer's breaches of clause 13.2.2(b) of the Federal Award the Employees were underpaid.*

Underpayment of Public Holiday Rates – Contravention of the Award

SF29 *The Federal Award requires employers bound by it to pay casual employees at 175% of the ordinary time rate for all work done on a public holiday (Clause 13.2.2(c).*

SF30 *During the relevant period Ms Osland preformed (sic) worked (sic) on 4 separate public holidays and Ms MacDonald preformed (six) worked (sic) on 7 separate public holidays.*

SF31 *In accordance with clause 13.2.2(c) of the Federal Award the Employer was required to pay the Employees for work undertaken on a public holiday at the following hourly rates:*

- ***$38.08** from 27 March 2006; and*
- ***$40.06** from 1 December 2006*

SF32 *In the relevant period the Employer instead paid the Employees a rate of **$35.03** per hour for time worked on a public holiday, in breach of its obligations under the Federal Award.*

SF33 *As a result of the Employer's breaches of clause 13.2.2(c) of the Federal Award the Employees were underpaid.*

Non-Provision/Underpayment of Mean Breaks – contravention of the Award

SF34 The Federal Award requires employers bound by it to provide employees a meal break of not less than 30 minutes, to be commenced not later than the sixth hour of duty (Clause 24.1), or in lieu of the meal break to pay the employee at time and a half the ordinary rate until released for a meal break (Clause 24.1.3).

SF35 During the relevant period Ms Osland was not provided with the required meal break, or payment in lieu, on three separate occasions. Ms MacDonald was also not provided with the required meal break, or payment in lieu, on three occasions.

SF36 As a result of the Employer's breaches of Clause 24.1.3 the Employees were underpaid.

Non-payment Superannuation – contravention of the Award

SF37 The Federal Award requires employers bound by it to pay superannuation contributions monthly or as otherwise agreed in writing between the Trustee of the Fund and the employer (Clause 22.5.3).

SF38 During the relevant period the Employer, in breach of the Federal Award, failed to make any superannuation contributions in respect of the Employees.

*SF39 In **December 2007** the First Defendant without involvement or knowledge of the Workplace Ombudsman, via BHG Securities Pty Ltd, made payments to the Australian Taxation Office in respect of superannuation contributions for all employees of the Employer. The First Defendant was not personally obligated by law to make such payments.*

SF40 BHG Securities Pty Ltd was at the relevant time landlord for the Midway Motor Inn and shared a common director, Ms Leonie Bramley, with the Employer. BHG Securities Pty Ltd is an independent legal entity and trustee of a unit trust which owns the property at 209 Pacific Highway, Coffs Harbour and shares no responsibility to Employer.

SF41 The Plaintiff does not press a penalty in respect of the non-payment of superannuation.

Total underpayments

*SF42 As a result of the breaches detailed at paragraphs 15-40 above the Employees were underpaid and to date remain out of pocket a total of **$5,731.09**, apportioned as follows:*

Karren Osland	***$2,855.47** in unpaid wages; and*
Paula MacDonald	***$2,875.62** in unpaid wages; and*

SF43 As the Employer has been deregistered the employees are unable to recover their entitlements.

Investigation and attempts to secure compliance

*SF44 On **22 March 2007**, the Workplace Ombudsman visited the Midway Motor Inn in Coffs Harbour and spoke with the First Defendant in relation to complaints lodged by the Employees.*

*SF45 On that occasion a 'Notice to Produce Documents' was provided to the First Defendant on behalf of the Employer. An unsigned copy of the Notice to Produce Documents is annexed and marked **'Attachment A'**. The Notice was not complied with.*

*SF46 On **13 April 2007**, the Workplace Ombudsman again visited the Midway Motor Inn in Coffs Harbour and spoke with the Second Defendant. The Second Defendant informed the Workplace Inspector that she was temporarily filling in for the First Defendant and had access to the employee records.*

*SF47 On that occasion a second Notice to Produce Documents was provided to the Second Defendant on behalf of the Employer. A copy of the second Notice to produce Documents is annexed and marked **'Attachment B'**.*

*SF48 The requested documents were personally delivered to the Workplace Ombudsman by the First Defendant on **7 May 2007**. The documents included time, wage and payroll records in respect of the Employees.*

*SF49 On **26 July 2007** the First Defendant attended Coffs Harbour Offices of the Workplace Ombudsman and participated in an electronically recorded interview. The transcript of that interview is annexed and marked **'Attachment C'**.*

SF50 The accuracy of the transcript of interview, the facts pertaining to the conduct of the interview and the events immediately following the interview are in dispute between the parties.

*SF51 On **9 August 2007** the Workplace Ombudsman issued a Breach Notice to the Employer, and its Directors. The Breach Notice:*

(a) particularised the breaches, including underpayment of the wages for all hours worked, non-payment of meal break penalties and non-payment of superannuation;

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

(c) advised that the Workplace Ombudsman may take legal action to recover the outstanding amounts.

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

SF52 No response was received to the Breach Notice.

*SF53 On **23 August 2007** the Workplace Ombudsman issued a Final Breach Notice to the Employer, and its Directors. A copy of the Final Breach Notice is annexed and marked **'Attachment E'**.*

*SF54 In **December 2007** the First Defendant without any involvement or knowledge of the Workplace Ombudsman, via BHG Securities Pty Ltd, made payments to the Australian Taxation office in respect of superannuation contributions for all employees of the Employer. The First Defendant was not personally obligated by law to make such payments.*

SF55 BHG Securities Pty Ltd was at the relevant time landlord for the Midway Motor Inn and shared a common director, Ms Leonie Bramley, with the Employer. BHG Securities Pty Ltd is an independent legal entity and trustee of a unit trust which owns the property at 209 Pacific Highway, Coffs Harbour and shares no responsibility to Employer.

*SF56 On **17 December 2008** the Plaintiff commenced this prosecution.*

Admission of breaches

SF57 The First Defendant admits that he was involved in the contraventions of the Employer detailed at paragraphs 15 to 37 above, within the meaning of section 728 of the WR Act.

SF58 Since commencing the prosecution the First Defendant has adopted a cooperative approach to resolving these proceedings."

3 Notwithstanding reference in the Agreed Statement of Facts to a *"first respondent/defendant"* and *"second respondent/defendant"*, the sentencing hearing on 1 June 2009 proceeded on the basis that only the First Respondent, Mr Christopher Brainley, was before the Court for sentencing. There is no dispute that the Workplace Relations Act has been breached, and that, within the meaning of S728 of that legislation, the Respondent, as the day to day manager of the business owned by the employer was involved in the contraventions. The first consideration for the Court is the issue of the appropriate analysis to determine the number of separate breaches before the Court. Ms Andelman, appearing for the Applicant, submits that:-

> *"5.5 Therefore the Court should consider that the maximum penalty it could impose in this matter is $33,000 that is five breaches for both employees."* (Page 6 Applicant's submissions on penalty).

4 These five alleged breaches are summarised at Page 2 of the Applicant's written submissions, and in brief, they can be summarised as follows:-

(a) Breach of S182 of the Workplace Relations Act being a failure to pay the employees their required minimum rate of pay.
(b) Breach of Clause 13.2.2(b) of the Federal Motel, Accommodation and Resort Award being a failure to pay the employees the required minimum rate of pay for time worked on Saturdays.
(c) Breach of Clause 13.2.2(b) of the Award, being a failure to pay the employees the required minimum rates of pay for time worked on Sundays.
(d) Breach of Clause 13.2.2(c) of the Award, being a failure to pay the employees the required minimum rates of pay for time worked on public holidays.
(e) Breach of Clause 24.1.3 of the Award, being a failure to provide the employees with meal breaks or payment in lieu of meal breaks, after six hours of work.

5 The Court must take into account the provisions of S719(2) of the Workplace Relations Act. That subsection is in the following terms:-

S719(2) "Subject to subsection (3), where:
(a) two or more breaches of an applicable provision are committed by the same person:
and
(b) the breaches arose out of a cause of conduct by the person:
the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term."

6 In support of the contention that there are five separate breaches before the Court for sentencing purposes, Ms Andelman relies upon the decision of his Honour Mr Justice

Gray of the Federal Court of Australia, in Gibbs v Mayor, Councillors and Citizens of City of Altona, 37FCR 216 at 233, where his Honour found that when considering S719(2), the Court should find that each separate obligation found in an award should be regarded as a term for the purposes of that section.

7 I am satisfied that the approach taken by his Honour, which binds this Court, has the result of preventing a defendant from asserting, for example, that they ignored a relevant industrial instrument in its entirety, and that in doing so, there was a single course of conduct, namely disregard of the award, and therefore, for sentencing purposes, a single contravention. The decision of Mr Justice Gray requires the Court to investigate the provisions of the Award and take account of the separate obligations created by the terms of the Award, and to assess the relevant conduct of the Defendant/Respondent for the purpose of forming a view as to the nature of the Defendant/Respondent's failures.

8 In the present case, I am satisfied that the Applicant's submission would be correct if the employees in question had been paid the same hourly rate for work performed during ordinary hours, ie Monday to Friday, the same rate for Saturdays, the same rate for Sundays, and the same rate for public holidays. In those circumstances, there would be separate contraventions in my view.

9 However, as I understand the evidence in this case, the Respondent organised the pay for the employees with the incorrect ordinary hourly rate of pay, and used that incorrect hourly rate when calculating the appropriate hourly rate for Saturday work, for Sunday work and for public holidays. In other words, the Respondent took steps to comply with the Award by paying a higher or penalty rate for Saturdays, Sundays and public holidays, but because the Respondent was using the incorrect hourly rate as a starting point, the calculations were in each case incorrect and below the Award standard. Because the basic premise was wrong, the Respondent's calculations were tainted by the incorrect starting point.

10 In those circumstances, I am satisfied that the first four breaches identified by the Applicant, should be treated as one breach for the purposes of sentencing, as the second,

third and fourth breaches all flow mathematically from the failure of the Respondent to ascertain the correct minimum hourly rate for ordinary work.

11 The fifth breach, being a failure to provide the employees with meal breaks, or pay in lieu thereof, constitutes an entirely separate obligation, unrelated to the Respondent's failure to ascertain the correct ordinary hourly rate of pay, and in those circumstances, I am of the view that it can be, and should be, treated as a separate contravention.

12 Consequently, I find that for sentencing purposes, and having regard to the requirements of S719(2), there are two contraventions before the Court.

13 Having identified the number of separate breaches for the purposes of S719(2), it is necessary for the Court to give consideration to the objective seriousness of each offence, and to take into account any subjective matters which mitigate in favour of the Respondent.

14 It is put, on behalf of the Respondent, that when he took up the role of manager of the business conducted by the employer, the two employees who were underpaid, were already on the payroll, and the Respondent simply maintained the payroll procedures which were already in place and had been determined by the previous manager. It is also put that the Respondent was operating under the mistaken belief that the relevant industrial instrument was the state award rather than the federal award which actually applied in circumstances where the business was listed as a respondent to the Federal Award.

15 Notwithstanding such assertions, it is clear that the Respondent was directly involved in the failure of the employer to have proper regard to legal obligations created by an industrial instrument, in circumstances where the relevant authorities make clear that such failures are to be treated as serious offences. It is apparent that neither the Respondent nor his predecessor as manager, bothered to examine carefully the company's legal obligation to employees. Any confusion concerning which award had application, is of

little consequence in circumstances where the rate of pay in one award was mirrored in the provisions of the other award.

16 I do, however, take into account the fact that the business in question was a relatively small operation, lacking management staff with specialised knowledge of industrial relations matters. There is nothing in the evidence which suggests deliberate steps on the part of the Respondent or the company, to exploit employees ignorant of their entitlements. As indicated above, it was thoughtless, rather than deliberate, conduct in my view.

17 In the case of each employee, the quantum of the underpayment was close to $3,000. Whilst such underpayments would clearly be significant from the point of view of the employees, they are, nonetheless, relatively small compared with many other cases coming before eligible Courts dealing with federal enforcement matters.

18 I note also that in the case of the second defence, namely the failure to provide crib breaks or pay in lieu, the contraventions were occasional rather than regular, and the moneys calculated as being underpaid, can properly be described as insignificant.

19 Given the nature of the offences, it is necessary for the Court to include a general deterrence factor in any penalty imposed. There is also a need for a specific deterrence factor, but in my view it need not be significant. The Respondent comes before the Court without having recorded any prior contraventions, and I regard the likelihood of him reoffending as being extremely low. I have no reason to believe that he will not in the future take seriously the implementation of industrial instruments when engaged in the management of any business activities.

20 There are a number of matters which mitigate in favour of the Respondent. As mentioned above, he comes before the Court with no previous record of any contraventions. He is entitled to some leniency because of that good record, although it is relevant to note that his managerial function did not extend over a lengthy period of time. Further, the admissions and concessions made by the Respondent have considerable utilitarian value,

and, in addition, may indicate some remorse on the part of the Respondent. I am, however, unconvinced that the Respondent takes full responsibility for the contraventions in which he was involved. Placing the blame on the previous manager does not sit well with an acceptance of responsibility for his own failure.

21 The Court is informed, and I accept, that the Respondent has fully cooperated with the Applicant from the time of the institution of proceedings.

22 Given my earlier finding that for sentencing purposes there are two offences before the Court, the total maximum penalty available to the Court is $13,200 or $6,600 for each offence. It is clear that the maximum penalty is available and can be imposed for offences which fall within the most serious examples of breaches of the legislation. Such serious offences would include cases where the offender has a prior history of contraventions and has engaged in deliberate contravention of a significant nature in circumstances where the Court is entirely satisfied that the offender was fully aware of the relevant obligations under the legislation, but acted in deliberate defiance. The two offences before the Court fall well short of such conduct. Having considered the objective seriousness of each offence, as well as the subject matters which mitigate in favour of the Respondent, I find that in relation to the first offence, the appropriate penalty is $2,800.00 from which there should be a discount of 25% in acknowledgment of the admissions made by the Respondent. I regard the second offence as being significantly less serious, and warranting a penalty at the lower end of the range. In relation to the second offence, the Respondent is to pay a penalty of $1,000,.00 reduced to $750.00 in acknowledgment of the admissions made to the Court which have obviated the need for the Applicant to establish all of the factual matters, and obviate the need for the two former employees to be brought to the Court to give evidence.

23 Consequently, the total penalty to be imposed on the Respondent will be $2,850.00 which is to be paid to the two former employees, in equal shares, pursuant to the provisions of S841(b) of the Workplace Relations Act. The moneys are to be paid within 28 days.

24 I take this opportunity to express a concern relating to the provisions of S719(2), given the interpretation given to the words in that subsection over a period of time by superior Courts of record, and in particular, the Federal Court of Australia. In my view, potential difficulties arise for a sentencing Court when the offence before the Court is said to involve the underpayment of two or more employees, rather than a single employee. The authorities appear to establish conclusively that this is the correct approach. Both the Applicant and the Respondent in the present matter, have made submissions on that basis, and I have adopted that approach in my sentencing decision.

25 In this case, there is no evidence of any significant difference between the two former employees who were underpaid. However, if the factual circumstances had been different, and there had been evidence that one of the employees was young, or otherwise vulnerable in some way, I would not have been able to impose a higher penalty in relation to the conduct of underpaying a young or vulnerable employee because the required approach is to deal with offences against multiple employees as being a single offence.

26 There is, in my view, a much greater potential difficulty flowing from the wording of the subsection, that could seriously impair the capacity of a sentencing Court to impose appropriate penalties in certain cases. A large employer with, say 300 employees, may have underpaid all 300 employees over a period of time, and then become aware, perhaps through the visit of an inspector or a union official, that there is likely to be a prosecution. Such employer might find it expedient to arrange for one of the employees to bring a claim against the company, seeking restitution, and the imposition of a penalty. Such litigation might well be listed for hearing whilst the other 299 employees are still providing statements. In such circumstances, the sentencing judge or magistrate, would be dealing with what would appear to be a one off instance of an employee being underpaid pursuant to a relevant industrial instrument. In such circumstances, a relatively small penalty might well be imposed. When, subsequently, the proceedings brought seeking restitution and penalties in respect of the other 299 employees, was listed, the Court would find that the penalty imposed in respect of the single employee, arose out of the same course of conduct as the identical offence against the other 299, and, on the authorities, an additional penalty could not be imposed.

27 I raise these issues because I have considerable doubt that such outcomes were contemplated and intended when S719(2) passed into law.

28 It may well be that S719(2) was intended to avoid an unfair duplication of charges. But for the section, it is clear that an employer could face dozens or even hundreds of charges from a single contravention. For example, an employee over a period of years, might be underpaid every pay day for a particular allowance provided by the award, but overlooked by the employer. If the employee is paid fortnightly, that would mean 26 offences every year. If weekly, that would mean 52 offences every year. In such a case, the number of offences of somewhat arbitrary and obscures the reality that there was one offence which was repeated in the case of the single employee, pay day after pay day over a period of time. It is clear that justice is served by there being a provision in the legislation which prevents such arbitrary duplication and accumulation of offences.

29 I recall a criminal law lecture given by Dr Duncan Chappell of the University of Sydney Law School, many years ago, when he warned law students of the dangers of an uncritical use of crime statistics. By way of illustration, he referred to an incident some years earlier, when the New South Wales Police Commissioner had become extremely concerned when receiving monthly crime reports from area commanders around the State. The report of one area commander from remote New South Wales showed a massive outbreak of carnal knowledge in the area, an increase of some thousands per cent. Whilst the Commissioner was gratified to see that the cleanup rate for this outbreak was 100%, he wondered what the Minister and the afternoon papers would make of this development. The Commissioner made enquiries, which established that a mother of a teenage girl had returned home early from work to find her fifteen year old daughter having sex with a boy from her school. The distraught mother had phoned the local police, and the young lovers had confessed that they had been spending their after school hours in this fashion every day for over two years. The diligent young police officer had set about calculating the number of unlawful acts of congress which had taken place over that time, and included the figure in the monthly statistics for his station.

30 Notwithstanding that caution, there is, in my view, a world of difference between a situation where there are multiple separate counts of the same offence against a single employee, and a situation where offences are committed against a large number of employees. Certainly, the differences are such that a sentencing Court endeavouring to determine the nature and quality of the offence, or the objective seriousness of the offence, may well be restricted by S719(2) in a fashion which was neither contemplated nor intended by the Parliament.

31 I raise the issue within these Reasons for Decision for consideration by officers of the Office of the Fair Work Ombudsman, and invite such officers, if they deem it appropriate, to refer the matter to the Attorney General and to the Minister for Employment and Workplace Relations.

32 The orders of the Court are as follows:-

1 Within 28 days, the Respondent is to pay a penalty in the sum of $2,100.00 in relation to the first offence.

2 Within 28 days, the Respondent is to pay a penalty in the sum of $750.00 in respect of the second offence.

3 The penalties are to be paid to the Office of the Applicant, and thereafter distributed in equal shares to former employees, Ms Karren Osland and Ms Paula MacDonald, pursuant to S841(b) of the Workplace Relations Act.

33 I publish my reasons for decision.

G J T Hart
Industrial Magistrate

1 September 2009