IN THE MAGISTRATES' COURT OF VICTORIA AT MELBOURNE INDUSTRIAL DIVISION

COURT NUMBER: Y01699366

BETWEEN

FAIR WORK OMBUDSMAN

Plaintiff

and

OLARA PTY LTD

EXOFUN PTY LTD

HARRY FRIEDMAN

Defendants

TRANSCRIPT OF HEARING: 9 NOVEMBER 2009

Magistrate Holzer
For the Plaintiff: Matthew Robinson
For the Defendants: Herman Borenstein SC and Mark Feldman of counsel.

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

HIS HONOUR:

1. Sorry for the short delay.

2. In this matter I heard the proceeding on 4 November and I reserve my decision until today. It's a penalty hearing and at the start of the hearing I grant the leave to amend the plaintiff's name from Workplace Ombudsmen to Fair Work Ombudsman. The complaint in the matter was issued on 10 June 2009 it relevantly raised various provisions of the Workplace Relations Act and sought the imposition of penalties on a number of bases. That claim was defended on the 7 July 2009, and one part of that defence for reasons that will become apparent shortly is of particular significance in the way which I dealt with the matter today. The matter came before me on the basis of a set of agreed facts. The matter was the subject of Directions and on the 11 August 2008, the matter was dismissed by consent as against Michael Friedman and the matter therefore proceeded against only, in the individual sense, Harry Friedman and the two companies Olara Pty Ltd and Exofun Pty Ltd. Those two companies trade as Exclusive Food Houses and operate from premises substantially based at Moorabbin. The details of that are set out in the Affidavit of Mr Friedman.

3. Before me there are a number of Affidavits and I should refer to each of them. Apart from the Statement of Agreed Facts which was filed on the 29 October as indicated, there was an Affidavit of the Investigator Joshua Iser sworn the 7 October 2009, there was also an Affidavit of Clare Hartigan sworn 2 November 2009 and the Affidavit of Mr Friedman to which I've already referred which was sworn 31 October 2009. And they allege under payments between a period from February 2003 to October 2008 so it's a significant period of time and they concern the employment of one Ronald McColl who at the time of this proceeding was 62 years of age. He was employed as a delivery truck driver firstly between October 1983 and 30 June 2008 with Olara Pty Ltd, the First Defendant, and thereafter from 1 July 2008 until 31 October 2008 with Exofun Pty Ltd, the Second named Defendant, and again those dates are important for reasons again which will become clear in a moment.

4. Mr Friedman as is common ground, is and was director of the times of both Olara and Exofun, using the shorthand descriptors of those two companies. He's also the company secretary of both Olara and Exofun and is a shareholder of Exofun.

5. In terms of chronology it's also important for me to highlight the fact that a Breach Notice was served on or about 11 March 2009 and it's also important for me to recognize, and I do, that there was substantial compliance with that Notice by 6 or 7 April 2009 and that involved payment of the amount $32,000 gross by way of a payment sort to rectify and address the underpayments in the period which I've already identified.

6. The approach in matters like this, it was common ground, are as set out in the Plaintiff's Outline of Submissions on the penalty. There's no challenge to the approach and the approach is well established in

accordance with law. In general terms what it requires me to do is firstly to identify the separate contraventions and the law is equally clear that if I treat multiple breaches involved or I must treat multiple breaches which are involved in a course of conduct excising those words as a single breach and that approach arises both from an analysis of section 178(2) and 719(2) of the Workplace Relations Act and also the established authorities of His Honor Justice Gray in the *Gibbs* case 1992 and His Honour Justice Tracey in *Kelly v Fitzpatrick* in 2007. The Gibbs case stands for the proposition that I must regard matters as matters of substance and the Kelly case (using the shorthand descriptor) indicates that I should have regard to substantial obligations as set out in the authority. Particularly in circumstances is where the relevant instrument subject of the Award is varied.

7. So the first task for me as I said is the identification of breaches and turning to each of the companies relevant to this prosecution I make the following findings:

8. In my view there are three relevant groups of breaches, I use that word advisedly. Firstly in having regard to Olara the first one is the failure to pay the minimum rates of pay to Mr McColl either under the Minimum Wage order or the Transport Workers Award or the Australian Pay Classification Scale. The second identified breach is the failure to pay Mr McColl minimum rates of Annual Leave, again either under the Award or in breach of s235 of the Workplace Relations Act. The third breach identified is the failure to pay Mr McColl minimum rates for Personal Leave again either under the Award of in breach of s 247 on this occasion of the Workplace Relations Act. Turning to Exofun, in my view there are three similar identifiable breaches the first being failure to pay Mr McColl minimum rates of pay under the APCS – Australian Pay Classification Scale. The second a failure to pay minimum rates of annual leave either under the Award or in breach of section 235 of the relevant statute and thirdly the failure to pay the minimum rate for sick leave.

9. Mr Friedman is, in my view, a person involved in the contraventions being knowingly concerned in unpaid breaches under section 728 of the Act. I don't accept the submission that was put to me by Mr Borenstein, who appeared with learned junior Mr Feldman on behalf of the companies and Mr Friedman, that because he was merely the directing mind and will of the companies he should not be penalised in effect more than has already occurred by virtue of the redressing of the underpayments and I therefore find that he's a person within the terms of the statute as a person being involved in all the six of the breaches. Three on Olara's side and three on Exofun as I have outlined just a few moments ago. And in coming to those conclusions I've had regard whether or not in truth the breaches alleged by the Plaintiff are breaches of the same term arising out of a course of conduct and in doing so I've looked at the history, and I've adopted the multifaceted approach that's set out in the *Mornington Inn* decision to which I was referred and I think that in regard to those authorities it is appropriate that I've identified as I have the discreet breaches and contraventions that I've just spoken of.

10. The second stage of the process having identified the contraventions is to look at what an appropriate penalty is regarding each course of conduct and having regard to all the circumstances. In that regard, be it the decisions of *Mason v Harrington* and *Kelly v Fitzpatrick* are clear as to the method of approach which I should adopt.

11. It's important for me to emphasise that in this case this isn't at the lower end of the scale. In my view, in terms of where this sits in the overall scheme of things. There is upon me, on behalf of the companies and Mr Friedman this was of the lower end. Mr Robinson who appeared on behalf of the Fair Work Obudsman took a different view and that's a view with which I respectfully agree. It's serious for a number of reasons not the last of which is that there have been repeated breaches of the terms over a period of six years and in my view there is an element of deliberateness in the breaches which I should emphasise in my penalty today. That's not to say that the maximum penalties follow from such an analysis that's lead to reflect the fact there are a number of factors which are relevant to the exercise of discretion on penalty given this particular set of facts. I'll go through those now at some more length.

12. I mentioned in the pleading that there was an issue that I thought was of significant in the Defence as this: that paragraph 26 of the Defence filed 17 July 2009 rejected the notion that there should be any penalty at all in this prosecution. That's not a position that was adopted by Mr Borenstien and Mr Feldman when the matter came before me but the pleading was drafted and signed by Mr Feldman, presumably on instructions and at a time when a different approach could have been flagged to the Plaintiff and that wasn't done. It seems to me that that pleading is somewhat inconsistent with paragraph 36 of Mr Friedman's Affidavit and if I can turn to that by way of demonstration. Paragraph 36 of Mr Friedmans Affidavit sworn 31 October goes to the question of the expressed wish not to contest in the proceedings in respect of any the breaches. Now in effect that's not what happened at all given that position was taken not to make a concession of a sort that could have been made. That positions changed between 17 July and 4 November but it certainly can't be said that that pleading in the original position taken was consistent with one of contrition and one of remorse and willingness and preparedness not to impose the prosecution.

13. An issue for me is the characterisation of the conduct involved, as I indicated it's over a protracted period of time, there's an element of deliberateness about it and when one has regard to Mr Iser's Affidavit in particular the Exhibit JI8 I think that is of some significance. JI8 was a memorandum which was subject to some discussion between myself and counsel on both sides. It's a facsimile on 13 March 2009 and the attitude expressed in that is, to say the least by Mr Friedman, to the Workplace Ombusman, unfortunate. There's an impression one gains from reading that facsimile of one of someone who is less than contrite, less than prepared to accept there's been a considerable period of over a period of time of underpayments. The contrary seems to suggest that the position that really Mr Friedman was doing Mr McColl a favour and that's not an attitude that should be condoned in my view by this Court. There was some attempt to

explain that correspondence, but in my view it's something that's still front and centre to the way in which I have dealt with and propose to deal with these matters today.

14. The question of penalty and the variation of that over a period of time is of some relevance as well. I have noted the decision of His Honour Justice Gyles in *Sharpes* case 2007, I don't propose to follow the mathematical approach, if I can use that phrase, that His Honour adopted in that process. I think the fact of that there has been a variation of penalties is a relevant factor in the way in which I should exercise my discretion but I don't propose to adopt His Honours more structured analysis for the purposes of penalty today.

15. In the six year period in which these breaches occurred it's important for me to also note that the First and Second Defendants of Olara and Exofun has had the benefit and use of the amounts underpaid over a long period of time. That has to the detriment of Mr McColl. It's also of significance that senior management has been involved in the breaches. It's relevant also the question of contrition that I note on that front that Mr Robinson withdrew at 2.00pm his submissions in relation to contrition and facts and circumstances going back more than six years. But as far as I'm concern contrition is still a relevant factor in the exercise of my discretion. I don't agree that the conduct could be described as not exploitative there was certainly an attempt to adjust Mr McColls work environment by adjusted distribution loads for his job, the purchase of a mobile phone and a pre arranged phone plan for him. But notwithstanding that, the conduct of Olara and Exofun falls well short of conduct one might expect of a responsible, prudent employer in the circumstances of this case. Equally there's been no real effort to address the underpayments in the six year period that I've spoken of and it only became because of the prosecution that the payment was made as it was in April of this year.

16. I can infer I think that Mr McColl being 62 years of age at the time of the prosecution and given the medical background that was explained to me would've had limited employment prospects and opportunities in the workplace. However that doesn't absolve responsibility of employers in position of Olara and Exofun to act in an appropriate and responsible manner. I do accept that there's been no previous similar conduct by the Respondents. I do accept also that Olara and Exofun are relatively small companies with up to 20 employees. 17 on the part of Olara, 3 on the part of Exofun and any monetary amount has to give recognition to the size of the organisation involved.

17. As will be apparent I do regard the breaches as arrising substantially under one course of conduct under in the groupings I've already identified and that has the effect of discounting to some considerable degree the maximum penalties to which the Plaintiff in the first instance in the outline of submissions was urging me to impose. I note that the payment of 6 April made by Olara and Exofun was voluntary. Voluntary to the extent of compliance and responsive to the Breach Notices but I take that into account and I take into account the fact that proceeded, by some two months odd, the commencement of this proceeding on 10 June. I also take into

account the fact that there's been, on the evidence before me, a degree of cooperation with the Plaintiff. Full admissions have been made. A guilty plea has been entered, but that must be, as I said, offset by the reference in the Defence to which I've already referred. I accept that the Olara was a member of VECCI and accept that the existence of the supported wage system was not known to Mr Friedman at the relevant time and perhaps it ought to have been but it wasn't and I accept that it wasn't and that might have alleviated some of the mitigation had that been made aware of and was known to Mr Friedman at an earlier stage.

18. The fact that there was an agreed Statement of Facts in itself is of some relevance as well at least there's been an attempt to draw together some of the uncontested matters in this prosecution and I do take that into account in the admitted breaches that were contained in paragraph 14 of the Defence in that regard.

19. To end on the question of deterrence I think in this case specific deterrence is an issue for the reasons I've already identified but I think more relevantly general deterrence is perhaps more so. There's a need for people in position of Olara and Exofun to recognize the disability of workers such as Mr McColl and the need to ensure that there is compliance with the statutory of obligations in terms of your minimal pay obligations which didn't occur in this case over a long period of time as I've said.

20. So all of those matters are matters that I've reflected upon and taking into account in terms of working out what an appropriate penalty would be for the courses of conduct that I have identified and I note that there is some concession given by me in relation to the fact that there are some common elements between contraventions. There is some overlapping. There is some grouping and I think regard to that need to take that into account particularly in relation to the *AOS v McAlary-Smith* decision in 2008 in terms of imposing penalties upon the relevant actor(s) in this case. So what does that mean in a practical sense? I said I wasn't going to apply a structured approach like His Honour Gyles did but I still need to explain, I do explain the way in which I come to my final penalties as follows:

21. Turning to Olara first, there's a $33,000 common ground maximum penalty involved for identified breaches and I've identified three breaches by virtue of the groupings and courses of conduct that I've outlined today, which means that in theory there is a capacity for me to impose a maximum penalty of up to $99,000 being $33,000 times three. The reason for me to identify the dissection of employment time between Olara and Exofun is also the subject of my approach because if one identifies the relevant periods 68 of 72 months worth of the employment period in total was during the watch of Olara during the period in which Mr McColl was employed by Olara and so applying some kind of mathematical approach to that fact, what I've done is multiplied $99,00 being the maximum amount by the multiplier of 68 over 72 months which comes to a figure of $93,500 which I emphasise is the maximum penalty which I think, which is relevant in this case.

22. Taking the various means that I've identified in terms of the penalty

and discretion I think this fits something the order of 50% of the maximum. So again applying the mathematics of that 50% of $93,500 is $46,750. To that figure I've applied a further discount by virtue of the overlap and the need not to penalize the actor as relevant more than once for the same course of conduct. I apportion for that 20%. So I then apply a 20% discount and arrived at the figure $37,400 in respect to Olara.

23. In terms of Exofun the same approach has been followed by me. Again I'll go through it so that you understand the way in which I've approached it. $33,000 maximum per identified breach. Three breaches therefore maximum $99,000 penalty. Because of the much shorter period of employment with Exofun I've adopted the multiplier of 4 over 72 months to that figure of $99,000 and come to a figure of $5,500. Adopting the same discounts and multipliers 50% of $5,500 is $2,750 and take a further 20% off that figure comes down to a figure of $2,200.

24. Turning to Mr Friedman, Harry Friedman that is, the maximum penalty of $6,600 in respect to identified breaches and there are six breaches with which he has been in my view knowingly concerned in party to and involved in. The mathematics therefore are six times $6,600 arriving a maximum figure of $39,600. Applied the multipliers again as before, 50% of that is $19,800 less 20% is $15,840.

25. The fourth and final stage of the approach in matters such as these is to take a final look again at the penalty and see whether or not that's an appropriate response. That's the so called instinctive synthesis and the application of the totality principal which is set out in *Kelly v Fitzpatrick* and other cases of like. Applying that approach and rounding down I think therefore that the appropriate end in just penalties in this case are in respect to Olara $37,00, in respect of Exofun $2,000, and in respect of Mr Friedman $15,000. So a total of $54,000 split between the three actors, in this case two corporate, one personal. As I said $37,000, $2,000 and $15,000 respectively.

26. Now in terms of the request by Mr Robinson to identify the breaches; I propose to simply recite the factors I already I have. But I accept that there have been admitted breaches set out in paragraph 14 of the Defence and those breaches are set out in turn in the Plaintiff's outline of penalty. So I make a declaration in respect of each of the breaches identified for the reasons I've already said and applied the relevant groupings and discounts. I've come to a position of the sort I've just outlined in open court. It's appropriate that I indicate that those penalties be paid ultimately in to consolidate revenue.

27. Are there any matters which arise for those decisions and reasons?

Mr Rockman: 28. The only think that I seek to raise sir, You Honour, is that there were some documents in the course of the proceeding that were the subject of a Witness Summons for Production and I seek that those documents be released back to the Defendants.

HIS HONOUR: 29. What documents were they exactly Mr Rockman?

Mr Rockman: 30. They were financial documents of Olara and Exofun

HIS HONOUR: 31. I don't think they ever came to me, were they produced between the parties I don't know. I haven't seen any financial documents

Mr Rockman: 32. I can say they were filed with the Court, they may not have actually reached the file. I personally delivered them because there was an issue at the time as to whether there was going to be a hearing on the date.

HIS HONOUR: 33. [Did you hear that?]

Mr Rockman: 34. I did, so long as it's noted obviously that the Court makes an order that they be released back if need be.

HIS HONOUR: 35. There's no reason for the Court to retain them I don't think is there? Make a note to the Court they will be released forthwith and very shortly after forthwith

Mr Rockman: 36. Thank you Your Honour

HIS HONOUR: 37. Subject to the Court timelines. Is there anything else I need to do by the way of declarations or other matters arising? I think I've identified the way in which I intend both these penalties to be paid and the way in which they're calculated. I think I've made clear the basis for those orders. Would you both thank respectively counsel who appeared on the last occasion, both Mr Robinson, Mr Borenstien and Mr Feldmen, I'm grateful for their assistance and also the authorities for which I had the benefit of looking at since the 4 November. If nothing else I'll simply excuse you from further attendance I think I have other business to attend to in Court, so you're free to go. Thank you very much.