IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE
INDUSTRIAL DIVISION

Case No. X03576444

FAIR WORK OMBUDSMAN — Plaintiff

V

ELIAS MAZLOUM — First Defendant

- and -

MAISSALOUN MAZLOUM — Second Defendant

MAGISTRATE:	A. J. CHAMBERS
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 OCTOBER & 4 NOVEMBER, 2009.
DATE OF DECISION:	30 MARCH, 2010.
CASE MAY BE CITED AS:	FWO v. ELIAS MAZLOUM & ANOR

REASONS FOR DECISION

Catchwords:

Accessorial liability under s.728 of the *Workplace Relations Act (Cth) 1996*, imposition of penalties

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APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr Follett	Fair Work Ombusman
For the Defendants	Ms Galpin	D. E. Phillips

HER HONOUR:

Introduction

1 Between 2004 and September, 2007, Matthew Kupper was employed by South Morang Restaurant Pty Ltd (the employer) to work as a kitchen-hand on a casual basis. The employer operated a licensed pizza and pasta restaurant trading as "Sofia South Morang", in Plenty Road, South Morang, under a franchise arrangement. South Morang Restaurant Pty Ltd is now in liquidation[1].

2 Whilst employed in the business, Mr Kupper generally worked in the kitchen between 30 to 50 hours per week, Wednesday to Sunday. He was paid a flat hourly rate for each hour worked, set at $10.50 per hour in 2004 and increasing over time to $13.00 per hour at the time he ceased employment in September, 2007. Mr Kupper was paid in cash at the end of every week.

3 In October, 2007 Mr Kupper lodged a complaint with the Workplace Ombudsman regarding his rate of pay whilst employed at Sofia's restaurant.

4 In December, 2008 the Workplace Ombudsman[2], being a workplace inspector under the *Workplace Relations Act (Cth) 1996* (**WR Act**), issued proceedings in the Industrial Division of this Court in relation to the underpayment of Mr Kupper. The proceedings were not brought against the employer, South Morang Restaurant Pty Ltd, as it had been placed in liquidation. Rather, the proceedings were instituted against Elias Mazloum and Maissaloun Mazloum on the basis that both were responsible for the "overall direction, management and supervision of the employer's operations"[3] and therefore subject to the

[1] The employer was placed under external administration and resolved to voluntarily wind up by the passing of a special resolution on 9 December, 2009 – see paragraph 2A of the Amended Statement of Claim admitted in the Notice of Defence
[2] By leave of the court granted on 2 October, 2009, the name of the plaintiff was amended to the "Fair Work Ombudsman"
[3] Amended Statement of Claim, paragraph3(b)

accessorial liability provisions of the WR Act[4].

5 The Amended Statement of Claim dated 11 March, 2009 alleges that between 27 March, 2006 and 30 September, 2007 the employer was bound by the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998* (**the Award**) and in particular the provisions of the Award prescribing shift, weekend and public holiday penalties and allowances. In the particulars of complaint, it is alleged the employer became bound by the Award following a common rule declaration of the Commission on 22 October, 2004[5] with effect from 1 January, 2005. Moreover, it is alleged that during that period the employer was bound by the basic periodic rate of pay and the casual loading term contained in the preserved Australian Pay and Classification Scale (**APCS**) derived from the Award[6]. The plaintiff seeks the imposition of penalties on the defendants on the basis that each was "involved" in the alleged breaches and therefore to be treated as having contravened the civil penalty provisions by reason of s728 of the WR Act.

6 In the Notice of Defence filed on behalf of the Defendants, the allegation that they were both "involved" in the alleged contraventions is denied[7]. On the pleadings and following concessions made during the course of the proceedings[8], the defendants do not take issue with the application of the Award and ACPS to the employment of Mr Kupper by the employer. There is no dispute that Mr Kupper's duties fell within the classification of a Kitchen Attendant Grade 1 under the Award and that, during the course of his employment with South Morang Restaurant Pty Ltd, he was underpaid as

[4] See section 728 of the WR Act.
[5] PR952644
[6] By reason of sections 182(1) and 185(2) of the WR Act
[7] Paragraphs 3(b)-(d), 4(b)-(d), 19-27 of the Notice of Defence to the Amended Statement of Claim dated 1 April, 2009.
[8] See paragraphs 12 -16 of the Notice of Defence to the Amended Statement of Claim. In paragraph 18 of that Defence the defendants contend they either did not know or were unaware that the employer may have breached various components of the Award and the APCS. At the hearing on 4 November, 2009 Counsel for the Defendants advised the court that the Defendants accept that Kitchen Attendant Grade 1 was the appropriate classification for the work performed by Mr Kupper and do not dispute that the employer did not pay him the correct rates, penalties and allowances prescribed by the Award and APCS as set out in the Amended Statement of Claim.

claimed in the Amended Statement of Claim.

7 Accordingly, the following issues arise for determination in these proceedings:

(a) Were the defendants or either of them "involved" in a contravention of a civil remedy provision pursuant to section 728 of the WR Act; and if so;

(b) What penalty, if any, should be imposed on the defendant/s?

Applicable law

8 Section 728 of the WR Act, which deals with the issue of accessorial liability, provides:

(1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.

*(2) For this purpose, a person is **involved in** a contravention of a civil remedy provision, if, and only if, the person:*

(a) has aided, abetted, counselled or procured the contravention;

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

9 Section 728 of the WR Act largely mirrors the accessorial liability provisions found in section 75B of the *Trade Practices Act (Cth) 1974* (TPA). Authorities on that provision provide some guidance in the interpretation of s728. In summary, the authorities establish that in order for a person to be "involved in" a contravention of a civil remedy provision it is necessary to demonstrate that the person was a knowing participant in the contravention: *Yorke v Lucas*

(1985) 158 CLR 661 at 668-870.

10 In relation to paragraph (a), that of *aiding, abetting, counselling or procuring the contravention*, the High Court held that to form the requisite intent the person must have *"knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime"*[9].

11 In relation to paragraph (c), that of being *knowingly concerned in* the contravention, the High Court held that *"a person could only properly be said to be "party to" a "contravention" if his participation was in the context of knowledge of the essential facts constituting the particular contravention in question"*[10].

12 In *Dowling v Kirk & Ors* [2007] FMCA 2106, Cameron FM considered the various authorities relating to the equivalent provision under the TPA, including *Yorke v Lucas* in the context of s728 of the WR Act. The decision also sites the following passage of the Full Court of the Federal Court in *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17:

> *"For a person to be involved in a contravention within the meaning of s75B(1)(c) of the Act, a person must be an intentional participant in the contravention, the necessary intent being based upon knowledge of the essential elements of the contravention: see Yorke v Lucas (1985) 158 CLR 661 at 670. Thus, while it is not necessary to establish that the individual Respondents had knowledge that there was a contravention of a provision of Pt V of the Act, it is necessary to demonstrate that each individual Respondent had knowledge of each of the essential elements of the contravention.*
>
> *In order to establish whether any of the individual Respondents was involved*

[9] *Yorke v Lucas*, supra, paragraph 9
[10] Supra, paragraph 17

in a contravention, it is necessary to examine the state of mind of each of them separately in relation to each alleged contravention. Here the Commission's pleadings did not permit of such a course. It did not ever identify the contravention that each particular respondent was said to be involved in. We do not understand any of the Respondents to have addressed any case specific to them. Rather, his Honour appears to have assumed that merely being a director of IMB and being involved in promoting its activities was sufficient to attract the operation of s75B(1)(c) in relation to any contravention on the part of IMPB that occurred during the time that the individual was involved in promoting IMB's activities. However, his Honour made no finding concerning the state of mind of any of the individual respondents. Further, the Full Court was not invited by the Commission to make findings in that regard. Rather, the Commission sought to support the conclusions reached by the primary judge.

It is not necessary to establish any subjective element in relation to a contravention of PT V of the Act. A contravention may be committed unintentionally. That is to say, a person may contravene a provision of Pt V even though that person does not have knowledge of all the essential elements that constitute the contravention. However, before any accessorial liability will arise, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. That knowledge may be constructive in the sense that it may be possible to show wilful blindness in relation to the elements of the contravention. However, absent a finding of wilful blindness, it is necessary to establish actual knowledge on the part of a person to whom it is sought to sheet home accessorial liability in respect of a contravention of Pt V" at [133]-[135]).

13 Having considered these authorities in the case of *Dowling v Kirk & Ors*, Cameron FM determined that the following matters need to be shown for a person to have accessorial liability under s728(2) of the WR Act:

- The person must have knowledge of the essential facts constituting the contravention;
- The person must be knowingly concerned in the contravention;
- The person must be an intentional participant in the contravention based on actual not constructive knowledge of the essential facts constituting the contravention – although constructive knowledge may be sufficient under paragraph (c) in cases of wilful blindness;
- The person need not know that the matters in question constituted a contravention.

14 No issue was taken by either party with the application of these principles to a consideration of the factors to be determined by me under s728 of the WR Act. Whilst it is not necessary to establish any subjective element in relation to a breach of s718 of the WR Act by the employer, South Morang Restaurant Pty Ltd, before any accessorial liability will arise for the defendants, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. Counsel for the Plaintiff concedes that the essential elements of the contravention include knowledge of the fact of employment, of the amount that was paid and knowledge of, or wilful blindness to, the application of an award or industrial instrument and the rates of pay set thereby, applicable to Mr Kupper's employment. It is not necessary to establish that the defendants know that the matters in question constituted a contravention of s718 of the WR Act.

Analysis of the Evidence

Matthew Kupper

15 There is no dispute on the evidence that Mr Kupper has a cognitive impairment, however, no evidence was led before me as to the nature and extent of that impairment. Mr Kupper gave sworn evidence in the

proceedings[11]. Mr Kupper's Affidavit's dated 31 July, 2009 and 28 September, 2009 are in evidence[12].

16 Mr Kupper's evidence is that he commenced employment with another Sofia's restaurant at Wheelers Hill in 2002, also as a kitchen-hand, when he was 18 years old. He says the First Defendant ran the restaurant in Wheelers Hill. He says he started working at the Sofia restaurant in South Morang when it opened in 2003, "which was also run by the First Defendant (as well as the Second Defendant)"[13].

17 Mr Kupper further says[14]:

"Throughout my employment with the Employer, the First Defendant, who I know as "Louis" was responsible for operating and running the overall restaurant at Sofia and the Second Defendant, who I knew as "Mace" was responsible for running the kitchen where I worked. They were both my managers who governed and oversaw my work with the employer.

I dealt with either of the Defendants not only in relation to all work related issues (ie. What work to do, when, etc) but also dealt with either of the Defendants in relation to all employment related issues including the taking of leave, absences from work due to illness, WorkCover, pay rates and the like.

At no time did they indicate to me that they were not responsible for these things, or that they would have to ask someone else about a matter in order to answer any of my questions or deal with any of my issues.

I did not deal with any other management or other persons in relation to any of these matters."

18 Mr Kupper says he first approached the Second Defendant about working at

[11] No issue was taken as to Mr Kupper's competence to give sworn evidence.
[12] Exhibits 1 and 2
[13] Exhibit 1, paragraph 6
[14] Exhibit 1, paragraphs 2 -5

the Wheelers Hill restaurant "who then asked his dad (the First Defendant) to employ me". His evidence is that "all three of us moved across to South Morang when it opened" where "the First Defendant employed me, managed me, oversaw my work (with the Second Defendant) and was clearly responsible for operating and running the whole restaurant". He says the First Defendant was "the big boss" and the Second Defendant was "my direct boss in the kitchen where I worked"[15].

19 Specifically, Mr Kupper's evidence is that he "regularly spoke to the First Defendant about not only work related matters (sometimes he would scream at me about my job duties) but also general employment matters. The First and Second Defendants told me how much I would be paid and arranged my pay"[16].

Elias ("Louis") Mazloum

20 The First Defendant admits that between 13 August, 2002 and 1 March, 2004 he was a director of South Morang Restaurant Pty Ltd[17], which was established in 2002 in anticipation of running a Sofia's franchise in South Morang. In summary however, his evidence is that at the relevant time of Mr Kupper's employment he was employed as a pizza maker with the employer and was not a director of the company and not responsible in any way for Mr Kupper's employment.

21 Mr Mazloum gave evidence in the proceedings. His Affidavit sworn 21 September, 2009 is also in evidence[18].

22 Mr Mazloum's evidence is that, following his return from Lebanon in 2001, his brother John (also known as Jhon Yousef) employed him as a pizza chef at Sofia's Pizza Restaurant in Wheelers Hill. He says that at this time his brother

[15] Exhibit 2, paragraph 2 and 3
[16] Exhibit 2, paragraph 5
[17] Notice of Defence, paragraph 3(a)
[18] Exhibit J

John managed the business on behalf of the landlord, Sam Rayden who had created the Sofia's restaurant franchise. He says he remembers seeing Mr Kupper cleaning the kitchen area at this time in Wheelers Hill. He says, "he was only there for a few months and I did not have much to do with him"[19]. His evidence is that the Second Defendant told him his brother John employed Mr Kupper at the request of his mother.

23 Mr Mazloum says that South Morang restaurant opened in October-November, 2001. At that time, he says staff, including his brothers and his son, Mais Mazloum, were employed by Alissar Pty Ltd, a company of which Sam Raydan was a director[20]. He says it was not until the beginning of the financial year 2004 that Sam Raydan entered a franchise agreement with South Morang Restaurant Pty Ltd to commenced business operations on 1 July, 2004[21]. He says he and his son, Mais Mazloum, resigned as directors of South Morang Restaurant Pty Ltd in March 2004. Relevantly, he says that it was his brother, John Mazloum, who "was in charge of running and making decisions in the South Morang "Sophia" franchise but did not want to be a director because he had some marriage problems at the time"[22]. He says he remained at Wheelers Hill at this time.

24 Due to family illness, Mr Mazloum says he travelled to Lebanon after the Wheelers Hill Restaurant Pty Ltd went into liquidation in around April, 2005 and returned to Australia in late 2005. The evidence of travel to Lebanon is corroborated by entries in his passport showing Mr Mazloum entered Lebanon on 15 April, 2005 and returned to Australia on 26 December, 2005[23]. He says he asked his brother John for work at the restaurant making pizzas and began in January, 2006. He says he was paid in cash, as was everybody and that these were usually handed out by John, but occasionally by his other brothers

[19] Exhibit J paragraph 4.
[20] Exhibit J, paragraph 7 and "EM -1"
[21] Exhibit J, paragraphs 7 & 8
[22] Exhibit J, paragraph 8
[23] Exhibit K

Mous and Ray.

25 As to Matthew Kupper, Mr Mazloum's evidence is that when he started at South Morang, "I was aware that Matthew Kupper was working at "Sophia's" in the kitchen", washing dishes and cleaning. He says Mr Kupper "was of no real concern to me as I was there to make pizzas" and that "I did not have much to do with [him] and most of the time did not see him at all". "Matthew would walk past me when he came to work in the morning and walk past me when he left. The extent of our conversations was a cordial "Hello" when Matthew came in and "Goodbye" when he chose to exit the premises via the entrance to the public bar section"[24].

26 The Defendants also called two former employees of "Sophia's" restaurant in South Morang, Mr Ramsey Sliwo and Mr Eddie Bouzeid, to give evidence in the proceedings. In summary, both say Ray Mazloum employed them, and that it was Ray Mazloum who set their wages. I note that neither made reference to John Mazloum in their evidence, who Mr Mazloum says was "in charge and making decisions" at that time. Ultimately however, the evidence of these two employees is of limited relevance as neither gave evidence of their observations or involvement in the employment of Matthew Kupper at South Morang restaurant.

Mr Barry McDonnell, Workplace Inspector

27 In assessing the credibility of Mr Mazloum's evidence, and in particular his assertions that he had no or limited involvement with Mr Kupper in his employment at South Morang, it is relevant to consider the evidence of Mr Barry McDonnell, the Workplace Inspector. Mr McDonnell gave evidence during the proceedings. Mr McDonnell's Affidavits sworn 31 July, 2009 and 25 September, 2009 are in evidence[25]

[24] Exhibit J, paragraphs 10, 12.2, 12.3
[25] Exhibits 3 & 4

28 Mr McDonnell's Affidavit sworn 31 July, 2009 exhibits the initial complaint made by Mr Kupper to the Workplace Ombudsman (WO) in October, 2007, one month after ceasing his employment with "Sophia's" in South Morang[26]. In that complaint, Mr Kupper nominates "Louie" as the Manager/Contact Person for the employer. Following receipt of the complaint, Mr McDonnell says he contacted the restaurant on 25 October, 2007 and spoke to the First Defendant. The content of that conversation is contained in a file note exhibited to Mr McDonnell's Affidavit[27]. I accept the evidence of Mr McDonnell that all notes referred to in his Affidavit, including this note, were made by him either at the time of the conversation/s referred to or as soon as practicable thereafter. I accept they are contemporaneous notes and as such, given my findings below, should therefore be given weight.

29 In the note of the conversation of 25 October, 2007, Mr McDonnell records that he spoke to "the presumed employer Louis". Mr McDonnell says the person spelt out his surname as "Mazloum". When Mr McDonnell told him he would soon receive a claim from Mr Kupper, the note records Mr Mazloum says "that MK had *'mental problems'*...that he had felt sorry for MK because he was not right in the head"[28]. Mr McDonnell says that after a letter addressed to "Mr Louis Mazloum" regarding Mr Kupper's complaint was sent on 25 October, 2007[29], he received a telephone call from the First Defendant on 8 November, 2007, the conversation being recorded in a file note of that date[30]. The letter sent to Mr Louis Mazloum on 25 October, 2007 had sought a response by that date.

30 As to the telephone conversation on 8 November, 2007, the evidence of Mr McDonnell is that Mr Elias Mazloum said, amongst other things, that:

- Matthew Kupper was a casual and therefore not entitled to annual

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[26] Exhibit 3, BM-1
[27] Exhibit 3, BM-4
[28] Exhibit 3, BM-4
[29] Exhibit 3, BM-5
[30] Exhibit 3, BM-7

leave;

- Matthew Kupper had walked in, provided his notice and left and that he did not work out his notice and therefore "owed them notice";
- Through an act of generosity he had given Matthew Kupper annual leave on one occasion;
- Read out a medical certificate stating that Matthew Kupper was "mentally incapable" of working. He said he had a sick leave certificate applicable to Mr Kupper that he wanted Mr McDonnell to view;
- That his gesture in employing Mr Kupper as an act of kindness was now a source of stress to him and his son;
- Raised a WorkCover issue in relation to the Mr Kupper;
- In response to Mr McDonnell saying that a rate of $14 per hour for all hours worked including weekends and public holidays did not seem valid, he said, *"No, its because we are Federal"*[31].

31 Mr McDonnell further says that he attended Sofia's restaurant in South Morang on 18 December, 2007 and spoke to Louis Mazloum, providing him with a Notice to Produce Documents in relation to Mr Kupper's employment, addressed to Mr Louis Mazloum[32].

32 At that meeting, Mr McDonnell says Mr Mazloum told him that he was "disappointed that Matthew Kupper had made a claim" and that he (Matthew Kupper) was "sick in the head". Mr McDonnell says Mr Mazloum told him that "he only employed MK as his mother had made representations on his behalf" and that he had "felt sorry for MK".

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[31] Exhibit 3, BM-7

[32] Exhibit 3, BM-9

33 When questioned regarding an apprenticeship for Mr Kupper, Mr McDonnell says Mr Mazloum told him that "MK had commenced as a Kitchen Hand trainee" but that he "was incapable of cooking", that the traineeship was "not a success". Mr McDonell says, when asked about the underpayment, Mr Mazloum said that "the company would not pay MK" and that he "was not owed anything". When asked how they established what rates to pay their staff, Mr McDonnell says Mr Mazloum told him "this was all done by their accountant"[33].

J. Sabri & Associates, Accountants

34 Mr McDonnell's evidence also refers to discussions and correspondence with Mr Sabri, of James J Sabri & Associates Pty Ltd, accountants for South Morang Restaurant Pty Ltd. Mr Sabri was not called to give evidence in the proceedings. Counsel for the Plaintiff submits that this evidence is admissible as an exception to the hearsay rule, by reason either that it constitutes a business record or as evidence of adverse admissions made by an agent, acting for and on behalf of the defendants.

35 For the reasons that follow, I do not consider the evidence regarding discussions with Mr Sabri or correspondence from his firm admissible as falling within an established exception to the hearsay rule.

36 As to the issue of agency, the question is whether the making of the admission fell within the scope of the agent's authority to act on behalf of the party. In this case, the correspondence from the firm refers only to acting for South Morang Restaurant Pty Ltd[34]. There is no reference to either of the defendants in the correspondence and no reference to the person who, from the company, is providing the accountant with instructions to act. Relevantly, at the time of the discussions and correspondence, the enquiries to which Mr Sabri and his firm are responding relate to underpayments by the company.

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[33] Exhibit 3, BM-10
[34] See for instance, Exhibit 3, BM-18

There is no suggestion the plaintiff is investigating the conduct of the defendants, as possible accessories, at this time. I am not persuaded the evidence establishes the accountant, in making admissions, had authority to do so for and on behalf of the defendants.

37 The business record exemption does not apply to representations prepared or obtained for purposes relating to actual or contemplated litigation. As these records were clearly prepared/obtained during the course of an investigation by the WO leading to litigation, they do not fall within the business record exemption: *Evidence Act (Vic) 1958:* s55 (4)

Analysis of evidence of Mr Mazloum

38 Mr Mazloum, in his evidence, denies having any conversation with Mr McDonnell prior to the meeting on 18 December, 2007. Specifically, he denies speaking to Mr McDonnell on the telephone on 25 October, 2007 or receiving the letter addressed to him dated 25 October, 2007 or spoking to Mr McDonnell on 8 November, 2007. He admits meeting with Mr McDonnell at the restaurant on 18 December, 2007. However, he says at that point he told Mr McDonnell that that he had he was "not the man he should be talking to"[35]. Under cross-examination, he says he told Mr McDonnell that he should speak to his brothers John and Ray as "they were in charge".

39 Under cross-examination, Mr Mazloum vehemently denied having received any breach notices or sending any notices to Mr Savri, or indeed being requested by his brother to do so. However, when directly questioned about evidence contained in his Affidavit[36] and in particular, paragraph 13.13 where he expressly states his brother Ray gave him a copy of the Breach Notice and asked him to send it to J Sabri & Associates, he said he had not recalled this. Mr Mazloum then sought to explain this evidence, by stating he had not read the letter or provided instructions to Mr Sabri. His evidence was inconsistent

[35] Exhibit J, parap 13.8
[36] Exhibit J

on this issue. When this was pointed out, his evidence was no more than self-serving and, in my view, lacking in credibility.

40 Critically, Mr Mazloum says he told Mr McDonnell that he had "nothing to do with Matthew Kupper and his wages". Under cross-examination, Mr Mazloum told Mr McDonnell to "speak to Ray and John as they employed Matthew Kupper and set his pay". He says he told Mr McDonnell that he told him he was "just a pizza maker". Neither of these assertions were put to Mr McDonnell in cross-examination.

41 Mr Mazloum initially denied saying Mr Kupper was "sick in the head" but subsequently conceded he may have said this "as a joke". Under cross-examination, he said he know nothing about aspects of the conversation recorded in the notes of Mr McDonnell on 18 December, 2007 in particular, regarding the apprenticeship or that he had said Mr Kupper was "not owed anything", saying "what would I know".

42 However, for the reasons that I now give, I find Mr Mazloum's evidence in general and his denial of any discussion with Mr McDonnell prior to 18 December, 2007 in particular, to be implausible and indeed, fabricated for the purpose of down-playing his involvement in the employment of Mr Kupper. I find Mr Mazloum's repeated assertion that he was "only the pizza maker" falls within this category of improbable evidence.

43 First, I find it more probable than not, that Mr Mazloum received and read the letter dated 25 October, 2007 addressed to him and that her responded by contacting the WO by the date advised in the letter, 8 November, 2007. Second, I accept the evidence of Mr McDonnell, as evidenced by his contemporaneous notes, that there is a "continuity of understanding" of the status of the investigation and a consistency in response during each of the conversations he says he had with the First Defendant. I find Mr Mazloum's evidence that he had no contact at all with Mr Mcdonnell and that it may have

been his brothers pretending to be him, wholly without credibility.

44 On this issue, and more relevantly, as to the assertion that it was variously John Mazloum or Ray who ran the restaurant, Mr Mazloum did not call either to give evidence in these proceedings. Counsel for the Defendants submits that the failure to do so is explicable on the basis that to call these witnesses would be to expose the brothers to potential prosecution under the WR Act. Further, the First Defendant says there has been a breakdown in the relationships between the family members[37] and accordingly, he elected not to call either John or Ray Mazloum.

45 In my view however, it was clearly for the Defendants to call these witnesses. On the account of Mr Mazloum, both would have had a close knowledge of the facts surrounding the employment of Mr Kupper. If the Defendants had subpoenaed John and/or Ray Mazloum to give evidence it is open to them to raise any privilege against self-incrimination. Presently, the explanations given by Mr Mazloum are no more than self-serving statements that, in the absence of the witnesses, are impossible to test. I therefore find, in accordance with the rule in *Jones v Dunkel*[38], that it is open to infer that any evidence either John or Ray Mazloum could have given would not have assisted the defendants' case.

46 On the balance of the evidence, I accept the evidence of Mr McDonnell as to the accuracy of his accounts of his conversations with the First Defendant.

47 In many aspects the evidence of these discussions corroborate the evidence of Mr Kupper. For instance, Mr Mazloum's refers to Mr Kupper's WorkCover claim, receipt of sick leave certificates and of having received notice from Mr Kupper, all of which are consistent with Mr Kupper's evidence of having provided these documents to "Louis". They are certainly inconsistent with Mr Mazloum's evidence he did not have "much to do" with Mr Kupper and only

[37] Exhibit J, paragraph 6
[38] (1959) 101 CLR 298

spoke to him occasionally, to say "hello" or "goodbye". To the extent the evidence is consistent with that of Mr Kupper, I consider it bolsters his credibility as a witness.

48 There is no doubt that for much of the period of Mr Kupper's employment with the employer, neither the First or Second Defendant were directors of South Morang Restaurant Pty Ltd. However, the wording of s728 does *not require* such a finding. Clearly some directors have a greater involvement in the business operations of a company than others. The critical question is whether the First Defendant was "involved" in the contravention, that is, whether he had knowledge of the essential elements of the contravention.

49 In my view, the overwhelming weight of the evidence supports a finding, on the balance of probabilities, that the First Defendant was "involved" in the contravention at the relevant time for the purposes of s728 of the WR Act. I find that he had actual knowledge of the fact of Mr Kupper's employment, including his status as a casual employee, the circumstances in which he came to be employed, his rate of pay and hours of work. I find, contrary to Mr Mazloum's assertion that he was only a pizza maker at the restaurant, that he was responsible for the overall direction of the restaurant, including management of the employer's operations.

50 I further find that Mr Mazloum was aware of the fact the employer was legally obliged to pay its employees, including Mr Kupper, minimum entitlements set by industrial awards/instruments and legislation, noting in particular his reference to being "Federal" and the evidence of his understanding of other regulatory obligations, such as WorkCover, payslips, apprenticeship arrangements, and Group Certificates. Moreover, there is evidence, which I accept, that the First Defendant was, at best, wilfully blind as to his obligations under industrial instruments/legislation in relation to the rates applicable to Mr Kupper, particularly having regard to his comments regarding Mr Kupper's cognitive and work capacity. A clear inference can be drawn from the

evidence that the First Defendant considered Mr Kupper's remuneration to be commensurate with his skills and ability.

51 I find that the First Defendant was knowingly involved in the contravention and liable, pursuant to s728(1) to be treated as having contravened the civil remedy provision of the WR Act.

Maissaloun ("Mais") Mazloum

52 In my opinion, the position of Mr Maissaloun Mazloum can be contrasted with that of his father, Mr Elias Mazloum. Mr M Mazloum gave evidence in the proceedings. His Affidavit sworn on 21 September, 2009 is also in evidence[39].

53 Whilst there is certainly evidence, which I accept, of Mr Mazloum being involved in the initial employment of Mr Kupper at Wheeler's Hill in 2002, at its highest the evidence is that it was the First Defendant and not the Second, who determined to employ Mr Kupper.

54 Thereafter, it is not disputed on the evidence that Mr M Mazloum held the position of chef in the kitchen at South Morang following its opening in 2004, and following his return from Lebanon in February, 2004[40]. Mr Mazloum's evidence is that he became Head Chef with responsibility for running the kitchen. It is clear that at this point Mr Kupper was working in the kitchen. Mr Mazloum says staff would tell him "if they were ill or going to be away and the like and I would have general discussions with them about those types of matters that affected the daily running of the kitchen"[41]. It is consistent with that evidence that Mr Kupper says the Second Defendant would tell him what duties to undertake and would ask him to work overtime. I also find that, consistent with the evidence of Mr Kupper, the Second Defendant would advise him of pay increases, although I do not accept as reliable Mr Kupper's evidence, in cross-examination, that Mr Mazloum said "I have decided to give

[39] Exhibit C
[40] Passport of the Second Defendant, ExhibitD
[41] Exhibit C paragraph 6

you a pay rise".

55 The plaintiff also relies on conversations between Mr McDonnell and Mr M Mazloum as demonstrating a more fundamental involvement on the part of the Second Defendant regarding Mr Kupper.

56 The first conversation is evidence of Mr McDonnell, adopted by Mr Kupper in his Affidavit[42], that Mr Kupper rang him to say he received a phone call from the Second Defendant in October, 2007 in which he is alleged to have said words to the effect, *"you think you are going to get money? You are getting nothing?"* Even if I was to accept this evidence as reliable (about which I am hesitant, noting that the only reference to this conversation in the evidence of Mr Kupper was his adoption of the entirety of Mr McDonnell's evidence in his Affidavit in response) it is not evidence of involvement in Mr Kupper's employment and could not form the basis to infer such involvement on the part of the Second Defendant, notwithstanding the unpleasant nature of the alleged conversation.

57 The second conversation, which is denied by the Second Defendant, but which I accept on the balance of the evidence occurred[43], is a telephone discussion also with the Second Defendant on 8 November, 2007 in which he is recorded to have confirmed that Mr Kupper worked regularly on weekends and public holidays and that he was paid about $14 per hour as a "casual first year apprentice". Again, I consider the evidence that Mr M Mazloum know of the working arrangement of Mr Kupper and of his hourly rate, consistent with his position as Head Chef at the time, but not evidence beyond that the level of involvement required to found to be knowingly involved in the contravention by the employer.

58 Unlike the First Defendant, Mr Kupper did not name Mr M Mazloum as his

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[42] Exhibit 2

[43] The file note at Exhibit 3, BM-7 refers to his son, Mace (sic) which is consistent with the conversation being with the Second Defendant and not the brother of the First Defendant, Mous.

employer or manager in his complaint to the WO. In contrast to the First Defendant, Mr M Mazloum's contact with the Workplace Inspector was minimal. He was not present when Mr McDonnell attended the restaurant in December, 2007. He did not make arrangements with Mr McDonnell relevant to the provision of information related to Mr Kupper. In contrast to the First Defendant, there is nothing to indicate that he was actively involved in the regulatory aspects of the employer's operations, such as assuming responsibility for WorkCover. Mr Kupper's evidence, which I accept, is that his WorkCover claim was provided to and discussed with the First and not the Second Defendant.

59 Finally, reliance is placed on a conversation between Mr McDonnell and the Second Defendant on 14 December, 2007 during which Mr Mazloum said words to the effect *"that they only employed him (Matthew Kupper) out of compassion. That he is mentally unfit for any work"*[44]. Again, this evidence is consistent with my finding of Mr M Mazloum's initial involvement in the employment of Mr Kupper in 2003, but cannot be relied upon to infer further involvement. Mr McDonnell says Mr M Mazloum said that *"he discusses with employees on what pay seems reasonable. He referred to Workchoices"*[45]. However, I note this comment was made in response to a recommendation by Mr McDonnell that Mr M Mazloum ring the WIL line to obtain information about Award rates generally, and that his response was correspondingly general, and not specific to Mr Kupper's employment.

60 In these proceedings, the Plaintiff bears the onus of establishing the requisite degree of involvement for accessorial liability to be established under s728 of the WR Act. In respect of the Second Defendant, I am not satisfied that the evidence establishes, on balance, that Mr M Mazloum was knowingly involved in the contravention by the employer in respect of Mr Kupper. The complaint against the Second Defendant is therefore dismissed.

[44] Exhibit 3, BM-8
[45] Exhibit 3, BM-8

Penalty

61 This court may impose a penalty in respect of a breach of an applicable provision by a person bound by the provision under s719(1) of the WR Act. An "applicable provision" includes a term the APCS and a term of an award: s 717 of the WR Act.

62 As discussed above, s728(1) of the WR Act provides that a person who is involved in a contravention of a civil remedy provision, such as s719 of the WR Act, is treated as having contravened that provision.

63 The maximum penalty that may be imposed on the First Defendant applicable to each of the breaches of the Award and the APCS, for the period on and from 27 March, 2006, is 60 penalty units[46]: s719(4) of the WR Act. The maximum penalty for each breach of the award or the APCS, for which the First Defendant becomes liable, is $6,600.00.

64 Relevantly to this case, s719(2) of the WR Act provides that where the breaches arises out of a course of conduct by the person, it is to be taken to constitute a single breach of the provision for the purposes of s719. In the Plaintiff's submissions as to Penalty, it is appropriately conceded that the First Defendant has the benefit of s719(2) of the WR Act in relation to each of the repeated breaches of the terms of the Award and the APCS[47]. As a consequence the maximum penalty that could be imposed on the First Defendant is $39,600 constituted by breaches of clauses 26.3.1, 26.2.1, 26.2.2 and 13.2.3 of the Award and breaches of s182(1) and s185(2) of the WR Act, as preserved terms of the APCS relevant to Mr Kupper's employment.

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[46] Section 4AA of the *Crimes Act 1914 (Cth)* defines a penalty unit to be $110.00

[47] See paragraph 5.3 and 5.4 of the Plaintiff's Outline of Submission on Penalty

65 In considering an appropriate penalty to impose in this case, I have had regard to the non-exhaustive list of factors summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*[48].

Nature and extent of the conduct

66 The First Defendant submits that he was "not personally liable for payment of Kupper's wages" and that 'the company assumed the employer was under a federal system". Moreover, that due to a lack of awareness of the full legal position, the employer lost the financial advantage of employing Mr Kupper under the Supported Wage System.

67 However, it is clear from my findings that the First Defendant was involved in the contravention by the employer under the WR Act irrespective of whether he was "personally liable" for payment of Mr Kupper's wages. Mr Mazloum was aware of Mr Kupper's cognitive impairment and, on my finding, was involved in the employer's decision to strike a flat hourly rate of pay it considered commensurate with his skills and ability.

68 In doing so, I find the First Defendant was at best, wilfully blind to the obligations of the employer to accord Mr Kupper the benefits of the Award and APCS, particularly as to shift and weekend penalties and allowances. It was this wilful disregard of the obligations of the employer that resulted in the employer not having the advantage of the Supported Wage System. Accordingly, I do not consider this a mitigating factor.

69 On the other hand, the Plaintiff submits that a relevant consideration is that the underpayment exceeded the relevant period of the proceeding[49] but that the liquidation of the employer, and the fact s728 only operates from 27 March, 2006, resulted in the individual Defendant obtained a significant

[48] [2007] FMCA 7 at [26]-[59], adopted by the Federal Court in *Kelly v Fitzpatrick* (2007) 166 IR 14 (Tracey J) amongst other authorities.

[49] The plaintiff submits the underpayments extended for the entire duration of Mr Kupper's employment, being from 2002, however it is clear from the evidence that South Morang Restaurant Pty Ltd became the employer of Mr Kupper from 1 July, 2004.

benefit. This benefit, it is submitted, derives from the limit that Mr Mazloum can be found to be in contravention of the WR Act, and also because the employer cannot be liable for the resultant underpayments.

70 However, in my view, in the absence of evidence as to the circumstances of the liquidation of the employer, and in particular, any suggestion that the First Defendant was involved in voluntary winding up of the company to avoid its obligations towards Mr Kupper, this cannot be a relevant consideration. Moreover, it cannot be an aggravating feature of Mr Mazloum's conduct that he only became liable, by operation of law, from 27 March, 2006.

Nature and extent of loss and damage

71 I do consider however, that the fact the underpayment of Mr Kupper, a young man with a clear intellectual impairment, occurred over the course of his employment with the employer, and particularly in circumstances where his disability was known to the First Defendant, is an aggravating feature of the contravention. There is no doubt that the underpayments (in the vicinity of $40,000 over the entire period of his employment) are significant, particularly for a young, vulnerable employee reliant on the safety-net of a minimum wage.

72 The submissions of the First Defendant urge the court to find that the failure by Mr Kupper or his family to raise any concerns regarding his rate of pay at an earlier time, denied the employer and Mr Mazloum an opportunity to rectify the loss.

73 In my view there is no substance to this submission for two reasons. First, the WR Act squarely places the obligation on the employer to comply with applicable awards/industrial instruments. To suggest that a failure by an employee, particularly one with an intellectual disability, to pursue underpayments could be a factor in mitigation is, in my view, fundamentally misconceived. Second, there is no evidence to suggest that once the

underpayment was brought to the attention of the First Defendant, he would have taken steps the rectify the loss on behalf of the employer. To the contrary, the evidence demonstrates that during the course of the WO's investigation, Mr Mazloum's attitude was that Mr Kupper was "not right in the head" and was paid a reasonable amount given his limited working capacity. When asked about the underpayment, Mr Mazloum's response was that "the company would not pay [him]" and that "he was not owed anything"[50]. There is nothing to suggest that if Mr Kupper or his family had raised the issue of pay earlier that his response would have been any different.

Similar previous conduct

74 The Plaintiff, in its submissions, concedes there is no evidence of previous contraventions of the WR Act or other industrial regulations by the First Defendant. The Plaintiff does, however, seek to rely on evidence of Mr McDonnell that the employer underpaid most of its employees, to various extents. It is contended that the First Defendant can be similarly found to be involved in these contraventions.

75 In the absence of evidence of the involvement of the First Defendant in any other alleged underpayments, I am unable to agree with this submission. My finding that Mr Mazloum was involved in the contravention is specific to the employment of Mr Kupper by the employer, and no other employee. I have proceeded on the basis that there is no evidence of previous similar conduct by Mr Mazloum.

Size of the business

76 In my view, this factor is most relevant where the penalty is to be imposed on the employer, and not an individual involved in the contravention. Save to say that the employer in this case was small, employing in the vicinity of 30 employees and is now in liquidation. Perhaps more relevantly, the Tax

[50] Exhibit 3, BM-10

Returns for Mr Mazloum for 2005/06 are in evidence[51], as is a spreadsheet of his current assets and liabilities[52]. This later document records that Mr Mazloum currently works as a barista in Toorak, with an estimated income of $3,000 per month, and with liabilities exceeding $110,000.00.

Contrition, corrective action, co-operation with authorities

77 In my view, consistent with my findings, there is no evidence of contrition on the part of the First Defendant. To the contrary, my findings are that the First Defendant has always sought to justify, inappropriately, the rate of pay as reasonable because he believed Mr Kupper had "mental problems"[53].

78 Whilst there is evidence that Mr Mazloum spoke with and meet with the Workplace Inspector in relation to his investigation, and indeed, referred the matter to the accountants acting for the company, there is no evidence of meaningful co-operation with the plaintiff, particularly by way of corrective action. To the contrary, the evidence of Mr McDonnell suggests that the First Defendant, at all times, sought to justify and defend his actions, including threatened claims and counter-claims (relating to notice, property damage) which did not materialise.

Specific and general deterrence

79 Given the importance of ensuring compliance with minimum standards prescribed by awards/industrial instruments, general deterrence is a significant sentencing consideration. The court is required to denounce in clear terms conduct by individual participants who are involved, as accessories, in contraventions of these minimum standards.

80 It is clear that in introducing the accessorial provisions into the WR Act, parliament sought to ensure that individual players who are knowingly

[51] Exhibits L & M
[52] Exhibit N
[53] Exhibit 3, BM-4

involved in a contravention are liable to face the penalty provisions of the Act, notwithstanding the fact the employer corporation may have afforded itself of the liquidations protections available under the Corporations Law.

81 As for specific deterrence, in the absence of any acknowledgement of wrong-doing, or contrition on the part of the First Defendant, it is appropriate that the penalty imposed on him act as a clear warning that it can never be acceptable, in employing staff, that decisions as to pay be solely determined by reference to his own assessment of that employee's skills and competencies, effectively undermining the safety net afforded by minimum standards. I note that Mr Mazloum has worked in the hospitality industry for a considerable period with his family and continues to do so, albeit presently as an employee.

Grouping of Contraventions

82 Again the Plaintiff appropriately concedes that there is a case for grouping or other reduction in the amounts assessed as appropriate penalties, given the overlap with each other and the potential punishment of the First Defendant for the same or substantially similar conduct, ie paying a "flat hourly rate of pay.

Penalty

83 The Plaintiff submits that the imposition of a penalty towards the middle to high end of the range is appropriate to this case.

84 Taking each of the above considerations into account, I order that the First Defendant pay an aggregate of $21,780 as a fair and reasonable pecuniary penalty in relation to the breaches identified, made up as follows:

- Breach of s182(1) – guaranteed basic periodic rate of pay - $4,195.00;
- Breach of s185(2) – guaranteed casual loading - $4,195.00;

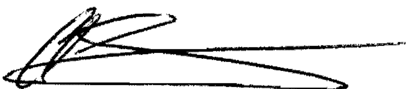
- Breach of clause 26.3.1 – failure to pay shift penalties - $4,195.00;
- Breach of clauses 26.2.1 and 26.2.2 – failure to pay rates applicable to Saturday and Sunday work - $5,000.00;
- Breach of clause 13.2.3 – failure to pay hourly rate for public holidays - $4,195.00.

85 Given the consideration already given to the overlap in obligations imposed by the award obligations and the provisions of s719(2) of the WR Act, I do not consider further reduction warranted in response to the totality principle.

86 As there is limited prospect of Mr Kupper recovering the underpayments through the South Morang Restaurant Pty Ltd (In Liquidation), I consider it appropriate to order that the penalty imposed on the First Defendant be payable to Mr Kupper pursuant to s841(b) of the WR Act.

ORDERS:

1. That an aggregate penalty in the sum of $21,780 be imposed on the First Defendant pursuant to s719(1) and 728(1) of the WR Act;
2. That the penalty referred to in Order 1 be paid to Mr Kupper (c/- the Plaintiff) pursuant to section 841(b) of the WR Act;
3. That there be a stay of 30 days on Orders 1 and 2;
4. That the complaint against the Second Defendant be dismissed.



A.J. CHAMBERS
30.3.2010.