IN THE FEDERAL MAGISTRATES COURT OF AUSTRALIA
BRISBANE REGISTRY
FAIR WORK DIVISION

File number: BRG 997 of 2009

FAIR WORK OMBUDSMAN
Applicant

MALEHA NEWAZ PTY LTD
T/AS PHYSIO PLUS PHYSIOTHERAPY AND SPORTS INJURY CLINIC
(ACN 113 193 061)
First Respondent

SABA AHAMMAD
Second Respondent

APPLICANT'S OUTLINE OF SUBMISSIONS ON PENALTY

INTRODUCTION

1. This is the Applicant's outline of submissions concerning the imposition of penalties for admitted contraventions of the *Workplace Relations Act 1996* (**WR Act**). The application has been brought by the Fair Work Ombudsman against the First Respondent (as an employer) and the Second Respondent (as a person involved in the contraventions) for the imposition of penalties in relation to contraventions of the Freedom of Association provisions of the WR Act.

2. The Applicant relies on:

   (a) Application and Statement of Claim, filed 23 December 2009;

   (b) Agreed Statement of Facts (**ASOF**), filed 30 April 2010;

   (c) Affidavit of Stephanie Marie Pastusin, sworn and filed 7 May 2010; and

   (d) Affidavit of Renee Joy Corney, sworn and filed 7 May 2010.

Filed on behalf of the Applicant
Clayton Utz
Lawyers
Level 28, Riparian Plaza
71 Eagle Street
Brisbane QLD 4000

Tel: (07) 3292 7000
Fax: (07) 3221 9669
Contact: Hedy Cray
Email: hcray@claytonutz.com
Ref: 13888/14555/80100545

BACKGROUND

3. Ms Stephanie Pastusin was employed by the First Respondent from 16 April 2007 to 7 February 2009 as a casual receptionist. During Ms Pastusin's employment the First Respondent was bound by the Notional Agreement Preserving the *Clerical Employees Award – State 2002 (Qld)* (**NAPSA**) in respect of clerical staff employed by the First Respondent[1].

4. The First Respondent operates a business providing physiotherapy and related services based in Carindale Queensland. The First Respondent is, and was during Ms Pastusin's employment, a registered proprietary company incorporated in Queensland and an Employer within the meaning of section 6(1) of the WR Act[2].

5. Towards the end of 2008, Ms Pastusin made telephone enquiries with one of the Workplace Ombudsman, the Queensland Department of Employment and Industrial Relations or the Queensland Workplace Rights Office regarding the terms and conditions of her employment. As a result of her enquiries, Ms Pastusin obtained a copy of an award summary sheet published by Wageline that summarised her entitlements under the NAPSA (**Wageline Summary Sheet**)[3].

6. On 4 November 2008 Ms Pastusin wrote to the Director of the First Respondent, Ms Maleha Newaz, and the Second Respondent proposing that her wages be re-evaluated and she be paid in accordance with the Wageline Summary Sheet[4].

7. On 6 November 2008 the Second Respondent sent an email to Ms Pastusin in response to her letter of 4 November 2008. In sending this email, the Second Respondent:

   (a) acknowledged that he had the authority to review and increase wages on behalf of the First Respondent;

   (b) refused to provided Ms Pastusin with her entitlements under the NAPSA; and

   (c) confirmed that if Ms Pastusin wished to make enquiries or complain further about her rate of pay and/or pursue her entitlements under the NAPSA she must resign or her employment would be terminated[5].

8. Ms Pastusin resigned from her employment with the First Respondent in order to pursue her entitlements under the NAPSA on 6 January 2009. Her employment ceased on 7 February 2009[6].

---

[1] Paragraphs 10 to 12 of the ASOF.
[2] Paragraph 5 of the ASOF.
[3] Paragraphs 15 to 16 of the ASOF; Paragraphs 15 and 16 of the Affidavit of Stephanie Marie Pastusin.
[4] Paragraphs 19 to 20 of the ASOF; Paragraph 17 and Annexure B of the Affidavit of Stephanie Marie Pastusin.
[5] Paragraphs 21 and 22 of the ASOF; Paragraphs 18 to 20 of the Affidavit of Stephanie Marie Pastusin.

9. The Applicant seeks orders under the WR Act in respect of the admitted conduct by the Respondents in threatening to dismiss Ms Pastusin for a prohibited reason in contravention in section 792(1)(a) of the WR Act. The parties agree the First Respondent contravened section 792(1)(a) when it, through the actions of the Second Respondent, sent Ms Pastusin the email in which she was threatened with dismissal. The parties agree that the First Respondent made this threat in relation to Ms Pastusin's employment for the reason that:

   (a) Ms Pastusin made, or proposed to make, an enquiry to a person or body having the capacity under an industrial law to seek compliance with the industrial law, or the observance of a persons' rights under an industrial instrument[7]; and

   (b) Ms Pastusin was entitled to the benefit of an industrial instrument, namely, the NAPSA[8].

10. These reasons are prohibited reasons pursuant to sections 793(1)(j) and 793(1)(i) of the WR Act.

11. The Applicant also seeks orders pursuant to section 728 of the WR Act against the Second Respondent for his involvement in the contraventions. The parties agree the Second Respondent was involved in the contraventions and by operation of section 728 of the WR Act is treated as having contravened section 792(1)(a) for the prohibited reason set out in section 793(1)(j) and section 792(1)(a) for the prohibited reason set out in section 793(1)(i) of the WR Act[9].

12. Further details of the Respondents' admissions are set out below.

LEGISLATIVE FRAMEWORK

Part 16 of the WR Act – Freedom of Association

13. Section 792(1) of the WR Act provides that:

   An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:

   (a) dismiss an employee;

   (b) injure an employee in his or her employment;

---

[6] Paragraphs 23 to 25 of the ASOF.
[7] Paragraph 27 of the ASOF.
[8] Paragraph 28 of the ASOF.
[9] Paragraphs 29 to 31 of the ASOF.

(c) *alter the position of an employee to the employee's prejudice;*

(d) *refuse to employ another person as an employee;*

(e) *discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee.*

14. The prohibited reasons for the purposes of section 792(1) are set out in section 793 of the WR Act. Relevantly, section 793 provides:

(1) Conduct referred to in subsection 792(1) or (5) is for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned:

...

(i) *is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or*

(j) *has made or proposes to make any inquiry or compliant to a person or body having the capacity under an industrial law to seek:*

i. *compliance with that law; or*

ii. *the observance of a person's rights under an industrial instrument; ...*

15. Section 792(4) of the WR Act provides that an employer does not contravene section 792(1) because of the reason in section 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in section 792(1).

16. Section 792(2) of the WR Act provides that section 792(1) is a civil remedy provision.

17. The Applicant has standing to bring this proceeding pursuant to section 807 of the WR Act and seek orders imposing pecuniary penalties in relation to contraventions of section 792 of the WR Act and orders requiring payment of compensation for damage suffered as a result of contraventions of section 792.

18. Section 807(1) of the WR Act provides that:

The Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the defendant) who has contravened a civil remedy provision of this Part:

(a) *an order imposing a pecuniary penalty on the defendant;*

(b) *an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;*

(c) *any other order that the Court considers appropriate.*

19. Section 779 of the WR Act defines ***Court*** for the purposes of Part 16 as the Federal Court of Australia or the Federal Magistrates Court.

20. Section 807(4) of the WR Act provides that each of the following is an eligible person for the purposes of section 807:

(a) *a workplace inspector;*

(b) *a person affected by the contravention;*

(c) *a person prescribed by the regulations for the purposes of this paragraph.*

Transitional issues

21. These proceedings are brought under the WR Act, in relation to conduct which occurred before the commencement of the *Fair Work Act* 2009 (**FW Act**) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**Transitional Act**) on 1 July 2009.

22. The Transitional Act states that the WR Act continues to apply on or after 1 July 2009 in relation to contraventions of the WR Act that occurred before 1 July 2009, subject to a contrary intention in the Transitional Act itself.[10]

23. It is submitted that, as there is no contrary intention in the Transitional Act, the WR Act continues to apply to the conduct of the Respondents the subject of these proceedings.

24. The Transitional Act expressly provides that Parts 5A and 6 of the WR Act (which deal with the Workplace Ombudsman and workplace inspectors) have no application after 1 July 2009.[11] This includes the provisions which appoint the Workplace Ombudsman as a workplace inspector, and provide the Workplace Ombudsman with the standing to bring the proceedings under the WR Act.

[10] Schedule 2, Part 3, Items 11(1) and (3) of the Transitional Act.
[11] See Schedule 18, Part 3, Item 12 of the Transitional Act.

25. However, *"in order to ensure continuation and completion of legal proceedings under the WR Act"*[12], the Transitional Act provides that an application that could have been made or continued by a workplace inspector in relation to conduct that occurred before 1 July 2009 may be made or continued, after 1 July 2009, by a Fair Work Inspector[13]. The Fair Work Ombudsman is a Fair Work Inspector by virtue of section 701 of the FW Act.

THE RESPONDENTS' ADMISSIONS

26. The Respondents have admitted contraventions of section 792(1)(a) of the WR Act on the basis of the facts set out in the ASOF.

27. The First Respondent admits:

(a) at the relevant time, the Second Respondent was acting as an officer, director, employee and/or agent of the First Respondent within the scope of his actual or apparent authority. In accordance with section 826(2) of the WR Act, the conduct engaged in by the Second Respondent is also taken to have been engaged in by the First Respondent;

(b) on about 6 November 2008 it dismissed, or threatened to dismiss Ms Pastusin for the reason that she made, or proposed to make, an enquiry to a person or body having the capacity under an industrial law to seek compliance with the industrial law, or the observance of a persons' rights under an industrial instrument, in contravention of section 792(1)(a) of the WR Act for the prohibited reason set out in section 793(1)(j) of the WR Act; and

(c) on about 6 November 2008 it dismissed, or threatened to dismiss Ms Pastusin for the reason that she was entitled to the benefit of an industrial instrument, in contravention of section 792(1)(a) of the WR Act for the prohibited reason set out in section 793(1)(i) of the WR Act[14].

28. The Second Respondent admits:

(a) for the purposes of section 728 of the WR Act, the Second Respondent was involved in the contraventions of the First Respondent because he:

(i) aided, abetted, counselled or procured the contravention; and/or

---

[12] See paragraph 668 of the Explanatory Memorandum to the *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.*
[13] See Schedule 18, Part 3, Item 13 of the Transitional Act.
[14] See paragraphs 26 to 28 of the ASOF.

(ii) by his direct act, was knowingly concerned in or party to the contravention.

(b) on about 6 November 2008 he was involved in dismissing or threatening to dismiss Ms Pastusin for the reason that she made, or proposed to make, an enquiry to a person or body having the capacity under an industrial law to seek compliance with the industrial law, or the observance of a persons' rights under an industrial instrument, in contravention of section 792(1)(a) of the WR Act for the prohibited reason set out in section 793(1)(j) of the WR Act; and

(c) on about 6 November 2008 he was involved in dismissing or threatening to dismiss Ms Pastusin for the reason that she was entitled to the benefit of an industrial instrument, in contravention of section 792(1)(a) of the WR Act for the prohibited reason set out in section 793(1)(i) of the WR Act[15].

AGREED ORDERS

29. As outlined in paragraphs 45 to 52 of the ASOF, the parties agree that the following orders are appropriate to be made:

(a) Declarations that the First Respondent contravened the WR Act, namely section 792(1)(a) for the prohibited reason set out in section 793(1)(j) and section 792(1)(a) for the prohibited reason set out in section 793(1)(i).

(b) Declarations that the Second Respondent contravened the WR Act, namely section 792(1)(a) for the prohibited reason set out in section 793(1)(j) and section 792(1)(a) for the prohibited reason set out in section 793(1)(i).

(c) An order under section 807(1)(a) of the WR Act that the First Respondent pay pecuniary penalties in respect of the contraventions.

(d) An order under section 807(1)(a) of the WR Act that the Second Respondent pay pecuniary penalties in respect of the contraventions.

(e) An order under section 807(1)(b) of the WR Act that First Respondent and/or Second Respondent pay compensation for damage suffered by Ms Pastusin as a result of the contraventions of section 792(1)(a) of the WR Act, as proved by the Applicant.

(f) An order that the Respondents pay the penalties to the Commonwealth of Australia within 30 days of the date of the order for payment.

[15] Paragraphs 29 to 31 of the ASOF.

(g) An order that the Respondents pay the compensation to Ms Pastusin within 30 days of the date of the order for payment.

(h) Any other order that the Court considers appropriate.

COMPENSATION FOR DAMAGE SUFFERED BY MS PASTUSIN

30. As set out in the Statement of Claim filed 23 December 2009[16], the Applicant seeks an order that the First Respondent and/or Second Respondent pay compensation for damage suffered by Ms Pastusin as a result of the contraventions of section 792 of the WR Act.

31. The Respondents agree that an order should be made under section 807(1)(b) of the WR Act that the First Respondent and/or Second Respondent pay compensation for damage suffered by Ms Pastusin as a result of the contraventions of section 792(1)(a) of the WR Act, as proved by the Applicant[17].

32. The parties agree that any loss and damage suffered by Ms Pastusin as a consequence of the contraventions is to be calculated by reference to the amount of remuneration that Ms Pastusin would have earned but for the contraventions in the period from the date of the termination of her employment (7 February 2009) to the date on which Ms Pastusin secured ongoing employment, minus any income earned by Ms Pastusin during that period[18].

33. The Applicant has evidence from Ms Pastusin[19] that after her employment with the First Respondent ceased, she did not receive any income from employment until she commenced employment with a new employer on 30 May 2009. During the period 7 February 2009 to 30 May 2009, when she received no income from employment, Ms Pastusin was actively looking for work. As at the date of filing this outline, the Respondents have not filed evidence or challenged Ms Pastusin's evidence.

34. In accordance with the agreed calculation method set out in paragraph 33 of the ASOF, the Applicant submits it has been determined that Ms Pastusin suffered loss and damage in the amount of $5,482.64[20].

---

[16] Paragraphs 34 and 35(d) of the Statement of Claim
[17] Paragraph 49 of the ASOF.
[18] Paragraph 33 of the ASOF.
[19] Paragraphs 27 to 31 of the Affidavit of Stephanie Marie Pastusin.
[20] Paragraphs 22 to 24 of the Affidavit of Renee Corney.

PENALTIES

35. Section 807(2) of the WR Act enables the Court[21] to order a person who has contravened section 792(1) of the WR Act to pay a pecuniary penalty of up to:

    (a) 60 penalty units for an individual; and

    (b) 300 penalty units for a body corporate.

36. Section 4(1) of the WR Act provides that "penalty unit" has the same meaning as in the *Crimes Act* 1914 (Cth). Section 4AA of the Crimes Act defines "penalty unit" to be $110.

37. Therefore, the maximum penalty that could be imposed by the Court for each contravention of section 792(1) of the WR Act is:

    (a) $33,000 in relation to the First Respondent; and

    (b) $6,600 in relation to the Second Respondent.

THE COURT'S APPROACH TO DETERMINING PENALTY

38. The Applicant respectfully submits the following approach for the Court to follow in determining appropriate penalties to impose.

39. The first step for the Court is to identify the separate contraventions involved.

40. Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Respondents did.[22] This task is distinct from and precedes the final application of the "totality principle".[23]

41. Thirdly, the Court will then consider an appropriate penalty to impose for each contravention, having regard to all of the circumstances of the case.

42. Fourth and finally, having fixed an appropriate penalty for each contravention , the Court should consider the aggregate penalty, to determine whether it is an appropriate overall

---

21 Defined in section 779 of the WR Act to include this Court.

22 *Pearce v The Queen* [1998] 194 CLR 610 at 623 per McHugh, Hayne and Callinan JJ, *Johnson v R* (2004) 205 ALR 346 at [27]-[34] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [23] per Gray J, [71]per Graham J, [93] per Buchanan J (**Merringtons**).

23 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46], per Stone and Buchanan JJ.

response to the conduct which led to the breaches.[24] The Court should apply an "instinctive synthesis" in making this assessment.[25] This is often referred to as an application of the "totality principle".

FACTORS RELEVANT TO PENALTY

43. The Applicant respectfully submits that the assessment of penalties requires consideration of the factors discussed below in the specific context of this case.

44. The Applicant submits that the Court adopt and apply the approach adopted by Mowbray FM in *Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar*[26] (**Pangaea**), which has been subsequently approved[27] . The Applicant submits that these principles are not controversial.[28]

45. In *Pangaea*, Mowbray FM stated:

> In *Trade Practices Commission v TNT Australia Pty Limited* [1995] ATPR 40, 161 at 40, 165 Burchett J said:
>
> *[I]t cannot be denied that the fixing of the quantum of a penalty is not an exact science. It is not done by the application of a formula, and within a certain range, Courts have always recognised that one precise figure cannot be incontestably said to be preferable to another.*

46. Mowbray FM in *Pangaea* identified a number of factors that can be taken into account when determining whether particular conduct calls for a penalty and the quantum of such a penalty, being[29]:

(a) nature and extent of the conduct;

(b) circumstances in which the conduct took place;

(c) nature and extent of any loss or damage;

(d) similar previous conduct;

---

[24] See *Kelly v Fitzpatrick* [2007] FCA 1080 at [30] (Tracey J) (**Kelly**); *Merringtons*, supra at [23] per Gray J, [71] per Graham J and [102] per Buchanan J.
[25] *Merringtons*, supra at [27] per Gray J and [55] and [78] per Graham J.
[26] [2007] FMCA 7
[27] *Kelly*, supra at [14], *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (**Australian Ophthalmic Supplies**), *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533
[28] *Lawlor v Personal Hire Pty Limited* [2009] FMCA 228; *Lowe v Georgiou* [2008] FMCA 1461.
[29] At [26]

(e) whether the breaches were properly distinct or arose out of one course of conduct;

(f) size of the company;

(g) deliberateness of the breach;

(h) involvement of senior management;

(i) the corporation's contrition, corrective action and cooperation with the enforcement authorities;

(j) ensuring compliance with minimum standards by providing effective means for investigation enforcement of employee entitlements; and

(k) deterrence.

47. The Applicant accepts that while the above factors are a 'convenient checklist', they do not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.[30] The Applicant submits however, that each of the factors is relevant to the circumstances of this proceeding and should be considered by the Court.

APPLICATION OF THE PRINCIPLES TO THE RESPONDENTS' CONTRAVENTIONS

Nature and extent of the conduct

49. The Respondents engaged in conduct which constituted a threat to dismiss Ms Pastusin for reasons which are prohibited under the Freedom of Association provisions of the WR Act.

50. The Respondents' conduct occurred on one occasion and was in relation to one employee.

Circumstances in which the conduct took place

51. The contraventions occurred in circumstances where Ms Pastusin had raised legitimate questions in respect of her remuneration with the Respondents[31]. The Respondents'

[30] *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, [11]; Australian Ophthalmic Supplies, at [91] per Buchanan J.

[31] Paragraphs 18 and 19 of the ASOF.

response to Ms Pastusin's queries was to send Ms Pastusin the email which formed part of the contravening conduct[32].

52. The conduct of the Respondents can only be interpreted as an act designed to silence Ms Pastusin and aimed at preventing her from seeking to her enforce her entitlements under law. Ms Pastusin understood the email sent by the Respondents to mean that if she wanted to pursue or complain further about her rates of pay, her employment would have to come to an end[33].

53. Ms Pastusin's concerns about her entitlements were legitimate. Following the termination of her employment with the First Respondent Ms Pastusin lodged a complaint with the then Workplace Ombudsman. After conducting an investigation, a Workplace Inspector determined that during the course of her employment, Ms Pastusin had been underpaid the basic periodic rate of pay in the Australian Pay and Classification Scale derived from the NAPSA and had not been paid appropriate overtime rates under the NAPSA. The underpayments were over almost all the period of her employment of almost two years[34].

54. On 25 March 2009 the Workplace Inspector provided the First Respondent with details of the underpayment totalling $7,092.90. This underpayment was rectified in full by the First Respondent on or before 1 May 2009[35].

Nature and extent of any loss or damage sustained

55. Ms Pastusin suffered financial loss and damage as a result of the conduct of the Respondents. Ms Pastusin resigned from her employment with the First Respondent as a direct consequence of the Respondents' conduct[36].

56. After her resignation took effect, Ms Pastusin was unable to gain alternative employment for a period of 15.68 weeks[37]. During this time, she suffered a total loss of $5,482.64 (gross) being the amount of average weekly remuneration she would have received had she continued her employment with the First Respondent[38].

---

[32] Email reproduced at paragraph 20 of the ASOF.
[33] Paragraph 20 of the Affidavit of Stephanie Marie Pastusin.
[34] Paragraph 36 of the ASOF.
[35] Paragraphs 34 to 38 of the ASOF.
[36] Paragraphs 20 to 22 of the ASOF
[37] Paragraphs 26 to 31 of the Affidavit of Stephanie Marie Pastusin; Paragraphs 22 to 24 of the Affidavit of Renee Joy Corney.
[38] Paragraphs 22 to 24 of the Affidavit of Renee Joy Corney.

57. In the event that the Court makes the order sought for the payment of compensation to Ms Pastusin, the money will become payable approximately 12 months after loss was incurred.

Similar previous conduct

58. The Applicant is not aware of any previous conviction in respect of similar conduct being made against the Respondents.

Whether breaches distinct or arose out of one course of conduct

59. The Applicant accepts the contraventions have common elements and arose out of the course of conduct which involved Ms Pastusin making enquiries as to her entitlements, Ms Pastusin sending the letter of 4 November 2008 seeking a re-evaluation and increase in her entitlements and the Second Respondent sending the email to Ms Pastusin on 6 November 2008.

Size of the company

60. The First Respondent operates a physiotherapy and sport injury clinic business based in Carindale which provides physiotherapy and related services. To the knowledge of the Applicant, this business is still operating.

61. While the evidence with respect to the size of the First Respondent is limited, the Applicant acknowledges that the business does not appear to be a large one. However, the size of the business does not absolve the First Respondent of its legal responsibility to comply with the law in relation to the employment of its employees.

62. In *Workplace Ombudsman v Saya Cleaning Pty Ltd*[39] Simpson FM provided a summary of the case law in this respect:

> *The first respondent is a small company and, I infer, has very few assets. However, as Justice Tracey said in Kelly v Fitzpatrick:*
>
> > *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*

[39] [2009] FMCA 38, at paragraphs [26] to [30].

to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.

63. Further, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* it was said[40]:

> *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.*

64. Accordingly, irrespective of whether the First Respondent's business is considered large or small, the First Respondent is required to comply with its obligations under the Award and the WR Act. The size of the undertaking provides no excuse for non-compliance.

65. Further, the Applicant submits that the Respondents' financial situation should have no impact on assessment on penalty. In *PKIU and Others v Vista Paper Products Pty Ltd and Another*[41] Wilcox CJ, in penalising both a company in receivership and its bankrupt controlling director said:

> *While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate.*

66. Driver FM said in *Cotis v Macpherson*[42]:

> *It is, in my view, important to make the point that employers should not and cannot regard insolvency, either personal or corporate, as a refuge from their responsibilities under the Workplace Relations Act.*

67. It is submitted that the Court should impose penalties which take into account the principles set out above.

---

[40] [2007] FMCA 1412, at paragraphs [27] to [29].
[41] (1994) 127 ALR 673.
[42] (2007) 169 IR 30 at [12].

Deliberateness of the contraventions

68. The issue of whether a breach is deliberate was considered in *Cotis v McPherson*[43]:

> *In issue in this matter is whether the identified breaches were deliberate. I do not think that they were deliberate in the sense of Mr Macpherson setting out with an intention to breach the Workplace Relations Act. However, the facts compel the conclusion that Mr Macpherson was at least reckless in relation to the responsibilities of his company and himself as an employer. Mr Macpherson was made aware of some of the breaches by employees whilst the business was still in operation. He also acknowledged the breaches to the inspector following the closure of the business. Mr Macpherson has no contest with the evidence provided by Ms Cotis.*

69. Turner FM considered ignorance on the part of an employer in *Brobbel v Mack & Anor*[44]:

> *The facts in this case show ignorance of the law by the second respondent and a careless disregard for the rights of the employee. It is no excuse for the second respondent to say that he was confused and did not know what he was doing. Ignorance of the law is no excuse. An employer dealing with an employee and their rights under the law has a responsibility to make enquiries to find out what an employee is entitled to, and what is required of the employer…*

70. It is submitted that while the Respondents may not have set out to deliberately breach the WR Act, their contraventions evidence at least a reckless disregard for the First Respondent's statutory obligations.

Involvement of senior management

71. The conduct which constituted the contraventions of section 792(1)(a) of the WR Act was engaged in by the Second Respondent as an officer of the First Respondent.

72. At all material times, the Second Respondent was a Secretary of the First Respondent and was responsible for payroll, the financial management of the business and all employment matters within the First Respondent, excluding recruitment[45].

73. It is submitted that the involvement of the Second Respondent in the contraventions equates to that of senior management.

---

[43] Ibid at [17].
[44] [2008] FMCA 1355 at paragraph [15].
[45] Paragraphs 9 and 10 of the ASOF.

Contrition, corrective action and cooperation with the enforcement authorities

74. There is some evidence of the Respondents' contrition on account of their admissions as to the contraventions and by entering into the ASOF. However there is no evidence of any apology or show of contrition having been made to Ms Pastusin and no evidence as to any corrective action taken by the Respondents to ensure that such contraventions do not occur in the future.

75. The Applicant acknowledges that since the initial contact with the then Workplace Ombudsman, the Respondents have demonstrated a level of cooperation. In response to a Workplace Inspector identifying that Ms Pastusin had been underpaid, the First Respondent rectified the amount of the underpayment in full[46]. The Second Respondent also participated in an interview with representatives of the Applicant on 14 August 2009[47]. However the Director of the First Respondent, Ms Maleha Newaz, refused to communicate with the representatives of the Applicant and declined an invitation to participate in a record of interview as she did not believe that it had anything to do with her or the First Respondent[48].

76. Since initiating these proceedings, the Respondents have cooperated with the Applicant by reaching the ASOF and admitting the contraventions.

Ensuring Compliance

77. The principal object of the WR Act is set out in section 3 of the WR Act and relevantly states:

> *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> ...
>
> *(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the Act; and*
>
> ...

[46] Paragraphs 34 to 38 of the ASOF.
[47] Paragraph 37 of the ASOF and Annexure F to the Affidavit of Renee Joy Corney.
[48] Paragraphs 40 to 42 of the ASOF and Annexure H to the Affidavit of Renee Joy Corney.

(f) *ensuring compliance with minimum standards, industrial instruments, and bargaining processes by providing effective means for the investigation and enforcement of:*

(i) *employee entitlements; and*

(ii) *the rights and obligations of employers and employees, and their organisations*

...

(j) *ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association.*

78. The objects of Part 16 of the Act in which s 792 appears are set out in s 778 as follows:

In addition to the object set out in section 3, this Part has the following objects:

(a) *to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations;*

(b) *to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations;*

(c) *to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association;*

(d) *to provide effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association.*

79. O'Sullivan FM discussed the importance of the Freedom of Association provisions in *Smith v Prescott & Ors*[49]:

> *The threats the second respondent has accepted responsibility for, strike at the heart of the legislative scheme of the WR Act. It is important that all employees, particularly young employees be protected from conduct that infringes that protection embodied in the freedom of association provisions of the WR Act. It is also important that employees can discuss employment arrangements freed from any unlawful threats to their entitlements under the relevant award or other provisions of the WR Act.*

80. The actions taken against Ms Pastusin for prohibited reasons are contrary to the observance of the safety net minimum and the freedom to associate which the WR Act is designed to protect. The importance of employees exercising their rights to freedom of association continue to be recognised under the FW Act[50].

81. The Applicant accepts that each case, of course, will depend on its facts. However, it is submitted that the Court should give effect to the seriousness of employer obligations under the WR Act, the impact upon an individual employee whose rights have been compromised, and the integrity of the workplace relations system generally, when assessing an appropriate penalty for each contravention.

The need for deterrence

82. The penalties imposed in this matter must reflect the need for both general and specific deterrence.

83. In *Ponzio v B & P Caelli Constructions Pty Ltd*[51], Lander J summarised the purpose of imposing penalties for breaches of the WR Act as follows:

> *There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SARC 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be*

[49] [2008] FMCA 1672 at [38].
[50] Part 3-1 of the FW Act deals with General Protections.
[51] (2007) 158 FCR 543 at [93].

made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 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 the 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. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.

84. The First Respondent continues to operate the business, and the Second Respondent continues to hold the position of Secretary in the First Respondent. As this is the case, there is a need for specific deterrence. The imposition of an appropriate (but not oppressive) penalty on the Respondents in this case will deter both Respondents from engaging in similar conduct in contravention of workplace laws in the future.

85. In addition to specific deterrence, general deterrence is also an important objective:

> *The penalty should be such as to deter not only the particular offender, but others who may be disposed to engage in prohibited conduct of a similar kind*[52]:.

86. The relevant principle for general deterrence was stated in *CPSU v Telstra Corporation Limited*[53] thus:

> *... even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct: R v Thompson (1975) 11 SASR 217. It is also important to remember that proscribed conduct is often engaged in because it is profitable, or will enhance the profitability of the company. To deter conduct engaged in with that purpose, any penalty imposed must have the potential to render the conduct unprofitable. The achievement of*

[52] *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 4 FCR 296, at 298 per Toohey J.
[53] (2001) 108 IR 228 at [9] per Finkelstein J.

that object is subject to the limitations placed upon the court's power by the legislation in question. ...

87. In *Kelly*, his Honour referred with approval to the comments of Finkelstein J above[54].

88. While the penalty ordered against the Respondents should not be so great as to be oppressive, '*...for a penalty to have the desired effect, it must be imposed at a meaningful level*'[55].

89. The penalty imposed should deter not only the Respondents but also other employers and their officers from threatening to dismiss their employees for reasons that are prohibited by law.

THE TOTALITY PRINCIPLE

90. In assessing the penalty, the appropriate course is for the Court to assess the appropriate penalty for each separate contravention, and then to review the aggregate penalty and consider whether the aggregate penalty as against each of the Respondents is 'just and appropriate' in all the circumstances[56].

CONCLUSION AND PROPOSED RANGE OF PENALTY

91. In determining penalty, the Court should have regard to the penalties imposed in comparable decisions in this and other jurisdictions. **Annexure A** is a summary table of relevant cases.

92. The Applicant submits that the circumstances in which the contraventions occurred and the nature of the conduct require a meaningful penalty to be imposed having regards to the objects of the WR Act and the need for specific and general deterrence.

93. In proposing a penalty range, the Applicant has taken into consideration and applied discounts similar to those the Court has historically applied in matters of this type (including, but not limited to, discounts for admissions of breach).

---

[54] At [28].
[55] *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited* [2001] FCA 383 at [13]; *Pangaea*, supra at [51].
[56] *Pearce v The Queen*, op cit at [45] per McHugh, Hayne and Callinan JJ

94. The Applicant submits that a total penalty in the range of $10,000 to $16,500 should be imposed on the First Respondent in relation to the admitted contraventions.

95. The Applicant submits that a total penalty in the range of $2,000 to $3,300 should be imposed on the Second Respondent in relation to the admitted contraventions.

96. The Applicant submits that the Court make an order in the terms sought in the Statement of Claim that the First and/or Second Respondents pay to Ms Pastusin $5,482.64 in compensation for loss and damage.

This outline of submissions was settled by Ms Geraldine Dann of Counsel

Dated: 19 May 2010

.....

Hedy Cray
Clayton Utz
Solicitors for the Applicant

Annexure 'A' – Applicant's Submissions

Case	Number and Nature of Breaches	Number of Employees Involved	Aggravating and mitigating circumstances	Penalty Upheld
Glenn Jordan v Mornington Inn [2007] FCA 1384	9 Duress breaches (s400(5)) and 10 Freedom of Association breaches (s792(1), s793(1)(i)). Separate penalty not sought in respect to 9 of the s792 breaches.	5	• Agreed statement of facts with all contraventions admitted however this was entered into at a late stage • Low paid vulnerable workers • Policy to implement AWAs implemented in a cynical and brutal way • Behaviour was deliberate, targeted, sustained and aggressive	$170,000 ($17,000 per breach)
Filipczuk v Princess World Pty Ltd & Anor [2007] FMCA 1883	One Freedom of Association breach (s792(1)(a), s793(1)(j))	1	• No contrition, did not participate in penalty proceedings • Respondent paid the applicant her award entitlements and superannuation contributions when alerted to the fact	$4,950 (penalty imposed on individual only)
Byrne v Australian Ophthalmic Supplies Pty Ltd [2008] FCA 66	6 Freedom of Association breaches (s792(1)(b), s793(1)(j), (k) and (l)), grouped into 2 courses of conduct.	1	• Breaches flagrant and defiant • Conduct was designed to humiliate and pressure an employee for doing no more than protecting her rights at work • No previous similar conduct	$60,000 ($30,000 for each course of conduct).

Case	Number and Nature of Breaches	Number of Employees Involved	Aggravating and mitigating circumstances	Penalty Upheld
			• Need for specific deterrence lessened as Respondent no longer trading	
Brobbel v Darrell Lea Chocolate Shops Pty Ltd [2008] FMCA 714	12 Duress (s400(5)) breaches, 4 Freedom of Association (s792(1)) breaches and 7 information statement breaches (s337(9)). Separate penalty not sought in respect of s792(1) and s337(9) breaches as arose out of the same course conduct as the s400(5) breaches.	12	• Large business which ought to have been able to obtain competent advice • Vulnerable young workers • Conduct was engaged in by senior managers • Cooperation with the authorities • Breaches admitted	$120,000 ($10,000 for each course of conduct)
Brobbel v Mack & Anor [2008] FMCA 1355	One Freedom of Association breach (s792(1) and s793(1)(j))	1	• Not a deliberate breach • Cooperation with the authorities • Employer showed careless disregard for the law • Breaches admitted • Contrition displayed	$19,800
Smith v Prescott & Ors [2008] FMCA 1672	One Freedom of Association breach (s792(1), s793(1)(j))	1	• Contravention admitted • Vulnerable and young employee	$1,900 (penalty imposed on an individual only and amount agreed by the parties)

Case	Number and Nature of Breaches	Number of Employees Involved	Aggravating and mitigating circumstances	Penalty Upheld
Fair Work Ombudsman v Primrose Development Company Pty Ltd & Anor [2009] FMCA 632	9 duress breaches (s400(5)), 18 Freedom of Association breaches (s792(1)(b) and (c), s793(1)(j)) and 20 agreement lodgement (s342) breaches. Separate penalty not sought in respect of s792(1) breaches as arose out of the same course conduct as the s400(5) breaches.	9	• Contraventions admitted • Young casual employees • Conduct was that of senior management but only a small operation • No previous similar conduct • Contrition displayed	$60,000 ($51,601.25 for 9 Duress breaches)
LHMU & Anor v Cuddles Management Pty Ltd [2009] FMCA 746	One Freedom of Association breach (s792(1),793(1)(j))	1	• Prior history of contravention • Conduct deliberate, but not deliberately defiant • No evidence of contrition • No cooperation	$29,700
CFMEU v Quality 1 Security Services Pty Ltd [2009] FMCA 1076	One Freedom of Association breach (s792(1), s793(1)(a), (i) and (j))	Unknown	• Contraventions admitted • No adverse consequences to the conduct • Contrition displayed • No previous similar conduct • Respondent company not large	$8,000 (penalty amount agreed by the parties)