FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v FORTCREST INVESTMENTS PTY LTD ACN 070 865 824 *[2010] FMCA 18*

INDUSTRIAL LAW – Takeaway business underpaying an employee – also failing to provide the employee with pay slips and failing to keep adequate records of superannuation contributions – liability admitted – assessment of penalties.

Workplace Relations Act 1996 (Cth), ss.149(e), 178(20, 178(4) 182(1), 513, 208(2), 719(4), 846(2)
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)
Workplace Relations Regulations 2006 (Cth), rr.19.20, 19.13, 14.4, 19.21
Workplace Relations Regulations 1996 (Cth), r.132A, 131H
Retail Wholesale and Distributive Employees (NT) Award, cl.13, 21

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Kelly v Fitzpatrick [2007] FCA 1080
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union [2008] FCAFC 170
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Yardley v Betts (1979) 22SASR 108
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Alfred v Walter Contruction Group Limited [2005] FCA 497
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited (1997) 145 ALR 36
McDonald v R (1994) 48 FCR; 120 ALR 629
Mill v R (1988) 166 CLR 59; 83 ALR 1
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Fair Work Ombudsman & Bundy Meat Markets [2009] FMCA 994
Fair Work Ombudsman & Land Choice Pty Ltd [2009] FMCA 1255

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	FORTCREST INVESTMENTS PTY LTD ACN 070 865 824
File Number:	DNG 4 of 2009
Judgment of:	Terry FM

Hearing date:	4 November 2009
Date of Last Submission:	4 November 2009
Delivered at:	Darwin
Delivered on:	18 January 2010

REPRESENTATION

Counsel for the Applicant:	Mr Liveris
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr O'Loughlin
Solicitors for the Respondent:	TS Lee & Associates

ORDERS

IT IS DECLARED THAT:

(1) The Respondent has, by failing between 30 June 2003 and 28 March 2008 to pay Naomi Atkinson (the employee) the minimum wage and the District Allowance to which she was entitled contravened:

(a) S.149(e) of the *Workplace Relations Act 1996* in force prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act* 2005 ("the pre-reform Act") and s.182(1) of the *Workplace Relations Act 1996* ("WR Act");

(b) Clause 13 of the *Retail Wholesale and Distributive Employees (NT) Award* ("the Award");

(c) S.149(e) of the pre-reform Act and s.513 of the *Workplace Relations Act*; and

(d) Clause 21 of the Award.

(2) The Respondent has, by failing between 30 June 2003 and 28 March 2008 to provide payslips to the employee, contravened regulation 132A of the Workplace Relations Regulations in force prior to the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* ("the pre-reform Regulations") and Regulation 19.20 of the *Workplace Relations Regulations 2006* ("WR Regulations");

(3) The Respondent has, by failing between 30 June 2003 and 28 March 2008 to keep records of superannuation contributions made on behalf of the employee in accordance with the requirements of the regulations, contravened regulation 131H of the pre-reform Regulations and Regulation 19.13 of the WR Regulations.

IT IS ORDERED THAT:

(4) The Respondent pay a penalty of:

(a) $10,000.00 in respect of the contravention of s.149(e) and s.182(1) of the legislation (failure to pay a minimum wage or basic period rate of pay);

(b) $10,000.00 in respect of the contravention of s.149(e) and s.513 of the legislation (failure to pay a District Allowance);

(c) $1,100.00 in respect of its contravention of rr.132A and 19.20 of the regulations (failure to provide pay slips); and

(d) $1,100.00 in respect of its contravention of rr.131H and 19.13 of the regulations (failure to keep records of superannuation paid on behalf of the employee as prescribed by the legislation).

(5) The penalties referred to in (4) above be paid to the Commonwealth Consolidated Revenue Fund by 4.00pm on 18 April 2010.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT DARWIN

DNG 4 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

FORTCREST INVESTMENTS PTY LTD ACN 070 865 824
Respondent

REASONS FOR JUDGMENT

Introduction

1. On 30 June 2009 the Workplace Ombudsman commenced proceedings against the respondent seeking the imposition on it of civil penalties for alleged breaches of its obligations to:

   - pay its employee Naomi Atkinson the requisite minimum wage;
   - pay her a District Allowance;
   - provide her with pay slips; and
   - keep proper records of the superannuation payments it made on her behalf.

2. It was alleged that the breaches began on 7 January 2002 when Ms Atkinson's employment began, and continued until 28 March 2008 when she resigned. However the relevant legislation provides that an application for a civil penalty must be filed no later than six years after the date of an alleged breach. The Workplace Ombudsman therefore

sought to have penalties imposed for breaches which occurred between 30 June 2003 and 28 March 2008.

3. After being served with the application the respondent co-operated with the applicant in the preparation of an agreed statement of facts and the matter was listed on 4 November 2009 for submissions as to penalty.

4. Pursuant to an order made by consent on 16 September 2009 the Fair Work Ombudsman was substituted as the applicant in the proceedings.

Background facts

5. The following background facts are taken from the agreed statement of facts filed on 28 October 2009.

6. The respondent is a company which has been incorporated since 1995. At all material times it operated a takeaway shop, "Lips Café" in the Oasis Shopping Centre in Palmerston.

7. The respondent is a very small company. Ms Lisa Tchong has been its director since 2000, and her husband Mr Lip Heng The is the manager of the business.

8. On 7 January 2002 the respondent employed Ms Atkinson, then 19 years of age, to work in the business on a casual basis as a kitchen hand and food service attendant. Ms Atkinson's employment or at any rate the breaches of the relevant legislation continued until 28 March 2008.[1]

9. The respondent fixed on a rate of pay for Ms Atkinson by talking to other shop owners. No inquiries were made with any relevant authority or organisation about the appropriate rate of pay for Ms Atkinson.

10. Ms Atkinson's employment was in fact covered at all material times by the *Retail Wholesale and Distributive Employees (NT) Award 2000.* The minimum rate of pay for an employee of Ms Atkinson's

[1] In the Statement of Claim and in the Applicant's written submissions it is stated that Ms Atkinson ceased working for the respondent on 18 April 2008. In the Agreed Statement of Facts it is recorded that Ms Atkinson resigned on 28 March 2008, and the underpayments itemised in the Statement of Claim ceased on 28 March 2008. The book which is Exhibit C also records the last payment to Ms Atkinson by the respondent as having been made for week ending 28 March 2008.

classification was prescribed in cl.3 of the Award, and pursuant to cl.21 of the Award Ms Atkinson was entitled to be paid a District Allowance because of the location of the business in which she worked.

The underpayment of wages

11. As at 30 June 2003 when the breaches relevant to this application commenced, the respondent was obliged pursuant to s.149(e) of the *Workplace Relations Act* ("the WR Act") as it was in January 2001 (the pre-reform Act), to pay Ms Atkinson an hourly rate of pay which was at least equal to the minimum payable under the award.

12. As a result of the enactment of the *Workplace Relations Amendment (Work Choices) Act 2005* the respondent's obligations to pay Ms Atkinson a minimum wage changed as of 28 March 2006.

13. As of that date pursuant to s.208(2) of the WR Act the minimum terms and conditions of Ms Atkinson's employment were prescribed by:

    a) the *Retail Wholesale and Distributive Employees (NT) Award 2000*; and

    b) a preserved Australian Pay and Classification Scale derived from the award (preserved APCS).

14. Pursuant to s.182(1) of the WR Act the respondent was obliged to pay Ms Atkinson a basic period rate of pay for each of her guaranteed hours (in the case of Ms Atkinson being the number of hours which she was requested to and did work each week).

15. On every occasion between 30 June 2003 and 28 March 2006 the weekly amount the respondent paid Ms Atkinson was below the minimum wage or basic period rate of pay to which she was entitled.

The non-payment of a District Allowance

16. Pursuant to clause 21 of the Award, s.149(e) of the pre-reform Act and s.513 of the WR Act Ms Atkinson was entitled to be paid a District Allowance of 0.4368 cents per hour. At no time between 30 June 2003 and 28 March 2008 was Ms Atkinson ever paid the District Allowance.

The total underpayment between 30 June 2003 and 28 March 2008

17. Between 30 June 2003 and 28 March 2008 Ms Atkinson was underpaid, when wages and District Allowance are combined, a total $24,526.50 gross.

The provision of pay-slips

18. Pursuant to reg.132A of the *Workplace Relations Regulations 1996* in force prior to the enactment of the *Workplace Relations Act (Work Choices) Act* ("the pre-reform Regulations) and Regulation 19.20 of the *Workplace Relations Regulations 2006* ("WR Regulations"), the respondent was required to provide Ms Atkinson with a pay slip for each payment made to her.

19. The respondent kept a wages book which Ms Atkinson was obliged to sign each time she was paid but at no time between 30 June 2003 and 28 March 2008 was Ms Atkinson ever given a payslip.

The obligation to maintain superannuation records

20. Pursuant to reg.131H of the pre-reform regulations and reg.19.13 of the WR Regulations the respondent was required to keep records of the superannuation contributions made on behalf of Ms Atkinson.

21. The agree statement of facts records that the respondent "*failed to keep a record of the superannuation contributions made by the respondent on behalf of Ms Atkinson.*"

22. It was conceded that the respondent had in fact paid superannuation for Ms Atkinson, and during submissions on 4 November 2009 the respondent's counsel produced an exercise book containing some records in relation to Ms Atkinson's superannuation. The Applicant's counsel accepted that the book was not a recent invention.

23. The exercise book lists the amount paid to Ms Atkinson for each pay period, the tax withheld, net pay and, under a heading "Super (9%)" a single entry each quarter being the superannuation payable for that quarter.

24. The records do not comply with the regulations insofar as they do not include information about the amount actually paid from time to time, the date on which it was paid and the name of the fund to which it was paid.

Ms Atkinson's complaint and its investigation

25. Ms Atkinson lodged a complaint with the Workplace Ombudsman via the internet on 11 March 2008. On 28 March 2008 she resigned from her employment.

26. A Workplace Inspector had a number of meetings with Mr The, and as a result it was determined that Ms Atkinson had been underpaid an amount of $29,055.20 gross for the period 7 January 2002 to 28 March 2008. A Breach Notice was issued to Mr The.

27. At a subsequent meeting Mr The admitted to the Workplace Inspector that the respondent's record keeping was not good. He requested however that when calculating the underpayment it be taken into consideration that Ms Atkinson had received free meals, drinks of $10.00 per day provided to Ms Atkinson and additional benefits such as jewellery, used furniture and interest free loans.

28. Ms Atkinson stated that she only occasionally received free goods, and in any event it was explained to Mr The that the items he referred to could not be taken to have been accepted in lieu of wages.

29. On 7 July 2008 a final notice was issued to Mr The advising him that unless the respondent took action within seven days to rectify the breaches and pay Ms Atkinson the amount of $29,055.20 gross, the respondent might be subject to legal action seeking to recover the outstanding amount and seeking the imposition on it of penalties for breaches of the legislation.

30. The breaches were not rectified and nor was Ms Atkinson paid the outstanding amount rather on 1 August 2008 Mr The sent a letter to the Workplace Ombudsman enclosing an invoice to Ms Atkinson for $23,050.40 for meals, drinks and paid leave allegedly provided to her by the respondent throughout her employment.

31. On 5 September 2008 however Mr The participated in a record of interview and on 8 September 2008 he delivered to the office of Workplace Ombudsman a cheque for $25,597.00 which was the underpayment of $29,035.29 less tax of $3,458.29.

32. Mr The was advised that the Workplace Ombudsman reserved the right to take legal action to seek penalties in respect of serious breaches of the legislation. On 30 June 2009 the Workplace Ombudsman commenced legal proceedings seeking the imposition of civil penalties on the respondent.

The applicable penalties

33. Although the respondent committed multiple breaches of each of the provisions concerning the payment of a minimum wage, payment of the District Allowance, provision of pay slips and the keeping of adequate records of superannuation payments, s.719 of the WR Act and its predecessor s.178(2) of the pre-reform Act both state that:

> *"where:*
>
> *(a) 2 or more breaches of an applicable provision are committed by the same person; and*
>
> *(b) the breaches arose out of a course of conduct by the person;*
>
> *the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term."*

34. The parties agreed that the respondent had committed four breaches of the legislation, as follows:

a) failure to pay Ms Atkinson a minimum hourly rate of pay;

b) failure to pay Ms Atkinson the District Allowance;

c) failure to provide pay slips;

d) failure to keep the prescribed records in relation to superannuation paid on Ms Atkinson's behalf.

35. Pursuant to s.178(4) of the pre-reform Act, the maximum penalty which could be imposed for a breach of a term of an award (the failure to pay the minimum wage and the failure to pay the District Allowance) by a body corporate was $10,000.00 until 10 August 2004 and thereafter and until 28 March 2006 was 300 penalty units or $33,000.00.

36. Pursuant to s.719(4) of the WR Act, in force from 28 March 2006, the maximum penalty which can be imposed on a body corporate for failing to pay a minimum wage and failing to pay the District Allowance is also 300 penalty units or $33,000.00.

37. The failure to provide payslips and to keep records of superannuation payments are breaches of the WR Regulations.

38. Pursuant to reg.132A of the pre-reform regulations, the maximum penalty for the failure by an employer to provide a payslip was $1,000.00. The maximum penalty for failing to keep superannuation records was also $1,000.00.

39. Pursuant to reg.14.4 of the WR Regulations and s.846(2) of the WR Act the maximum penalty which may be imposed on a body corporate post 28 March 2006 for a contravention of the regulations is 50 penalty units or $5,500.00.

The applicant's submissions

40. The applicant relied on written and oral submissions.

41. The applicant submitted that the respondent, in failing to comply with its obligations the respondent acted with "*complete disregard and wilful ignorance as to its statutory obligations.*"

42. The respondent made no effort to find out about the correct rate of pay from any government authority, rather it simply made inquiries with other shopkeepers about the appropriate rate of pay. It made no inquiries about its record keeping obligations.

43. Ms Atkinson was 19 when she commenced employment with the respondent in January 2002 and as a result of her age and lack of experience in the workforce was a vulnerable employee.

44. Ms Atkinson was underpaid in an amount which (for the purposes of these proceedings) totalled $24,560.00 gross. The weekly amounts of the underpayments varied but Ms Atkinson was frequently underpaid amounts in excess of $100.00 per week gross, which were significant amounts for a low paid worker.[2]

45. The respondent did not immediately admit liability after the investigation commenced and it was not until nearly five months later, and three months after a final notice requiring payment was given to the respondent, that the underpayment was rectified. The respondent first attempted to avoid liability by delivering a bill to Ms Atkinson for $23,050.40 for meals, drinks and paid leave allegedly provided to her during her employment.

46. The respondent was certainly a small employer, but this did not absolve it from responsibility for complying with the law, nor should it be given any great weight when penalty was assessed.

47. The applicant submitted that specific deterrence was a relevant consideration. This was particularly so when there was no evidence that the respondent had improved its systems since the events which occurred between 2002 and 2008 and nothing to demonstrate that it now had a better understanding of its obligations as an employer.

48. General deterrence was also an important consideration in this case. It was of grave concern that the respondent had acted on information from other shopkeepers about its payment obligations which proved to be incorrect.

49. The applicant submitted that there should be no discount of penalty simply because the respondent had made good the underpayment in full and had admitted liability and saved the public the cost of a hearing, in circumstances where, in the applicant's view, the respondent had made no apology and shown no contrition.

50. The applicant submitted that a limited discount if any should be given to the respondent for its eventual admission of liability and rectification of the underpayment. It submitted that the offences were serious, and

[2] See detailed breakdown of underpayments in the schedule attached to the Statement of Claim filed on 30 June 2009

that the need for specific and general deterrence was strong, and that a mid-range penalty should be imposed for each of the four breaches.

51. Using as a yardstick the maximum penalty currently applying for each of the breaches, the applicant submitted that the penalties should be:

a) for failure to pay Ms Atkinson a minimum hourly rate of pay:

$10,000.00 to $15,000.00;

b) for failure to pay Ms Atkinson the District Allowance:

$10,000.00 to $15,000.00;

c) for failure to provide pay slips:

$2,000.00 to $3,000.00.

d) for failure to keep prescribed records in relation to superannuation:

$2,000.00 to $3,000.00.

52. On a summation of the above figures the total penalty applicable would be between $24,000.00 and $36,000.00.

53. The applicant conceded that the court needed to step back at this point and consider whether the total amount arrived at by a summation of the four penalties was disproportionate to the offence.

54. The applicant made no submissions about whether the penalty should be reduced by application of the totality principle but submitted that if the court was minded to reduce the penalty it should not be reduced below $20,000.00.

The respondent's submissions

55. The respondent did not file any affidavit material but filed written submissions and made oral submissions.

56. The Court was informed that the director and manager of the respondent were East Timorese refugees and had a poor command of English. The take-away business was their first business and it was

submitted that the failure by the respondent to pay Ms Atkinson the requisite minimum wage was due to simple ignorance, not to deliberate defiance of the law.

57. In written submissions it was said on the respondent's behalf that:

> *"As to the underpayment, the respondent had no knowledge of an applicable award or that there was regime which imposed minimum wages. The directors merely spoke with other shopkeepers to identify what was an accepted hourly rate to pay staff."* [3]

58. The respondent, it was claimed, did not "have the resources and means of a larger company to identify all the statutory requirements associated with employing staff."[4]

59. It was submitted that while the respondent did not provide payslips to Ms Atkinson, it did keep a wages book which Ms Atkinson signed on each occasion she was paid, and Ms Atkinson being aware of the book could have asked to inspect it at any time. In any event Ms Atkinson was provided with group certificates and therefore did not suffer any detriment as a result of the "technical breach" of failure to give her weekly pay slips.

60. The breach of the record keeping requirements in respect of superannuation was also a technical breach, as the respondent did keep some records and had paid the superannuation contributions.

61. The respondent submitted that its "record keeping was not excellent but was maintained on good faith and to the best of the respondent's ability."[5]

62. The respondent's counsel tendered an article from a local newspaper which made reference to the Court proceedings against the respondent, and submitted as follows:

> *"Note the Ombudsman's own press release indicated that more than 50% of the businesses did not comply with the Act. It is possible that all these businesses are flagrantly breaching the Act*

[3] Respondent's written submissions on penalty filed 4 November 2009 paragraph 25
[4] Respondent's written submissions on penalty filed on 4 November 2009
[5] Respondent's submissions filed 4 November 2009 paragraph 17

but the better theory is that a number of employees (sic), like the respondent, are simply not aware of the provisions."[6]

63. One inference contained in this submission as I understand it is that the respondent should not be singled out for harsh treatment when there is widespread non-compliance with the law. However the respondent also submitted that the publicity given to the proceedings to date had had adverse consequences for it and its office-holders already and that was a punishment in itself which should be taken into account when penalty was assessed.

64. It was submitted that the respondent had improved its systems and now paid award or above award wages, paid the District Allowance, kept proper records and provided payslips. It was submitted that the respondent had "*learned a lesson and will have to pay legal expenses.*"[7] It was submitted that there was "*no likelihood of the respondent re-offending.*"

65. The respondent admitted the breaches following the complaint to the Workplace Ombudsman and made payment to Ms Atkinson for the full amount of the underpaid wages from 7 January 2002 to 28 March 2008.

66. The amount attributable to unpaid District Allowance was quite small and the underpayment in this regard had also been rectified.

67. It was the respondent's case that it should get a discount for its admission of liability and co-operation in the preparation of an agreed statement of facts, which had saved the costs of a contested hearing.

68. The respondent submitted that a reprimand or a low fine would be appropriate.

Assessment of penalty

69. In *Mason v Harrington Corporation Pty Limited*[8] Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the

[6] Respondent's submissions filed 4 November 2009 paragraph 20
[7] Respondent's written submissions on penalty filed on 4 November 2009 paragraph 25
[8] *Mason v Harrington Corporation Pty Limited* [2007] FMCA 7 at [24]

imposition of a penalty, and if it does the amount of the penalty". Tracey J in *Kelly v Fitzpatrick*[9] adopted those considerations and described them as follows:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*
- *Whether the party committing the breach had cooperated with the enforcement authorities.*
- *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
- *The need for specific and general deterrence.*

70. There was no dispute about **the nature and extent of the conduct which led to the breaches.** Ms Atkinson was paid less than the requisite minimum wage or basic period rate of pay week in and week

[9] *Kelly v Fitzpatrick* [2007] FCA 1080 at [14]

out for the entire period covered by these proceedings, and was never paid the District Allowance. She was also never provided with a pay slip, and the superannuation records kept on her behalf do not comply with the legislation.

71. I do not accept the argument that the failure to provide pay slips was a technical breach, simply because there was a time and wages book which Ms Atkinson could have looked at if she had asked to do so.

72. The submission that the provision of a payment summary (called a group certificate by the respondent) somehow makes up for the failure to provide pay slips and also helps to render the breach a technical breach raises a concern that the respondent has still not had a look at reg.19.21 of the WR Regulations. That Regulation provides that the particulars which must be included on a payslip are:

> *(a) the name of the employer;*
>
> *(b) the name of the employee;*
>
> *(c) the date on which the payment to which the pay slip relates was made;*
>
> *(d) the period to which that pay slip relates;*
>
> *(e) if the employee is paid at an hourly rate of pay:*
>
> *(i) the ordinary hourly rate; and*
>
> *(ii) the number of hours in that period for which the employee was employed at that rate; and*
>
> *(iii) the amount of the payment made at that rate;*
>
> *(f) .....*
>
> *(g) the gross amount of the payment;*
>
> *(h) the net amount of the payment;*
>
> *(i) any amount paid that is an incentive-based payment, bonus, loading, monetary allowance, penalty rate or other separately identifiable entitlement the employee has;*

(j) the details in respect of each amount deducted from the gross amount of the payment including the name, or the name and number, of the fund or account into which the deduction was paid;

(k) if the employer is required to make superannuation contributions for the benefit of the employee:

(i) the amount of each contribution that the employer has made for the benefit of the employee during the period to which the pay slip relates, and the name of any fund to which that contribution was made; or

(ii) the amounts of contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name of any fund to which those contributions will be made.

73. The respondent did not keep superannuation records which complied with the legislation and I do not accept that the breach of the regulations in this regard were technical breaches.

74. As to **the circumstances in which the conduct took place**, Ms Atkinson was 19 years of age when she commenced employment with the respondent. It was submitted that she was a vulnerable employee, but there is some difficulty with this submission, as there was no evidence of Ms Atkinson's work history or personal circumstances, and some 19 year olds have already had three or four years experience in the workforce. I am not satisfied that there is evidence that would allow me to conclude that Ms Atkinson was an especially vulnerable employee.

75. As to **the nature and extent of any loss or damage sustained as a result of the breaches,** as a result of the respondent's conduct Ms Atkinson was underpaid every single week for a period of nearly four years (considering only the period relevant to these proceedings). On quite a number of occasions she was underpaid in excess of $100.00 gross, a significant amount for a low paid casual worker. The total underpayment of wages and District Allowance totalled $24,560.20 from the period 30 June 2003 to 28 March 2008.

76. There was no evidence that the failure to provide pay slips or the failure to keep adequate superannuation records had resulted in any loss or damage to Ms Atkinson. The superannuation contributions for Ms Atkinson were in fact paid, even though the records were not properly kept.

77. There has been no **similar previous conduct** by the Respondent.

78. As to **whether the breaches were properly distinct or arouse from one course of conduct**, the respondent argued in its written submissions that although there had been a breach of four different provisions of the workplace legislation, the breaches in their totality represented one course of conduct.

79. It was not made clear by the respondent's counsel whether the intent of this submission was to persuade the Court to impose one penalty rather than four penalties, but in any event I do not accept the submission

80. Certainly the four breaches all occurred in respect of one employee, they all covered exactly the same time span, and they all occurred in relation to the payment of wages and keeping of employment records for this one employee. However the respondent breached four separate and distinct provisions of the legislation and in my view it is entirely appropriate to treat the respondent as having committed four breaches of the legislation and not as having committed one course of wrongdoing.

81. This is not even a case where there is some overlap in the breaches. In particular, there is no overlap between the breach of the requirement that a minimum wage be paid and the breach of the requirement that the District Allowance be paid. These are quite separate obligations on an employer, as all employees doing the same work as Ms Atkinson are entitled to be paid a minimum wage, but only those working in certain locations are entitled to be paid the District Allowance.

82. As to **the size of the business enterprise involved**, the information available suggests that the respondent is a very small company. One director and one manager (husband and wife) were identified and it was not suggested that the respondent ran any businesses other than "*Lip's Cafe*" in Palmerston.

83. However in *Kelly v Fitzpatrick*[10] Tracey J observed that:

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

84. In *Rajagopalan v BM Sydney Building Materials Pty Ltd*[11] Driver FM remarked:

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

85. In my view however some regard must be had to the size of the respondent, because corporations range widely in size, from large listed companies such as BHP, which has levels of management and operations and employees all over Australia, to companies such as the respondent which is run effectively by two people and operates one small outlet. A penalty in an amount necessary to both punish and deter from re-offending a very large company could be excessively harsh if imposed on a very small corporation.

86. I must consider **whether the breaches were deliberate.**

87. The Applicant submitted that the respondent "*deliberately and intentionally*" underpaid Ms Atkinson. There was however no evidence that the Applicant underpaid Ms Atkinson well knowing that it was doing so.

88. It was however reckless in the extreme of the director and manager of the respondent, in circumstances where they had never run a business before and intended to set up business in a country with whose laws they were not familiar, to fail to make any inquiries with any relevant authorities about their obligations concerning paying employees and their record keeping obligations.

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[10] *Kelly v Fitzpatrick* (2007) 166IR 14

[11] *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27-29]

89. I must consider **whether the respondent has exhibited contrition**.

90. There was no evidence that the respondent had ever apologised to the Applicant, but it did, after some attempts in initial discussions with a workplace inspector to avoid its obligations, pay Ms Atkinson in full the amount she had been underpaid.

91. The respondent submitted that it was evidence of its contrition that it had no ill feeling toward Ms Atkinson and had given her a good reference when she applied for a job with Woolworths. Although this submission was perhaps not felicitously expressed, I take it to mean that the respondent accepts full responsibility for its actions in underpaying Ms Atkinson and failing to keep adequate records, and I am prepared to accept that the respondent has shown some contrition.

92. As to **whether the respondent has taken corrective action**, the respondent submitted that since the events of 2008 it had improved its record keeping practices and paid its employees at or above the award rate. There was no sworn evidence to support this submission but certainly there was no evidence of any ongoing concern by the authorities about the respondent's practices as an employer.

93. I must consider **whether the respondent cooperated with the enforcement authorities** and I am satisfied that in the end it did. Certainly this was not without letting some time pass and not without attempting to get out of the underpayments by making claims about Ms Atkinson having received free goods, but in the end Mr The took part in a record of interview and paid in full the not insignificant sum owing to Ms Atkinson.

94. I must consider **the need for specific and general deterrence** and in my view there is a need for both in this case.

95. The respondent's conduct occurred over a period of six and a half years (in reality) and over a period of nearly five years (the period with which these proceedings are concerned). Not once during that period did the respondent make any effort to acquaint itself with its obligations by means of recourse to an employer body or a government authority.

96. The respondent continues in business and it is important that a penalty be imposed at a sufficient level to deter the respondent from acting so recklessly in the future when it comes to properly acquainting itself with its obligations as an employer.

97. The need for general deterrence is also strong.

98. Many immigrants to Australia set up small businesses here and it is important that a penalty be imposed sufficient to deter other people in the director and manager's circumstances from acting in the same reckless fashion by failing to make any inquiries about their obligations as employers.

99. It is important that it be reinforced to all small business operators that they have an obligation to meet minimum requirements concerning pay and record keeping and cannot simply determine for themselves the amount they will pay or the records they will keep.

100. At the same time I bear in mind however the observations of Lander J in *Ponzio v B & P Caelli Constructions*[12] when he said:

> *"In regard to general deterrence it assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat."*

Conclusion

101. This Court and other Courts have handed down many decisions in recent times imposing penalties on employers for breaches of the requirement to pay a minimum wage. The applicant's counsel referred me to some of those cases. However while it is desirable that there be consistency between decisions, the factual circumstances in the reported cases vary widely.

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[12] *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543

102. For example in *Fair Work Ombudsman & Bundy Meat Markets*[13] for example a decision handed down on 8 October 2009, Jarrett FM imposed a penalty of $13,000.00 on a company for failure to pay one employee a minimum wage. Other penalties were imposed for breaches of other provisions of the legislation.

103. The company had been operating two butcher's shops. The total amount underpaid was $1,272.92 and the underpayment occurred over a period of about fourteen months. The underpayment had been drawn to the company's attention while the employee was still employed but it had failed to correct the situation. It had not made good the underpayment (or paid other entitlements which were owed to the employee) although two years had passed since the employee had ceased his employment and since an investigation had commenced, and its officers were not especially co-operative with the regulatory authorities. No previous civil penalty contraventions were alleged.

104. In *Fair Work Ombudsman & Land Choice Pty Ltd*[14] a decision handed down on 17 December 2009, Barnes FM imposed a penalty of $8,000.00 on a company which failed to pay one employee a minimum wage. Again, other penalties were imposed for breaches of other provisions of the legislation.

105. The company ran a real estate business and had about six employees. The employee in question was to all intents and purposes not paid at all during a period of six months and the total underpayment was $20,119.07. Only $5,000.00 of the underpayment had since been paid to the employee, although two years had passed.

106. FM Barnes considered that the underpayment had arisen out of a reckless breach of the legislation (the employee was wrongly treated as an independent contractor rather than an employee). She had regard to the fact that the company had shown contrition and had co-operated with the authorities. No previous civil penalty breaches were alleged.

107. As Moore J pointed out in *Rojas v Esselte Australia Pty Ltd (No.2)*:

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[13] *Fair Work Ombudsman & Bundy Meat Markets* [2009] FMCA 994
[14] *Fair Work Ombudsman & Land Choice Pty Ltd* [2009] FMCA 1255

> *"while general guidance as to the appropriate penalty may be obtained through an analysis of comparable cases, it remains necessary for the Court to give careful consideration to the circumstances of the case before it (see also Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560 at [12] per Gray J).*

108. In the particular case before me, considerations which weigh in favour of penalties at the lower end of the range being imposed are that the respondent has committed no previous civil penalty breaches, that it is a very small corporation and therefore even a modest penalty may be a significant punishment and deterrent, it has suffered some punishment already in the form of legal fees and adverse publicity, it has after a fashion shown contrition and that it has (significantly in view of the difficulty which seems to arise with this in many other cases) paid in full the amount of $25, 597.00 owing to Ms Atkinson.

109. Considerations which weigh in favour of a much higher penalty being imposed however are that the conduct continued for nearly five years, indeed continued until Ms Atkinson made a complaint to the Workplace Ombudsman. The underpayment of wages and District Allowance had a significant impact on Ms Atkinson each and every week during that period. There is some need for specific deterrence and there is a strong need for general deterrence, and in order to achieve the objective of general deterrence in particular a penalty must be imposed at a meaningful level.

110. In my view the appropriate penalties for the failure to pay the minimum wage and the failure to pay the District Allowance should be:

a) for failure to pay the minimum wage :$10,000.00;

b) for failure to pay Ms Atkinson the District Allowance:

$10,000.00;

111. Penalties for the record keeping failures were relatively low for the first three years of the five years of the offending and currently stand at a maximum of $5,500.00. In light of the differences in the penalty during the relevant period in my view an appropriate penalty would be 20% of the current maximum, or:

a) for failure to provide pay slips:

$1,100.00;

b) for failure to keep prescribed records in relation to superannuation:

$1,100.00.

112. This would equate to a total penalty of $22,200.00.

113. I am required to consider the totality principle. In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited*[15] Goldberg J expounded on this principle as follows:

> *"The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: McDonald v R (1994) 48 FCR 555; 120 ALR 629. But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In Mill v R (1988) 166 CLR 59; 83 ALR 1 the High Court accepted the following statement as correctly describing the totality principle:*
>
> > *The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence*

[15] *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (1997) 145 ALR 36 at [53]

which the arithmetic produces. It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences".

114. This approach was endorsed by the Full Court of the Federal Court in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith.*[16]

115. In the circumstances of this case, and particularly given the length of time over which the breaches occurred, the financial impact of the breaches on a young employee and the need for specific as well as general deterrence, I do not consider that the total penalty of $22,000.00 is excessive or should be discounted.

116. I therefore intend to impose penalties as set out in paragraphs 110 and 111 of the judgment.

117. No submissions were made about time to pay and the information given about the respondent's financial circumstances was limited to bare assertions of one or two sentences in its written submissions on penalty. I consider it reasonable to order that the penalty be paid to the Commonwealth within three months.

118. For all of the above reasons the orders of the Court are as set out at the beginning of this judgment.

I certify that the preceding one hundred and eighteen (118) paragraphs are a true copy of the reasons for judgment of Terry FM

Associate: Barbara Cameron

Date: 18 January 2010

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[16] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8