

INDUSTRIAL RELATIONS COURT (SA)

FAIR WORK OMBUDSMAN

v

HONEST AND FRANK PTY LTD
First Respondent

and

HYUN, Teh Seok (Paul)
Second Respondent

JURISDICTION: Federal Penalty

FILE NO: 4566 of 2009

HEARING DATE: 1 February 2010

JUDGMENT OF: Industrial Magistrate SM Lieschke

DELIVERED ON: 29 April 2010

CATCHWORDS:

*Contraventions of national employment laws - Imposition of penalties for breaches of "civil remedy provisions" - Failures by employer: to make and maintain records of employee's names, dates of commencement and status per reg 19.8; to keep records of wages paid, hours worked, gross and net paid, loadings and deductions per reg 19.11; to keep termination records per reg 19.14; to provide any pay slip within one day and at all per reg 19.20; and to keep records in a condition that allows inspectors to determine correct entitlements per reg 19.5 - False and misleading employee records provided to the FWO on two separate occasions contrary to reg 19.17 - Employer operated supermarket trolley collecting business with over 56 employees - Rates of pay used by employer were well below federal minimum adult casual hourly rate - Personal respondent was director and manager of employer and was personally involved in the contraventions - Contraventions had serious consequences of preventing correct entitlements being investigated - **Held:** Penalties of \$29,452 imposed on Honest and Frank, and penalties of \$5,890 imposed on Mr Hyun for 7 separate contraventions after 10% reduction - Ss 719 & 728 Workplace Relations Act 1996, Regs 14.4, 14.5, 19.4, 19.5, 19.8, 19.11, 19.14, 19.17 & 19.20 Workplace Relations Regulations 2006.*

These reasons for decision are uncorrected and subject to revision before external publication and distribution.

Cameron v The Queen [2002] 2009 CLR 339

REPRESENTATION:

Counsel:

Applicant: Ms E Priest

Respondents: Ms D Eszenyi

Solicitors:

Applicant: Fair Work Ombudsman

Respondents: Logos Lawyers

- 1 This is an application by the Australian Fair Work Ombudsman for the imposition of pecuniary penalties against Honest and Frank Pty Ltd and Teh Seok (Paul) Hyun for breaches of national employment laws¹.
- 2 Various breaches have been alleged against both respondents of a number of regulations made under the *Workplace Relations Act 1996*. Whilst that Act has now been replaced by the *Fair Work Act 2009* (Cth), the previous Act and Regulations continue to apply to the relevant conduct as it occurred before the commencement of the *Fair Work Act*.
- 3 The breaches relate to an employer's obligation to make, keep and provide basic mandatory employee and payment records, and to two occasions of making and providing to the FWO false and misleading employee records.
- 4 The breaches arise from the respondents' supermarket trolley collecting business, in which all employees were paid cash, no payslips were provided, no records were kept of how much was paid or for what work, no tax was deducted, no superannuation was paid, and no termination records were kept.
- 5 Honest and Frank admits to the following breaches of regulations between 1 February 2007 and 24 May 2008:
 - 1) Regulation 19.8 of the *Workplace Relations Regulations 2006* by failing to make and keep records of required information regarding the names of all employees, the dates of the commencement of their employment and their status, ie whether casual, permanent or part-time.
 - 2) Regulation 19.11 by failing to make and keep records that included the details of wages paid, the hours worked, any entitlements such as loadings, the gross and net amounts paid, and any deductions.
 - 3) Regulation 19.14 by failing to make and keep records as to the reasons and how employees were terminated, and by whom.
 - 4) Regulation 19.20(1) by failing to issue written payslips in relation to each payment made to employees.
 - 5) Regulation 19.20(2) by failing to issue such payslips within one day of payment of wages.

¹ s 719 *Workplace Relations Act 1996*

- 6) Regulation 19.17 on two separate occasions by making false and misleading employment records in response to specific requests for inspection of records by the FWO.
 - 7) Regulation 19.5 by failing to maintain employee records in a condition that enables an inspector to determine the employee's correct legal entitlements.
- 6 The first false records were provided in response to a written request by the Fair Work Ombudsman's Office on 13 August 2007. On 27 August 2007 Honest and Frank Pty Ltd provided a set of false records relating to 18 employees. The records included fabricated entries as to hours worked, a higher rate of pay than that which was actually paid and false income tax deductions.
 - 7 Mr Hyun then wrongly told an inspector by telephone in early September 2007 that Honest and Frank did issue payslips to its employees.
 - 8 After the FWO became suspicious of the accuracy of these records it issued a formal notice for Honest and Frank to produce specific employee records. This notice was issued on 2 November 2007. On 13 November 2007 Honest and Frank produced a further set of false records for 56 employees. These also included false and misleading weekly time records, and payment details.
 - 9 Mr Hyun admits to have been personally involved in each of the contraventions by Honest and Frank, such that by his own acts or omissions he was directly or indirectly knowingly concerned in or was a party to those contraventions².
 - 10 All the above breaches were admitted by both respondents before the complaint was lodged with the Court.
 - 11 The FWO is satisfied that after 24 May 2008 the respondents created and kept appropriate records. There was however no attempt by Honest and Frank or by Mr Hyun to correct any previous underpayments.
 - 12 Whilst extensive underpayments of wages also occurred with respect to at least 56 employees, the FWO has not made any complaint regarding the associated breaches of the *Workplace Relations Act 1996*. Accordingly the admitted fact of extensive underpayments is a relevant circumstance only, but is not a separate basis for the imposition of any penalty, or for the making of any repayment orders.
 - 13 Mr Hyun is the sole director of Honest and Frank. The company was set up in early 2007. Mr Hyun chose the name 'Honest and Frank' himself.

² S 728 *Workplace Relations Act 1996*.

He owned at least half the shares. He was responsible for the active control of the day-to-day management of the company and had control over employees. The company did employ a supervisor who had some role in recording the hours of different workers for weekly payment purposes. Those records were not retained.

- 14 Honest and Frank, and Mr Hyun operated its trolley collection business between 1 February 2007 and January 2009. It operated at up to six major suburban shopping centres in metropolitan Adelaide, including at Tea Tree Plaza, Golden Grove, Marion, Ingle Farm, West Lakes and Reynella. It also operated similar operations in WA.
- 15 Honest and Frank subcontracted to a company called Coastal Trolley Services Pty Ltd, which in turn contracted with the shopping centres' management. Honest and Frank's written contractual obligations required them to provide staff for approximately 80 hours per week at each of the Adelaide shopping centres. When the business started in February 2007 it was contracted to work at Tea Tree Plaza, Golden Grove and Marion. Ingle Farm was added in March 2007, West Lakes in April 2007 and Reynella in July 2007. The company commenced with nine employees and reached a peak of 35 in October 2007.
- 16 The respondents have not indicated how many employees were engaged in total by Honest and Frank during the relevant period. 56 different employees have been identified, but only by means of existing employment tax declarations for that number. The majority of employees, but not all, were Korean citizens who worked in accordance with student visas or as tourists. Most employment was of a transitory and short-term nature with most employees working for less than one month. Based on this employment pattern and the need to staff up to six shopping centres for approximately 480 hours a week in total, it is clear that a far greater number than 56 total employees were affected by the respondents' breaches.
- 17 The FWO accepts Mr Hyun's assertion that the employees were paid between \$8.00 and \$13.00 per hour. The majority were employed on a casual basis. During the relevant period the minimum federal adult hourly rate for casual work was \$16.16 per hour up to 30 December 2007 and then \$16.49 per hour for the remainder of the period.
- 18 Because of the respondents' failure to keep the required records it was not possible for the FWO to even estimate the extent of the underpayments. The FWO was also prevented from investigating other matters such as compliance with annual leave and occupational superannuation obligations.

- 19 Despite this some parameters can be established. Each individual adult employee was underpaid, without consideration of penalties given that work was also performed on Saturdays and Sundays and evenings often until 9.00pm, in the range of \$3.16 to \$8.49 per hour. Not all employees were likely to have been entitled to adult rates and thus not all juniors would necessarily have been underpaid on this limited data. Given that from July 2007 onwards when six sites were operating, and Honest and Frank had to provide at least 480 hours of trolley collecting services per week across the six sites, and based on only one adult person working at each site, the likely resulting underpayments range from \$1,516 to \$4,075 each week. On this limited factual basis it can be seen that the respondents' failure to keep the required records has prevented the FWO from taking any effective action in relation to extensive underpayments that involve a large number of people over a considerable period of time.
- 20 No complaint has been made in these proceedings in relation to the conduct of the WA operations. Honest and Frank was however convicted in the Joondalup Magistrates Court on 27 August 2009 for providing to Work Safe WA inspectors false and misleading training records in relation to an employee who was killed in the course of his employment in September 2007. Honest and Frank was fined approximately \$12,000 for that offence. That is not a matter I can take into account in setting penalties as no details have been provided as to when the false and misleading records were provided in relation to the current complaints, and the penalty was imposed after the relevant period under current consideration.
- 21 Honest and Frank no longer trades and has no assets. It is in the process of being deregistered as a company. The deregistration process has been specifically extended for the purpose of these proceedings to be heard. These circumstances mean that any penalty imposed on Honest and Frank is unlikely to be paid and to that extent assessing and imposing any penalty on it may be considered a futile exercise. However it is important to do so from the point of view of general deterrence.
- 22 The maximum pecuniary penalty that each separate breach of a regulation which is classed as a civil remedy provision, as these are, is a fine of \$1,100 for a natural person and \$5,500 for a corporation.
- 23 The FWO has submitted that the breaches were all deliberate, based upon a statement from Mr Hyun expressed in a statutory declaration that he was aware of the company's record keeping and payslip obligations, from when he commenced the business. Even if there is any doubt as to his awareness of the need to keep specific records the company was on notice from at least August 2007 after the first contact from an inspector, as to the nature of their obligations. The respondents' conduct is aggravated by the two separate and distinct episodes of creating and

providing false and misleading documents, and is further aggravated by the continuation of its breaches after providing the second lot of false documents by still not making and keeping appropriate records for a further six months until May 2008.

- 24 The FWO correctly points to the lack of any evidence that the respondents paused, reflected, took advice and responded appropriately. To the contrary they instead decided to adopt a course of deliberate dishonesty to produce more false and misleading documents and disregard continuing non-compliance, against a background of continuing to underpay considerable amounts to their employees.
- 25 The obligations that the respondents breached are of great practical importance in ensuring compliance with legal minimum conditions of employment. They are not merely technical or procedural requirements. In this case the breaches have had the effect of preventing any action to remedy significant underpayments of wages by a large number of people, and potentially of annual leave and superannuation entitlements for those who may have qualified.
- 26 The FWO submits a further aggravating feature is the nature of the employees affected, namely vulnerable workers who are casual and transient employees often without local ties and therefore the support, ability or the motivation to pursue underpayments.
- 27 Additionally the paying of cash wages without any records being kept creates the opportunity for potential breaches of a range of laws including: income tax, workers compensation, social security, and visas. Such behaviour also creates the opportunity for a grossly unfair competitive trading advantage against competitors who comply with the law.
- 28 The FWO submits that the respondents did offer a degree of cooperation once confronted with the full extent their wrongdoing and then admitted the breaches. Accordingly the respondents are entitled to a reduction on the penalty I would otherwise have imposed. The extent of the reduction is dependant upon the extent to which the pleas and cooperation are “indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice”³.
- 29 Whilst eleven separate contraventions of the regulations have been alleged and admitted by both respondents, they are not to be penalised for eleven individual contraventions. Separate contraventions are to be treated as one contravention and therefore give rise to the one penalty, if they relate to the same action or course of conduct⁴.

³ *Cameron v The Queen* [2002] 2009 CLR 339 at 346.

⁴ Reg 14.5(1) and (2).

- 30 The parties have presented an agreement to the Court that they are of the view that eight separate contraventions have been committed by each respondent.
- 31 The first is a continuous and ongoing failure to make general records of employment in accordance with reg 19.8(1).
- 32 The second comprises of the breaches of regs 19.11(1), (2) and (4) in relation to the making of proper pay records that include the rate of pay, the hours worked by casuals, gross and net payments, and any deductions.
- 33 The third was a failure to make termination of employment records in accordance with reg 19.14(1).
- 34 The fourth was a failure to make records in a condition that allow inspectors to determine correct entitlements, in accordance with reg 19.5.
- 35 The fifth comprises breaches of both payslip obligations in accordance with reg 19.20. Once there was a failure to provide any written payslips it follows that there was also a failure to do so within one day.
- 36 The sixth is the first episode of creating and providing the false records, contrary to reg 19.17.
- 37 The seventh is the separate second and separate episode of creating and providing false records.
- 38 The eighth is the failure to maintain the required general, pay and termination records in accordance with reg 19.4(1).
- 39 Whilst the parties have agreed to this number of separate contraventions I do not accept the eighth. In my view the failure to maintain the general, pay and termination records is part of the same course of conduct that gave rise to the first three contraventions in relation to general records, pay records and termination records. Once the respondents have continuously failed to make any such records it follows that there was a failure to maintain the non-existent records. Accordingly penalties will be imposed for the seven separate contraventions.
- 40 In a written submission to the Court in November 2009 the respondents' Sydney solicitors stated that the contraventions occurred as a result of Mr Hyun's lack of knowledge and lack of experience in operating a business. Contrary to Mr Hyun's admissions, it was submitted that the two separate occasions of creating and providing false records were not intended to convey the impression that Honest and Frank had complied with its obligations. It further accepted that there "may have been up to 55 employees", but made no comment on the actual likely number of

affected employees. Both respondents were also said to be “sincerely apologetic and very regretful” for their failures and ignorance. The solicitor further submitted that all the respondents’ actions were a result of ignorance and recklessness and were not deliberate.

- 41 Honest and Frank was then subject to a voluntary deregistration application based upon Mr Hyun’s decision to deregister it while it was still trading debt free. The business was said to have taken a “down turn” and was operating at a loss after the commencement of the FWO’s investigation. Mr Hyun was then said to have been unemployed since January 2009 with “no income except for his spouse’s part-time employment”.
- 42 A statutory declaration signed by Mr Hyun on 20 May 2009 states in para 33:

“I knew that I had to keep records, but I was too busy to do so, and at other times I forgot, and I did not keep the records properly.”
- 43 Mr Hyun did go on to suggest that the employed supervisor Mr Jin, may have kept a record but he did not know if this was the case.
- 44 Ms Eszenyi, counsel for both respondents, made oral submissions in mitigation. These were to the effect that Mr Hyun is now 48 years old and an Australian citizen. He came to Australia from Korea some 25 years ago. His employment history includes having worked as a contract cleaner for a number of years, then performing production work for a cable manufacturing business. This involved him working as a team leader supervising five employees. He also had previous experience working in his wife’s Korean café in Sydney. He moved to Adelaide in 2005 and performed work as a contract cleaner. He then got into the trolley collecting work and as he was seen to be a good organiser of a site he was introduced to Coastal Trolley Services. He then decided to set up his own business. Mr Hyun now makes a modest income from a Korean food shop that he runs in Adelaide with his wife.
- 45 Ms Eszenyi submitted that Mr Hyun did not have any prior experience in running a business. Whilst I accept that is the case from a proprietor’s point of view he clearly had previous experience in working in his wife’s business and he had worked for a manufacturing operation. Accordingly he could not be said to have been a complete novice when it comes to the operation of a business and the very simple aspects of making and keeping transparent records of employees and wages.
- 46 It was further submitted that Mr Hyun did not have any assistance in running the business. This was his choice as he was able to access accounting services to have the company set up, and he did have access

to a computerised payroll system that was used to create the false records.

- 47 But I do accept that prior to the FWO investigation Mr Hyun was not specifically aware of all records that must be kept for each employee, although he was aware of the need for general employee and wage records. I therefore accept Ms Eszenyi's submission that some of the general, pay and termination records contraventions were the product of reckless and ignorant behaviour as opposed to a deliberate disregard.
- 48 Ms Eszenyi submitted that the business was run at a loss at all times. No doubt unknown to Ms Eszenyi that submission is inconsistent with the written submission of November 2009 which indicated that the loss only occurred after the investigation and that Mr Hyun moved to deregister the company before it incurred debt. Given Mr Hyun's admitted dishonesty I do not accept Ms Eszenyi's later submission in the absence of any supporting evidence. In any event whether or not it traded at a loss for all or some periods is at best only a very minor consideration.
- 49 Mr Hyun's explanation for his flagrant dishonest attempt to cover his tracks by producing false pay records was explained as a panicked reaction that he now accepts was very stupid behaviour. Whilst I accept that explanation, of what is still a dishonest act, in relation to his first response it does not explain the second episode of false records a few months later. That cannot be characterised other than considered and planned dishonesty.
- 50 Whilst I accept that Mr Hyun both personally and on behalf of his company now sincerely regrets his actions and is apologetic, his contrition is limited by a lack of action taken to remedy in any way the harm that has resulted to a large number of former employees from his contraventions. There is also a strong flavour of Mr Hyun still failing to accept full responsibility for his actions and in particular through the written submissions of November 2009, as referred to above.
- 51 The respondents are however entitled to a reduction of the penalty that I would otherwise have imposed and in this regard based upon his response I will allow a 10% reduction.
- 52 In my view these are extremely serious breaches of the regulations. More serious breaches of the regulations are difficult to imagine. Each records and payslip contravention relates to a large number of employees over a lengthy period of time, and were not changed for many months after the FWO investigation began. The false records contraventions were serious acts of dishonesty, with the second slightly worse than the first, that had the potential to end the investigation without uncovering the contraventions. The termination records contraventions are less serious.

Given the short-term and casual nature of the employment, termination entitlements are unlikely to have been common or significant.

- 53 Furthermore the very reason that these regulations exist, namely to protect against and to allow rectification of underpayments, has in fact eventuated. The resulting loss to the employees is collectively likely to be a considerable amount of money. Mr Hyun and his company have by their breaches effectively avoided having to rectify the background underpayments.
- 54 The penalties need to be a general deterrent to both companies and individuals personally involved in their management. The penalties also need to be an individual deterrent to Mr Hyun.
- 55 I have also considered Mr Hyun's lack of assets and modest income. But as against this the penalty is not severe, and he does appear to have financial resources that he was able to draw upon in order to pay the Western Australian fine. Even if the penalty I propose to impose does cause some temporary financial hardship, this is not inappropriate.
- 56 After taking into account these considerations and all the circumstances of the contraventions I impose the following penalties:

- 1) General records contravention (90% of maximum less 10%) -

Honest and Frank Pty Ltd:	\$4,455.00
Mr Hyun:	\$891.00
- 2) Pay records contravention (90% of maximum less 10%) -

Honest and Frank Pty Ltd:	\$4,455.00
Mr Hyun:	\$891.00
- 3) Termination of employment records contravention (50% of maximum less 10%) -

Honest and Frank Pty Ltd:	\$2,475.00
Mr Hyun:	\$495.00
- 4) Payslips contraventions (90% of maximum less 10%) -

Honest and Frank Pty Ltd:	\$4,450.00
Mr Hyun:	\$891.00
- 5) 1st False records contravention (90% of maximum less 10%) -

	Honest and Frank Pty Ltd:	\$4,450.00
	Mr Hyun:	\$891.00
6)	2 nd False records contravention (95% of maximum less 10%) -	
	Honest and Frank Pty Ltd:	\$4,702.00
	Mr Hyun:	\$940.00
7)	Condition of records contravention (90% of maximum less 10%) -	
	Honest and Frank Pty Ltd:	\$4,450.00
	Mr Hyun:	\$891.00.

57 Next I must take into account of the totality of the penalties imposed in relation to each respondent. In this regard I have considered the overall conduct of each respondent and have considered whether the total of the penalties is proportionate to that conduct. In my view the aggregate penalties do not result in a final pecuniary penalty that is disproportionate to each respondent's overall conduct and wrongdoing relating to these specific contraventions.

58 In conclusion I order that within 28 days Honest and Frank Pty Ltd pays to the Fair Work Ombudsman a penalty of \$29,452, and Mr Hyun pays to the Fair Work Ombudsman a penalty of \$5,890.

PUBLICATION OF THESE REASONS:

It is the practice of this Court to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Court's usual practice.