



# Fair Work

OMBUDSMAN

**IN THE MAGISTRATES' COURT  
OF VICTORIA  
AT MELBOURNE  
INDUSTRIAL DIVISION**

**COURT NUMBER Y01954577**

BETWEEN

**THE FAIR WORK OMBUDSMAN**

Plaintiff

and

**MYST OZ PTY LTD AND REBECCA PEARSE**

Defendant

**TRANSCRIPT OF HEARING: 3 FEBRUARY 2010**

Magistrate Magistrate Holzer  
For the Plaintiff: Mr Ben Vallenge  
For the Defendant: Mr Warren Friend

**DISCLAIMER: THIS IS AN EDITED EXCERPT OF THE ABOVE HEARING.  
NUMBERING HAS BEEN ADDED FOR EASE OF REFERENCE ONLY.**

HIS HONOUR:

1. In this proceeding brought by the Fair Work Ombudsman against Myst Oz Pty Ltd and Rebecca Pearse, I've been assisted greatly by the submissions of counsel, Mr Vallence, who appears on behalf of the Plaintiff and Mr Friend, who appears on behalf of the Defendants and I thank them for their assistance.
2. The complaint in this proceeding was issued on the 29<sup>th</sup> June 2009 and sought an amount of \$40, 916.41, and that was in relation to a series of underpayments in relation to a considerable number of employees who were at different times employees of the first named defendant's business which trades as "The Grotto" in St. Kilda and operates as a gifts and home wares business. The matter was initially defended by way of a defence filed on behalf of the defendants by McPherson and Kelly on the 11<sup>th</sup> September 2009 and materially, that made a number of significant admissions. Significantly also, they recite the fact that payment of the principle amount in dispute was payed promptly approximate to the initiation of the complaint.
3. The matter comes on before me today, on the basis of a penalty hearing, therefore alone. And in that regard I'm informed by a number of documents to which I've had regard. They are a Statement of Agreed Facts, dated 6<sup>th</sup> November 2009. They are the Submissions of the Plaintiff on penalty, dated 26<sup>th</sup> November 2009 and an Affidavit of Jane Dene, sworn 27<sup>th</sup> November 2009, in relation to the Plaintiff's position particularly and the responding materials comprised by the Submission of the Defendant on penalties dated 18<sup>th</sup> December 2009 and the Affidavit of Ms Pearse, sworn the same day.
4. Counsel have in both the Plaintiff's and Defendants' cases respectively added to those written positions and have emphasised various certain aspects of each side in respect of the positions that I should adopt. I don't think there's any serious disagreement about the method, the approach to determining penalty that I should follow. The principles are well established. They are set out in particular at page 5 of the Plaintiff's Outline of Submissions and I specifically followed the approach that has been recommended and set out there.
5. The issue I think for me is one principally, in regard to that background, not only to apply the facts of the law in this case but in particular to make a decision about the regime to be followed in terms of grouping or courses of conduct for the purposes of penalty. There are as well, as has been apparent as per the discussions with counsel and the presentation of the matter before me today and the response of the bench to that discussion, a number of positions theoretically open to me. The approach that I should adopt significantly varies on which one of those is appropriate in all the circumstances. The approaches to some extent are not mutually exclusive and supported by case law, by which I've been referred

today.

6. Most recently though in terms of case law, I may be bound by the decision of the Full Federal Court in the Construction, Forestry, Mining and Energy Union and Williams Case report of 2009, Full Court of Australia, Federal Court, page 71, their Honours' comprised of Moore, Middleton and Gordon and the decision delivered on the 7<sup>th</sup> December 2009. A date I note after the receipt of the Agreed Statements of Facts and the Affidavit and Submissions of the Plaintiff. I've been taken by both Counsel to various aspects of that decision. It seems to me that in particular the continuity of action is the touchstone of the decision that confronts me principally of the action that I should take. It's not a mathematically precise or scientific approach. It's not an approach capable of that kind of immunity. It's an approach that has to be taken into account based on the authorities, based on the established principles but having regard to whether or not in this context there is a continuity of action of the sort of the Full Court were talking about and the court in that case referred to a well known case of Merriman in 1973 in England, and they've specifically adopted that as part of the rationale that seems to me implicitly or explicitly.
7. It is the case that there are a number of concerning aspects of this particular litigation. One is the large number of employees to which this proceeding relates. Another is the period of time over which the offences in question are agreed to have taken place. There is in this case a commendable approach and commendable degree of candour shown by the Defendants. I indicated that in discussion with Counsel that this wasn't a case where the defendants have appeared to have struck their head in the sand and that does impress me in terms of outcome today. It's fair to say as well though, that the law applies equally to all business and employers and is designed to protect therefore all employees. It's no excuse, as Ms Pearse readily concedes in her affidavit, that ignorance is a defence in these matters. Ignorance is not a defence and employees, employers I should say, are required to be familiar with and to apply the relevant legislation at any particular point in time and if that's changed as it has from time to time, it's up to the employer to inform themselves about those changes, to take steps to remedy any omissions or defects in conduct and to generally make sure that there's an awareness and a proper application of the knowledge and awareness in terms of dealing with his or her employees. It's for that reason these sorts of prosecutions are to be taken with the upmost seriousness.
8. I do take into account the history of the case as has been outlined to me. In terms of the initiation of the business, I'm sure on what might be regarded on one view on a fairly basic level. The business has no doubt grown over the 15 years or so in which the business has operated and no doubt it's enjoyed some degree of success, although perhaps in a monetary sense the bank account doesn't necessarily or hasn't necessarily reflected that at any one particular point in time. There's been a viable and healthy business and it's

- been one that's been productive in terms of enjoying, the fruits of the labour which went into it no doubt.
9. In this case there are a number of facts though that directly impinge upon what I should or shouldn't do in terms of exercise of discretion. They include the way in which Ms Pearse of behalf of the first defendant sought to inform herself about legal obligations. In my view as I said she's done so in the appropriate manner, recognising as I have already stated the need to ensure up to date knowledge and information is applied in any one case. I accept that there were mitigating circumstances in this case in terms of your sister's health. I think that's a reasonable explanation open to me to take into account in terms of problems to do with these matters when they were first raised and I note that again with candour paragraph 7B of the outline concedes that there was a failure to take proper action. I believe that's acceptable in the circumstances of this case.
  10. I have to ensure that there is both specific and general deterrence also recognised in my decision today and I propose to do so. Having regard to the various matters that have been put to me that are both in writing and supplemented orally. I believe that I should treat the conduct concerned as one continuous course of conduct. It seems to me that the various breaches, to which there are 12 in total, arose out of and relate to one single course of conduct and that's directly relevant to the question of the maximum penalties which would be theoretically available to the court in this case. To that extent I reject the plaintiff's submissions in relation to the maximum penalties what would be otherwise available to me and prefer the approach of the defendants. In my view the maximum penalties given that finding is one of \$33,000 in relation to the first name defendant and \$6,600 in relation to the second defendant's involvement in relation to the breaches.
  11. Assessing the breaches and taking into account the mitigating factors that I've mentioned specifically, in my view the appropriate penalty in all circumstances in respect of the first named Defendant be in the amount of \$16,500 and the amount of \$3,300 in relation to the Second Defendant. Orders will be made by way of declarations of those sought that are set out and claimed by the Plaintiff. It is appropriate that I make orders in relation to the matter and the terms are set out. I won't recite those for the purposes of the record other than to simply indicate that I intend it to be that orders will be made of those sought that have been presented to me. It's appropriate also that penalties be payed into Consolidated Revenue again in the fashion that's been reached upon me. In terms of a time for payment, I think 3 months is an appropriate period of time by which to order a stay on the payments in question, I don't believe in terms of the application of both the amount and the stay in all circumstances it would be inappropriate method to dispose of the matter today. They're the orders I make and propose to make. Any issues that arise from my determination gentlemen on either side?

- Mr Vallence 12. The only one Your Honour is if a copy of the transcript could be made available to us.
- HIS HONOUR: 13. Certainly. I've retained copies of the cases and outlines of course will remain on the court file. In terms of the draft you handed up before Mr Vallence, I wonder whether I can use that as a template? It seems to be that clause 1 sets out contraventions. I think it should be formalised in that fashion similarly the involvement of the second defendant should be in a declaration. I could therefore perhaps amend by insertion on paragraph 3 to add the sum that I ordered.
- Mr Vallence: 14. You might be able to do that in orders 3 and 4.
- HIS HONOUR: 15. That's what I was going to do. I was going to insert \$16,500 in paragraph 3, I was going to insert \$3,300 in paragraph 4 and payment within, "x" days. Can I revisit that question? Subject to anything that you wish to say about that, either of you?
- Mr Vallence: 16. Yes, I'm happy with that date.
- HIS HONOUR: 17. Well can I say Friday 7<sup>th</sup> May, a whisker over 90 days, I think that's the end of the week. Is that a suitable date?
- Mr Friend: 18. Yes Your Honour.
- HIS HONOUR: 19. I'll delete the words within ninety days and insert on or before 7 May 2010, by signing the proposed words and date them with today's date and I'll put that on the file. If you need to uplift that for the purposes of having a copy at least so you can both take that away with you at the moment, I'll release that one to you if you have a word to my clerk. So I'll put that on the file. Is there anything else I need to attend to?
- Mr Vallence & Mr Friend: 20. No, Your Honour.
- HIS HONOUR: 21. Thankyou both for your assistance.