FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v ESSENDENE SECURITY PTY LTD & ANOR *[2010] FMCA 384*

INDUSTRIAL LAW – Contravention of AWA requirements – delay in lodgement of one AWA – failure to pay NAPSA rates prior to lodgement – failure to pay 'fairness-test compensation' after termination of employment – involvement of sole director and manager – substantial mitigating circumstances – legislative changes – cooperation of person responsible – general and individual deterrence considered – discretion to impose no penalty – total penalties of $6,000 and $800 imposed on employer and director.

Fair Work Act 2009 (Cth)
Workplace Relations Act 1996 (Cth), ss.326, 333, 340, 345, 346M, 346R, 346ZD, 347, 718, 719, 722, 728, 841, Part 8 Div 5A, Sch.8 Part 3.
Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth)

Australian Ophthalmic Supplies Pty Ltd v McAlary Smith (2008) 165 FCR 560, [2008] FCAFC 8
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd [2007] FCA 1607
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39
Construction, Forestry, Mining and Energy Union v Williams (2009) 262 ALR 417
Fair Work Ombudsman v McGrath [2010] FMCA 315
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Plancor Pty Ltd v LHMU (2008) 177 IR 243
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Torpia v Empire Printing (Australia) Pty Ltd [2009] FMCA 853
Workplace Ombudsman v Securit-E Holdings Pty Ltd (2009) 187 IR 330

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ESSENDENE SECURITY PTY LTD (ACN 101 744 576)
Second Respondent:	JOHN RICHARD RYAN

File Number:	SYG 3101 of 2009
Judgment of:	Smith FM
Hearing date:	13 May 2010
Delivered at:	Sydney
Delivered on:	11 June 2010

REPRESENTATION

Counsel for the Applicant:	Ms L Andelman
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr M Easton
Solicitors for the Respondents:	Steven T Parrott

ORDERS

(1) There is imposed on the first respondent pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ('the Act') a penalty in the amount of $1,000 for its failure to pay night shift loadings to Robert Wright in relation to the period 22 January 2008 to 26 March 2008 in accordance with subclause 21.3 of the Security Industry (State) Award (NSW) ("the Security NAPSA").

(2) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $1,000 for its failure to pay overtime to Robert Wright in relation to the period 22 January 2008 to 26 March 2008 in accordance with subclause 22.1.1 of the Security NAPSA.

(3) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $1,000 for its failure to pay Sunday loadings to Robert Wright in relation to the period 22 January 2008 to 26 March 2008 in accordance with subclause 22.1.2 of the Security NAPSA.

(4) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $1,000 for its failure to pay Saturday loadings to Robert Wright in relation to the period 22 January 2008 to 26 March 2008 in accordance with subclause 22.1.1 of the Security NAPSA.

(5) There is imposed on the first respondent pursuant to s.719(1) of the Act a penalty in the amount of $2,000 for its failure to pay fairness test compensation to Christopher Martin and Robert Wright in accordance with s.346ZD of the Act.

(6) There is imposed on the second respondent pursuant to s.728(1) of the Act four penalties of $200, totalling $800, for his involvement in the contraventions of the first respondent identified in orders 1 to 4 above.

(7) The penalties payable under the above orders must be paid to the Commonwealth pursuant to s.841 of the Act.

(8) The first respondent must pay to Christopher Martin the sum of $4036.47 pursuant to s.719(6) of the Act, plus interest on that sum up to judgment as agreed between the parties or determined by the Court.

(9) The first respondent must pay to Robert Wright the sum of $4,930.75 pursuant to s.719(6) of the Act, plus interest on that sum up to judgment as agreed between the parties or determined by the Court.

(10) The parties and Messrs Martin and Wright have liberty to apply in relation to the calculation of interest.

(11) These orders shall not take effect until 28 days after they are made.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3101 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

ESSENDENE SECURITY PTY LTD (ACN 101 744 576)
First Respondent

JOHN RICHARD RYAN
Second Respondent

REASONS FOR JUDGMENT

1. After working as an employee in the security industry, Mr Ryan commenced his own business in 1999 as a licensee of Sydney Night Patrol ("SNP"). The business was conducted by Essendene Security Pty Ltd ("Essendene"), of which Mr Ryan was the sole director and had the day-to-day management. He employed a small number of employees to assist in the business over the following years, until Essendene ceased to trade on 13 March 2009 for financial reasons. The company has not yet been de-registered, nor wound-up, nor passed out of the control of its director. Mr Ryan has continued working in the security industry as only an employee.

2. Mr Ryan now concedes that Essendene is liable for five breaches of the requirements on an employer under the *Workplace Relations Act 1996* (Cth), arising from its use of a form of AWA he downloaded from the SNP website, when employing two security officers in 2007 and 2008. He also concedes that he is a 'person involved' in those breaches within

s.728 of the Workplace Relations Act. I am asked to make orders imposing pecuniary penalties on each of the respondents under s.719(1) of the Workplace Relations Act. The maximum penalty which may be imposed in relation to one breach is $33,000 on Essendene, and $6,600 on Mr Ryan. I am also asked to order Essendene under s.719(6) to make payments to the two employees in relation to their outstanding entitlements. This relief is not sought against Mr Ryan, and the Court has no power to order him personally to compensate the employees for any loss of entitlements (see *Torpia v Empire Printing (Australia) Pty Ltd* [2009] FMCA 853 at [69]).

3. The hearing of the Fair Work Ombudsman's application was conducted upon a brief agreed statement of facts and some uncontested evidence from Mr Ryan. The evidence leaves some gaps in my understanding of the relevant circumstances, but this does not prevent my exercise of jurisdiction. Rather than repeating the agreed statement, I shall summarise the relevant events in relation to the two employees, Messrs Martin and Wright.

The circumstances of the breaches

4. Mr Martin was employed between 3 June 2007 and 6 October 2008. An AWA signed by him was lodged with the Workplace Authority on 27 September 2007. The AWA is not in evidence and there is no direct evidence as to the date when it was made, nor as to the date from which it governed his rates of remuneration after taking legal effect upon its lodgement (see s.347(1) of the Workplace Relations Act). It is not alleged that underpayment of wages to Mr Martin ever occurred by reason of Mr Martin being paid at rates provided under the AWA. Absent the AWA, Essendene would have been obliged to pay Mr Martin other rates of pay during the period of its operation under a 'notional agreement preserving' the Security Industry (State) Award (the "NAPSA") and under an Australian Fair Pay and Conditions Standard derived from the NAPSA (see Sch.8 Part 3 of the Workplace Relations Act).

5. Since Mr Martin's AWA was made after the commencement of the 'fairness test' on 1 July 2007, it became subject to the provisions of Division 5A of Part 8 of the Workplace Relations Act. These

provisions, and the whole scheme of AWAs under the Workplace Relations Act, were superseded after April 2008 by different industrial policies enacted in the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) and the *Fair Work Act 2009* (Cth).

6. Under the fairness test provisions, it was the duty of the Workplace Authority Director to consider the terms and circumstances of each AWA which was lodged, and decide whether it *"passed the fairness test"*. The considerations relevant to this decision were set out in s.346M:

> ***346M When does an agreement pass the fairness test?***
>
> *(1) A workplace agreement passes the fairness test if:*
>
> *(a) in the case of an AWA—the Workplace Authority Director is satisfied that the AWA provides fair compensation to the employee whose employment is subject to the AWA in lieu of the exclusion or modification of protected award conditions that apply to the employee; or*
>
> *(b) in the case of a collective agreement—the Workplace Authority Director is satisfied that, on balance, the collective agreement provides fair compensation, in its overall effect on the employees whose employment is subject to the collective agreement, in lieu of the exclusion or modification of protected award conditions that apply to some or all of those employees.*
>
> *Note: This section applies to a workplace agreement as varied in a corresponding way to the way in which it applies to a workplace agreement—see subsection 346B(3).*
>
> *(2) In considering whether a workplace agreement provides fair compensation to an employee, or in its overall effect on employees, the Workplace Authority Director must first have regard to:*
>
> *(a) the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in lieu of the protected award conditions that apply to the employee or employees*

under a reference award in relation to the employee or employees; and

(b) the work obligations of the employee or employees under the workplace agreement.

(3) In considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees, the Workplace Authority Director may also have regard to the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

(4) In exceptional circumstances, and if the Workplace Authority Director is satisfied that it is not contrary to the public interest to do so, the Workplace Authority Director may, in addition to the matters specified in subsections (2) and (3), also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee or employees when considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees.

(5) An example of a case where the Workplace Authority Director may be satisfied that it is not contrary to the public interest to have regard to the industry, location or economic circumstances of the employer is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.

(6) In deciding whether a workplace agreement passes, or does not pass, the fairness test, the Workplace Authority Director may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement.

(7) In this section:

***non-monetary compensation**, in relation to an employee, means compensation (other than an entitlement to a payment of money):*

> *(a) for which there is a money value equivalent or to which a money value can reasonably be assigned; and*
>
> *(b) that confers a benefit or advantage on the employee which is of significant value to the employee.*

7. In short, the Workplace Authority Director was required to compare the provisions of the AWA with any otherwise applicable 'protected award conditions' such as were found in a NAPSA, and to decide whether it provided 'fair compensation' for their exclusion or modification. The fairness of any exclusion or modification required assessments of 'monetary' and 'non-monetary' benefits to the employee, and of his or her 'work obligations' and personal and family circumstances. In 'exceptional circumstances', regard could also be taken of the 'industry, location or economic circumstances' of the employer.

8. The breadth of these considerations, and the subjective nature of the administrative decision required by the Director, makes it difficult to see how any employer could have been confident whether an AWA which removed or altered penalty rates under an award would, or would not, be accepted by the Director as having *"passed the fairness test"*.

9. Moreover, the legislation left the employer and the employee working under an AWA in a very difficult position in relation to the period before the Director made a decision. Rather than postponing or suspending the operation of the AWA pending the making of a decision, the terms of the AWA took immediate legal effect upon lodgement, and only 'ceased' to operate for future periods after an adverse decision. The cessation date was defined by s.346R as 14 days after the date of notification of the decision. That effect could be avoided by lodging a variation to the AWA within that period, and the varied AWA then became subject to a further decision under the fairness test. Upon an AWA ceasing to operate, the parties to the employment became bound by whatever industrial instrument had been excluded by the AWA, in relation to future periods of employment but not past periods. In relation to the employee's past period of employment under the terminated AWA, the Act gave the employee a statutory right to *"fairness test compensation"* accruing upon the making of an adverse

decision of the Director (see s.718(1)). This was calculated mathematically under s.346ZD as *"the amount of the shortfall"* between the total value of the excluded entitlements and the entitlements under the AWA, in respect of the period between the lodgement of the AWA and its cessation date.

10. An employer was, therefore, during the period taken by the Director to make a decision, bound only to pay the remuneration provided in the AWA, but was at risk that, if an adverse decision were made, he would then become bound to make a payment of compensation to the employee. The employee was at risk that an impecunious employer might not have made contingent provision in its accounts for a future compensation payment, and could not afford to pay the compensation when it accrued. These risks became compounded where, as in the present case, the Director took an inordinate time to make a decision.

11. It might appear cold comfort to such an employee that an employer's failure to pay compensation when it became due pursuant to s.346ZD was also a breach of *"an applicable provision"* of the Act, for which a civil penalty and judgment for the unpaid amount could be ordered against the employer under s.719. Such penalties are sought in these proceedings against Essendene and Mr Ryan.

12. Although this Court has in recent times considered a number of prosecutions involving small employers in the security industry, I would not assume that it was notorious in the industry during 2007 and 2008 that AWAs of the present type would not pass the fairness test, and that the employers should prepare themselves to make future compensation payments. If fairness test decision-making on other AWAs proceeded at the pace shown in the evidence in this case, then for a long period after the introduction of the fairness test, and long after it was superseded in March 2008 by a different 'no-disadvantage' test, many employers such as Mr Ryan might well have underestimated, or not appreciated at all, that they might become liable to make large compensation payments to their past employees. An employer in that position might appear to exhibit a lesser level of culpability for breaches of 'applicable provisions' conferring employee entitlements, by reason of non-payment of 'fairness test compensation' under s.346ZD, when compared with the culpability of an employer

who failed to pay employee entitlements legally accruing during the currency of an employment.

13. In the present case, Mr Ryan's state of mind as to the likelihood of his company's AWA not passing the fairness test was not shown in any evidence. Although he entered the witness box, it was not put to him – and there is nothing in the evidence upon which I would infer – that he was aware, or should have been aware, at any time prior to adverse decisions being made about the AWAs of Messrs Martin and Wright, that there was a likelihood that their AWAs would not pass the test, and that Essendene would become liable to pay them significant amounts of compensation. At most, I find that he might have been aware throughout that period that an uncertain 'fairness test' would be applied, and that from February 2008 he was made aware that this would involve, inter alia, comparing the AWA with the NAPSA.

14. Mr Martin's AWA was lodged on 27 September 2007. Presumably, notice of its receipt was sent by the Workplace Authority Director to Mr Ryan under s.345, but there is no evidence as to when this occurred, nor as to its terms. The first communication about the AWA shown in the evidence, is a letter dated 19 February 2008 addressed to Mr Martin. I assume that a similar communication was sent to Essendene. It was headed *"the fairness test will be applied to your Australian workplace agreement"*, and said:

> *The Fairness Test will determine whether the Agreement provides compensation to the employee for changing or removing any of the following protected conditions:*
>
> - *penalty rates, including for working on public holidays and weekends;*
> - *shift work and overtime loadings;*
> - *monetary allowances for employment related expenses, responsibilities or skills not included in the employee's rate of pay, and disabilities for performing certain tasks or working in particular conditions or locations;*
> - *annual leave loadings;*
> - *public holidays including substituted days and procedures for substitution;*

- *rest breaks; and*
- *incentive based payments and bonuses.*

Will the Fairness Test be applied to my Agreement?

The Workplace Authority has determined that the Fairness Test must be applied to your Agreement.

Other Requirements

This notice relates to whether the Fairness Test must be applied to a workplace agreement. It does not verify that an agreement complies with the other requirements of the Workplace Relations Act 1996, for example that it does not contain prohibited content.

Employers must also meet the minimum entitlements of employment contained in the Australian Fair Pay and Conditions Standard. Those conditions will apply where an agreement gives less favourable entitlements.

What happens now?

The Workplace Authority may contact you again for extra information that is needed to conduct the Fairness Test. This may include details of employee responsibilities, hours worked, pay or shift work rosters.

The Workplace Authority will inform you when the Fairness Test has been completed, whether or not your Agreement passed, and what to do if it has not passed. In the meantime, the Agreement continues to operate.

15. There is no evidence that the Director ever sought information from Essendene or from Mr Martin about their circumstances when they made the AWA, nor that the Director ever brought to Mr Ryan's attention any specific issues raised by s.346M upon which the Director might fail to be satisfied that it passed the fairness test.

16. Before the above letter was received concerning Mr Martin's AWA, Essendene had commenced to employ a second employee, Mr Wright, under the same AWA terms. His employment commenced on 22 January 2008 and lasted until 17 November 2008. The evidence is unclear when his AWA was actually signed so as to be 'made' within the terms of ss.326, 333(a), and 340(1). The AWA is not in evidence and I cannot detect whether its terms purported to govern Mr Wright's

employment from the date of its making or from the date of its lodgement. However, it is agreed between the parties that it was lodged on 27 March 2008, and that it operated to govern Mr Wright's terms of employment from that date and not earlier. I am not asked to consider whether this concession on the part of the respondents reflects a correct appreciation of the terms of the AWA and of the effect of s.347(1) of the Workplace Relations Act, which appears to make an AWA legally binding upon date of lodgement but with effect from any earlier date of commencement provided in its terms.

17. It is agreed that for the initial period of about two months until his AWA commenced, Mr Wright was legally entitled to be paid the rates of pay under the NAPSA. It is conceded that he was underpaid by Essendene during that period, because he was paid the rates provided in the company's AWA and not the NAPSA.

18. Mr Ryan gave the following evidence in his affidavit of 7 May 2010 explaining these underpayments:

> *13. I was late in lodging the AWA for Mr Wright as I had been working 10 hour days, 7 days a week and on attempting to lodge the AWA, my computer malfunctioned. I was of the opinion that the AWA would be approved and paid Mr Wright accordingly.*

This explanation was not challenged, nor explored in oral evidence.

19. Mr Ryan now concedes that Essendene is liable to four penalties under s.719(1) and (2) of the Workplace Relations Act for breaches of four terms of 'applicable provisions' of the NAPSA occurring between 22 January 2008 and 26 March 2008 in relation to Mr Wright's wages, being cl.21.3 requiring a 30% night shift loading, cl.22.1.1 requiring a 50% overtime loading, cl.22.1.1 requiring a 50% Saturday loading, and cl.22.1.2 requiring a 100% Sunday loading. These breaches resulted in total underpayments to Mr Wright of $2,775. The underpayments are not currently outstanding, since in my opinion they should be taken to have been paid from instalments made after Mr Ryan became aware of the breaches.

20. Mr Ryan concedes that he is also personally liable for penalties by reason of these breaches, as a person involved in the contraventions under s.728 of the Workplace Relations Act.

21. Returning to the history of the assessment of the AWAs of Messrs Martin and Wright under the fairness test, there is no evidence of any relevant communication from the Workplace Director to Essendene or to Messrs Martin and Wright about the application of the fairness test to their AWAs prior to Mr Martin ceasing his employment on 6 October 2008, other than the 19 February 2008 letter extracted above.

22. A letter was sent to Essendene dated 27 October 2008 concerning Mr Wright's AWA, which was headed *"the fairness test will be applied to your Australian workplace agreement"*. This was in the same terms as the letter sent in February concerning Mr Martin's AWA, i.e. indicating that the AWA remained operative and giving little insight into how the AWAs might be assessed under s.346M of the Act.

23. In email correspondence during October 2008, Mr Ryan appears to have been told that consideration was being given to Mr Martin's AWA. Mr Ryan was fully cooperative, and provided detailed information when requested, including the information that Mr Martin had left his employment. On 4 November 2008, Mr Ryan returned to the Director's office by fax, a form of acknowledgement that the AWA had already *"stopped operating due to termination of the employment relationship"* and that *"I ... will pay the applicable back pay within 14 days of the notice informing me that the agreement did not pass the fairness test"*. It is unclear whether at that time he was told to anticipate that an adverse decision was about to be made.

24. A notice of an adverse decision on Mr Martin's AWA was sent to Mr Ryan, by letter dated 5 November 2008. It appears to be a form letter, which suggested that Essendene had not provided *"sufficient information"* and that *"without this information, the Workplace Authority cannot be satisfied that fair compensation has been provided for the removal or modification of protected conditions"*. No details of any inadequacy of the information supplied by Mr Ryan were given, nor were any better reasons for an adverse decision under s.346M ever provided.

25. By letter dated 9 January 2009 from the Workplace Ombudsman, Mr Ryan was told that compensation might be payable to Mr Martin, and he was requested to provide details of rosters and pay sheets to allow this to be calculated. Mr Ryan responded by letter dated 21 January 2009, enclosing this documentation and also presenting meticulous calculations of the differences in rates under the AWA and the NAPSA in relation to Mr Martin's employment. The accuracy of these calculations was accepted, and is not challenged before me. Mr Ryan's covering letter said:

> *When I received your previous letter of the 5 November 2008, I contacted Christopher Martin and spoke to him about your letter. We came to an agreement that he would receive the sum of $200.00 (after tax) each week, until any outstanding moneys ($15,982.20) has been repayed, as the company could not repay that amount in full at that time. I had calculated the differences between the Award and the AWA. A copy of the resultant calculations are included, along with a copy of Award rates, pay slips and time/pay books.*

26. The agreed instalments of compensation to Mr Martin had already commenced on 1 December 2008, and continued until Essendene ceased business in March 2009. This event, and the company's intention to de-register, was confirmed to a Workplace Inspector by the company's accountant on 4 May 2009. Mr Ryan gave evidence, which I accept, that he returned to paid employment in the security industry, and has been struggling to pay the outstanding debts of his company as well as his personal creditors.

27. On 5 May 2010 Mr Ryan paid $4,000 to Mr Martin from his own savings. According to Mr Ryan's affidavit of 12 May 2010, a balance of 'fairness test compensation' remains owing from Essendene to Mr Martin in the amount of $4036.47. I accept Mr Ryan's evidence that he has discussed this with Mr Martin, and told him *"hopefully that more would be coming in time to come"*.

28. Similar events occurred in relation to the 'fairness test' assessment of Mr Wright's AWA. His employment terminated on 17 November 2008, before any decision was made by the Workplace Authority Director. A letter to Essendene dated 22 December 2008, followed the previous form of notice of an adverse decision under the fairness test. A letter

dated 17 February 2009 requested details to allow the calculation of a fairness test compensation amount. Mr Ryan was fully cooperative, and his calculations were not challenged. Meanwhile, Mr Ryan had explained his situation to Mr Wright, and from 3 February 2009 had commenced to pay instalments of $100, as agreed with Mr Wright, towards the underpaid NAPSA amounts and the fairness test compensation. The payments by Essendene stopped when it ceased business, but Mr Ryan recently paid Mr Wright $4,000 from his own savings and *"indicated that there would be more moneys coming"*. According to Mr Ryan's affidavit of 12 May 2010, a balance of $4,930.75 is outstanding from a total amount of $9,630.75 due to Mr Wright from Essendene.

The appropriate penalties

29. I must now consider how I should exercise the Court's power to impose penalties on Essendene and Mr Ryan in relation to five deemed breaches of 'applicable provisions' falling within s.719(1) as read with s.719(2) of the Workplace Relations Act. It is common ground that these breaches are constituted by the four NAPSA terms breaches in relation to Mr Wright's wages for his first two months of employment, and one breach of s.346ZD in relation to non-payment of 'fairness test compensation' to both Messrs Martin and Wright.

30. I accept the parties' agreement that there is a statutory aggregation of the two non-payments of compensation. This is because non-payment of a s.346ZD amount is deemed to be *"a breach of an applicable provision"* by item 5A under s.718(1). In the circumstances narrated above, I consider that the two breaches of this provision *"arose out of a course of conduct by"* the same person, so as to be *"taken to constitute a single breach of the term"* by force of s.719(2).

31. If I am wrong in thinking that the statutory aggregating provision applies, I would have arrived at the same conclusion as to the appropriateness of regarding the two non-compliances with s.346ZD as *"a single course of conduct"* for which it would be appropriate to impose only one penalty under general sentencing principles identified in *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417 at [14]-[19] and applied by their Honours at [25]-[26]

(see also *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [39]-[42]). It is appropriate to do this, since the liability of Essendene to pay the two fairness test compensation amounts arose from its reliance during 2007 and 2008 upon the same AWA, which operated lawfully throughout the employment periods of the two employees, and was only determined not to pass the fairness test after their employments had terminated. Essendene's general financial position at that time explains its inability to meet both these liabilities at the time required by s.346ZG, notwithstanding the desire of its director that it should do so. Taking into account the mitigating elements in the circumstances and the degree of culpability shown in Essendene's conduct, which I shall explain further below, I consider that the imposition of separate penalties for the two breaches of s.346ZD would result in a clearly disproportionate sentencing outcome.

32. I have also considered whether the general 'course of conduct' sentencing principle should result in the further aggregation of the five penalties for the four NAPSA breaches and the fairness test compensation breach. From one perspective, the NAPSA breaches at the start of Mr Wright's employment had no monetary consequences, since the decision that Mr Wright was entitled to fairness test compensation for the subsequent period while his AWA was in operation, meant that Essendene also became liable to pay the difference between the AWA and NAPSA rates for the remaining period of his employment. The delay in lodgement of the AWA therefore might appear to have had no consequence, since the same total amount would have become payable as fairness test compensation even if the AWA had operated from the commencement of Mr Wright's employment.

33. However, the NAPSA terms breaches occurring in January and February 2008 were different in nature to the fairness test compensation breach occurring the following year. They resulted in Mr Wright not receiving the remuneration which he was legally entitled to receive in the first two months of his employment, and this entitlement was subsequently in arrears until the breaches were noticed and remedied. The explanation for the oversight might be understandable, but in my opinion it reflects a degree of culpability which is different and more serious than that involved in failing to

comply with s.346ZD. I therefore do not consider that it would be appropriate to aggregate the NAPSA breaches with the s.346ZD breach. Nor, in view of the statutory aggregation of the breaches of separate terms of the NAPSA arising under s.719(2), do I consider it appropriate to further aggregate the penalties for the four NAPSA breaches.

34. I shall, however, take into account the overlapping circumstances of all the breaches when determining separate penalties for the five liabilities conceded by each of Essendene and Mr Ryan, and shall then consider the appropriateness of the overall sentencing outcomes under the 'totality' principle (see *Australian Ophthalmic Supplies Pty Ltd v McAlary Smith* (2008) 165 FCR 560, [2008] FCAFC 8 at [23], [71], and [94]-[101]).

35. Both counsel framed their submissions on penalty by reference to headings taken from the well-known list of sentencing considerations suggested in this area by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and summarised by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. As I have noted in previous cases, a list of considerations can guide, but is not a substitute for *"the unrestrained statutory discretion"* (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]). Ultimately, I must arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offence committed and also takes into account other sentencing considerations including deterrence (cf. Graham J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [54]).

36. I have taken into account all the matters pointed to in the headings and submissions addressed by both counsel. However, I consider that I can best explain my sentencing conclusions by summarising the considerations which I believe are most influential in the present case.

37. My above narration of the circumstances of the breaches points to strongly mitigating features in relation to both the NAPSA breaches and the fairness test compensation breach. These include:

- The NAPSA breaches concerned only one employee for a relatively short period. There is no evidence that it occurred in

relation to other Essendene employees, or reflected a general failing by its manager.

- The NAPSA breaches all arose from mistake or oversight of the relevant manager in attending to the making and lodgement of one AWA, whose terms were probably intended by both the employer and employee to have governed the employment. There was no deliberate flouting of the employer's obligations to pay legally effective rates of pay. The employee received the amounts he expected to be paid.

- The NAPSA underpayments to Mr Wright should be treated as having now been fully satisfied by the company and its director, and this occurred within a reasonable time after the oversight was detected, taking into account the financial positions of Essendene and Mr Ryan.

- The fairness test compensation breaches arose only after the two employments had terminated, and the employer had previously met all its obligations in relation to payments to the employees due under the AWAs while they were lawfully operating.

- There is no evidence that the employees, or Mr Ryan, or his company, anticipated or should have anticipated that the AWAs would not pass the fairness test, nor that they had any information allowing them to make an informed assessment of the risk that the AWAs would not be passed. There is no evidence suggesting that prudent employers generally, whether in the security industry or other industries, were encouraged by any government authority to make contingent provision in their accounts for future assessments of fairness test compensation, nor that prudent employers usually made such provisions during the period that the 'fairness test' scheme operated.

- The quantum of the fairness test compensation in relation to both employees was very substantially augmented by reason of the unexplained and inordinate delay of the Director of the Workplace Authority to investigate and decide whether the two AWAs passed the statutory test. Moreover, in the cases before me, the decision-making appears to have been deferred until long

after the 'fairness test' was superseded by the 'no-disadvantage test', and until the eve of legislation repealing the whole scheme of AWAs (the *Fair Work Bill 2008* (Cth) was introduced to Parliament on 28 November 2008).

- The employer operated a very small business in an apparently precarious financial position. The employer has ceased to trade, and its proprietor himself no longer trades or acts as an employer in the relevant industry or elsewhere. It appears quite possible, although the evidence does not allow clear findings as to the current financial positions of Essendene and Mr Ryan, that any substantial orders of the Court in relation to penalty and payment of outstanding monies by Essendene may cause the company to enter insolvency administration.

- The employer, and its sole director and manager Mr Ryan, were fully co-operative with the Workplace Ombudsman Inspectors investigating the matter. At no time did they dispute the breaches, and Mr Ryan provided fully satisfying calculations of NAPSA underpayments and the fairness test compensation amounts.

- There is no evidence suggesting that at any other time Mr Ryan, or any business associated with him, has ever been involved in another contravention of industrial legislation.

- After the commencement of the present application, Essendene and Mr Ryan did not contest the allegations. They promptly negotiated an agreed statement of facts, and were fully cooperative in seeking to minimise the expense to the public purse of the present proceedings.

- Mr Ryan negotiated and attempted to honour instalment commitments by Essendene to the employees, without any prompting by the Fair Work Ombudsman. He has himself in recent times made substantial personal payments to the two employees, notwithstanding that he is not personally liable for the NAPSA underpayments and the fairness test compensation amounts, and that no compensatory orders are sought against him in the present proceedings. I accept that he honestly believes that his personal financial position prevents his paying the full

amount, and that he intends to make future payments to the employees. There is no evidence that either of the two employees have expressed dissatisfaction with these responses.

38. In many civil prosecutions under industrial legislation, considerations of specific and general deterrence are highly significant, and point to the imposition of substantial penalties intended to deter the particular employer and other employers from allowing a repetition of the circumstances which gave rise to the liability. In the present case, the completely altered legislative environment, and the cessation of Mr Ryan and his company from involvement in any industry as an employer, suggest that considerations of deterrence carry little weight, at least in relation to the non-payment of fairness test compensation. Moreover, Mr Ryan's responses to the raising of the liabilities were generally appropriate. They do not require additional prompting by way of penalty, and should be encouraged on the part of other employers.

39. Assessing the overall culpability of the liabilities of Essendene and Mr Ryan, I consider that the NAPSA breaches did involve a degree of fault for which monetary sanctions are appropriately imposed on both Mr Ryan and his company. Small employers as much as large employers are expected to make themselves aware of their responsibility to ensure that their employees are being paid the current rates of remuneration which operate in law under Australian legislation. The adoption by Essendene of an AWA as the basis for its employment of Mr Wright carried with it the obligation to ensure that its legal operation was achieved by observance of the procedures of prompt execution and lodgement with the Workplace Authority. While I can understand that Mr Ryan might have been distracted from his obligations in this one instance, he admits that he was aware of the procedural obligations. In all the circumstances, I consider that penalties at the low end of the statutory ranges is appropriately imposed on both Mr Ryan and his company in relation to each of the NAPSA breaches. This will also send a message to employers of all sizes generally that their close attention to statutory formalities and procedures in relation to rates of pay is essential.

40. Weighing up the above considerations of culpability and deterrence, and taking into account relevant mitigating factors identified above, I have concluded that a penalty of $1,000 should be imposed on Essendene in relation to each of the four NAPSA breaches. I have concluded a penalty of $200 for each of those breaches should be imposed on Mr Ryan for his personal involvement in these breaches.

41. My mind has fluctuated whether any penalty is required to be imposed on either Essendene or Mr Ryan in relation to Essendene's failure to pay the fairness test compensation amounts to Messrs Martin and Wright when they became due 14 days after notice of the Director's decisions that their AWAs did not pass the fairness test. Notwithstanding that breaches are conceded, the Court has a discretion not to impose a penalty (see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607 at [13]).

42. The exceptional nature of many of the mitigating circumstances bearing on the s.346ZD contraventions, and the cumulative strength of all of those circumstances, tends to point to no penalty being imposed on either of the respondents. The imposition of penalties for this breach would appear to serve few of the objects of the current legislative regime, in relation to enforcement of the duties of employers to pay employee entitlements when they accrue. No entitlement equivalent to 'fairness test compensation' appears to exist under the current legislation. It is therefore difficult to see that any sentencing objective calls for a sanction to provide either general or special deterrence in relation to circumstances such as the present.

43. In this respect, I note that I was referred to the judgment of Raphael FM in *Workplace Ombudsman v Securit-E Holdings Pty Ltd* (2009) 187 IR 330, in which he imposed a penalty of $5,000 on a director of an employer, for its failure to pay fairness test compensation to six employees. His Honour adverted to the demise of this species of employee entitlement, but gave this consideration little weight:

> *Whilst the industrial relations climate in Australia has changed considerably since 2007 there is still a need to ensure that employers comply with their obligations whether statutory or under awards. It would be wrong to minimise a penalty in this*

case just because the statutory provisions under which it is levied have now been overtaken. Mr Ritchie continues to be an employer. He says that he has now taken note of his obligations. I am prepared to accept that, but I believe that the penalty that should be imposed in this case ought to provide him with a salutary reminder

44. I have given careful consideration to Raphael FM's reasoning in that case, and also to the warnings given in the Full Court that comparisons with sentencing outcomes in other cases may provide only an unhelpful distraction (see *Plancor Pty Ltd v LHMU* (2008) 177 IR 243 at [36] and [60]). Reference to the judgment in *Securit-E* suggests many factual distinctions between that case and the present, including the past and current situation of the employer and the number of employees involved. I am satisfied in the present case that Mr Ryan does not need a 'salutary reminder' to comply generally with obligations arising under industrial legislation. I doubt whether he will ever in the future again become, in effect, a sole employer in the security industry. I consider that his responses to the notification of Essendene's liability to make fairness test compensation were timely, appropriate, and reasonable in the circumstances shown in the evidence before me. I am unable to identify substantial culpability in the circumstances in which Essendene found itself unable to meet the liabilities to pay these amounts of compensation when they first arose. Above all, Mr Ryan has voluntarily made payments from his personal resources which reduce a substantial part of his company's liability, and he did so at a time when I accept that his personal finances are in disarray. It is reasonable to assume that he has also personally incurred the costs of employing legal representation in the present proceedings.

45. Taking the relevant mitigating considerations into account, I have decided that a penalty at the lower end of the range should be imposed on Essendene for its failure to pay the compensation amounts due to Messrs Martin and Wright within the statutory 14 day period. This will recognise that a strict liability was imposed on employers to comply with s.346ZD, but not on other persons involved in the breaches (see *Fair Work Ombudsman v McGrath* [2010] FMCA 315 at [19]-[27]). Notwithstanding Essendene's ceasing to be an employer in the industry and the intention of its proprietor that his company should be wound up, I consider that it is appropriate to impose a penalty on the employer

by way of general reminder to employers to be aware of, and to make appropriate provision for all employee entitlements, including those which are conditional and may only accrue after the termination of employment. I consider that in all the circumstances, a penalty on Essendene should be imposed in the amount of $2,000.

46. I consider that it is unnecessary and inappropriate to impose any penalty personally on Mr Ryan for his involvement in Essendene's failure to pay fairness test compensation within the period required by s.346ZD. This takes into account the generally mitigating circumstances of the contravention and of Mr Ryan's personal involvement in it. It gives particular weight to Mr Ryan's entirely appropriate responses to the occurrence of the breaches, and also, importantly, his voluntary personal payments to the employees, which considerably exceeded any amount of penalty which I might otherwise have imposed on him. In all the circumstances, I have decided not to impose a penalty on Mr Ryan in relation to his involvement in contraventions involving s.346ZD.

47. The total penalties imposed under my above reasoning are $6,000 on Essendene and $800 on Mr Ryan. I do not consider that these should be further reduced under the 'totality principle' on the principles explained in the authorities cited above.

48. Essendene should be ordered under s.719(6) to pay to Messrs Martin and Wright the outstanding balance of their entitlements, together with interest up to judgment under s.722. I note that the parties will be confirming the current balances, and expect to be able to agree upon the amounts of interest. I shall grant liberty to apply to the Court if they are unable to agree upon the calculations.

49. I consider that it is appropriate to order that the penalties should be paid to the Commonwealth pursuant to s.841 of the Workplace Relations Act, in circumstances where the proceedings have been brought by the Fair Work Ombudsman.

50. The parties agree that my orders should not take effect for 28 days after they are made.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: Michael Abood

Date: 11 June 2010 per: [illegible]