FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v PLAZA CAMERAS PTY LTD & ANOR *[2009] FMCA 935*

INDUSTRIAL LAW – Penalty hearing for failure to pay the balance of a redundancy payment to former employee – where breach admitted – lack of concern for employee – first time contravener – single contravention – general deterrence of considerable importance – punishment required.

Workplace Relations Act 1996 (Cth), ss.719(1), 728

CFMEU v Coal and Allied Operations Pty Ltd (No. 2) (1999) 94 IR 231; [1999] FCA 1714
Commonwealth Bank of Australia v Finance Sector Union of Australia (2007) 157 FCR 329; [2007] FCAFC 18
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Finance Sector Union of Australia v Commonwealth Bank of Australia (2005) 224 ALR 467; [2005] FCA 1847
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
Olsen v Sterling Crown Pty Ltd (2008) 177 IR 337; [2008] FMCA 1392

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	PLAZA CAMERAS PTY LTD
Second Respondent:	ASHLEY GEORGE HEUCHAN
File Number:	PEG 74 of 2009
Judgment of:	Raphael FM
Hearing date:	21 September 2009
Date of Last Submission:	21 September 2009
Delivered at:	Perth
Delivered on:	21 September 2009

REPRESENTATION

Counsel for the Applicant:	T. Woodland
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondents:	J. Johnston
Solicitors for the Respondents:	Calverley Johnston Lawyers

ORDERS

(1) The first respondent pay a penalty of $12,000.

(2) The second respondent pay a penalty of $3,500.

(3) The penalties be paid within 56 days to the Commonwealth of Australia, pursuant to the provisions of the *Workplace Relations Act 1996* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 74 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

PLAZA CAMERAS PTY LTD
First Respondent

ASHLEY GEORGE HEUCHAN
Second Respondent

REASONS FOR JUDGMENT

1. On 26 May 2009, the Fair Work Ombudsman, as he is now known, commenced these proceedings seeking a civil penalty against the two respondents, who are, respectively, the employing company and its principal director, for failure to pay the balance of a termination payment of $4,792 to a Ms Caroline Trumann, pursuant to clause 4.4 of the notional agreement preserving state awards (NAPSA), upon her redundancy, which occurred on 30 March 2007.

2. Following upon the commencement of proceedings, the amount due was eventually paid in two instalments. The respondents have conceded their breach of ss.719(1) and 728 of the *Workplace Relations Act 1996*, ("the Act")and the applicant's right to bring these proceedings. The hearing today was, as a consequence, confined to penalty only. The parties have prepared a Statement of Agreed Facts and provided the Court with helpful written submissions and authorities, which I have had the opportunity of reading in chambers.

The parties were represented at the hearing and made additional oral submissions.

3. Proceedings of this nature, under the Act, have been brought since 2007 and a body of authority from both the Federal Court and this Court has been built up, so that the factors which are to be considered, in relation to penalty, are now well established. I mention only *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337; *CFMEU v Coal and Allied Operations Pty Ltd (No. 2)* (1999) 94 IR 231; *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 as examples.

4. I accept the applicant's written submission that the following are those matters which I must take into account:

   a) the nature and extent of the conduct which led to the contraventions;

   b) the circumstances of the conduct (including deliberate defiance or disregard of the Act);

   c) the relevant record of civil penalty contraventions (including similar previous conduct);

   d) whether the contraventions are distinct or arise from a single course of conduct;

   e) the consequences of contravening conduct (e.g. whether the contraventions were substantive or technical in nature);

   f) deterrence, both general and specific;

   g) the objects of the Act (including the importance placed on compliance and enforcement);

   h) the size and financial resources of the contraveners;

   i) co-operation with regulatory authorities;

   j) the contravener's contrition;

   k) the size of the prescribed penalty, and any recent increases to that prescription; and

l) the totality principle.

5. The conduct which led to the contravention is described in the Statement of Agreed Facts. The first respondent is a company which trades as Plaza Cameras in Perth. Ms Trumann was its marketing manager and it would appear that at the relevant time there were approximately three branches of the company operating. As its name indicates, the company traded in cameras and associated photographic equipment and services. The company began to experience difficult trading times, although in the relevant financial year, its turnover was $9,789,063. I am sensible of the fact that turnover is no indicator of profitability. The company decided to reduce its staff and Ms Trumann was made redundant. Her position has not been filled. Under the NAPSA, Ms Trumann was entitled to eight weeks salary, which totalled the amount of $4,792 previously mentioned.

6. There was provision for the respondents to make an application to the Australian Industrial Relations Commission, or the Western Australian Industrial Relations Commission, to have the required severance payment varied on the basis of incapacity to pay, but this was not done. No payment was made. Not unnaturally, Ms Trumann was concerned and she complained to the Workplace Ombudsman on 12 June 2007. The Workplace Ombudsman contacted the company and commenced a lengthy correspondence with it through email and telephone. Eventually $1,000 was paid, but nothing further. Promises were made but they were not kept. It was explained to the Ombudsman that the company was in financial difficulties. Eventually the applicant ran out of patience and commenced these proceedings. Shortly thereafter arrangements for payment were made.

7. Although the amount of unpaid redundancy was not high, it was nonetheless significant to Ms Trumann. The respondents took over two years to make payments. Although a small amount of interest was added to them, the effect of the payments would have been much reduced. The purpose of redundancy payments is to assist a redundant worker to tide herself over during that period between the loss of her job and the obtaining of a new one. I have no evidence as to whether Ms Trumann is currently re-employed or how long it took for her to find re-employment but given the nature of what she was doing, it

seems to me that she would have been much assisted had that $4,792 been paid to her earlier rather than later. It is for those reasons that I consider the circumstances of the conduct, whilst not a deliberate defiance or disregard of the Act, to be unthinking at the very least and to indicate a lack of concern for employees, which is not appropriate in today's labour market.

8. There have been no previous civil penalty contraventions brought against either of the two respondents in this case and I have noted that at some time the company had employed over 100 persons. We now know that the company has reduced the number of its employees quite considerably and I think I am able to infer that those reductions were not done in contravention of any part of the Act.

9. There was only one contravention. This is not a case where one has to struggle with the difficult concept of "single course of conduct". I am, however, satisfied that the consequences of the contravening conduct were substantive and were not merely technical.

10. The applicant has addressed me in his written submissions in some detail about deterrence which he notes should be both specific and general. He notes the principal objects of the Act set out in s.3 including s.3(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; …*

11. It hardly bears repetition to say that in the current economic circumstances in which we find ourselves, notwithstanding the existence of green shoots of improvement, it is accepted that unemployment is bound to rise. The statutory protections that have been put in place when this occurs are important and should be enforced rigorously. It is for that reason that general deterrence is a matter of considerable importance. The penalties available to a court are high although the legislature has chosen to differentiate substantially between corporate breaches and those of individuals,

including individuals such as the second respondent who are persons involved in the contravention of their companies. If the Court is to impose a properly proportionate penalty in a case such as this, it should be noted by employers generally and the public, and hopefully this will discourage others from conducting themselves in the manner of the first and second respondents in these proceedings.

12. Specific deterrence should not, of course, be confused with punishment. It is a different concept. To my mind the respondents here should bear some punishment for their actions. $4,792 is not a lot of money and I note that in her articulate and persuasive arguments, Ms Johnston has told the Court that large sums of money have had to be raised by the second respondent and his fellow directors in order to keep this company afloat. If you are going to dispose of your property for $350,000 and place that money in the business in order to assist it with its working capital, it seems to me not unreasonable to expect that you could find $4,792 from it to pay a former employee who no longer is able to work for you because of the downturn in business. Failure to do so for two years strikes me as something which should merit a penalty that is more than just a slap on the wrist. Such a penalty will, hopefully, deter similar future conduct. But in this respect I have had regard to the submissions of Ms Johnston and would hazard a guess that neither the first nor the second respondents will be going down this path again.

13. I have already set out the relevant objects of the Act. The authorities, in particular *Finance Sector Union of Australia v Commonwealth Bank of Australia* (2005) 224 ALR 467 and *Commonwealth Bank of Australia v Finance Sector Union of Australia* (2007) 157 FCR 329, endorse the importance of those objects.

14. The only information I have about the size and financial resources of the first respondent is that it was a company with a turnover of approximately $9 million in three shops, and has now been reduced to a turnover of approximately $3 million in one shop. As I have said, I have no knowledge of the profit or loss made by the company, but the submissions indicate that the losses may have been considerable if the amounts of money referred to that were required to be put into it were required. Nonetheless, the company is still trading, and will have to

make provision for the payment of the penalty which I propose to award.

15. In my view, the applicant has been generous to the respondents in relation to its views on the company's cooperation. The company did absolutely nothing, apart from the payment of $1,000 before any proceedings were commenced, and those proceedings were commenced more than two years after the redundancy. When the proceedings were commenced, the company bowed to the inevitable. There has been some suggestion that this has saved the costs of a lengthy trial, but I am not impressed by that suggestion, because I do not think the trial would have been lengthy at all. Ms Trumann was made redundant. She was entitled to payment. No payment was made. What more is there to say?

16. The maximum prescribed penalty as at today for the corporation is $33,000, being 300 penalty units. For Mr Heuchan, the penalty is $6,600 or 60 penalty units. There have not been any increases to those penalties since 2007. In all probability, it is not intended that there should be, because the value of penalty units is itself adjusted from time to time. However, those penalties are not small and they allow a court considerable latitude in choosing the appropriate amount.

17. Finally, I should look at the totality principle, if it is relevant. It is not relevant. There is only one offence.

18. It will be clear from what I have said that I am unable to accede to Ms Johnston's request, on behalf of her clients, that the penalties here be placed at the very lowest end of the spectrum. The applicant suggests a penalty in the medium range, and refers me to the views expressed by the Full Federal Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72, where the Court indicated that the view of the regulator as a specialist point of view is a relevant but not determinative consideration on the question of penalty. I do not think this is a case for a penalty in the high range because whilst I am not impressed with the conduct of the respondents, this does appear to be a single offence and now, at least, the redundancy payment has been made. There would be little point in imposing a penalty so high that it could force the company into liquidation. If that happened, other employees would lose their jobs

and the penalty would not be paid. On the other hand, Mr Heuchan, who was the mind behind the decision, should be held appropriately responsible for the actions of his company.

19. In all these circumstances, the penalties I propose to impose are, in respect of the first respondent, Plaza Cameras Pty Ltd, the sum of $12,000, and in respect of Mr Heuchan, the sum of $3,500. Those penalties should be paid within 56 days to the Commonwealth of Australia pursuant to the provisions of the Act.

I certify that the preceding nineteen (19) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate:

Date: 23 September 2009