FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SANADA INVESTMENTS PTY LTD *[2010] FMCA 401*

INDUSTRIAL LAW – Pecuniary penalties – breaches of *Cafe Restaurant and Catering Award - State (Excluding South East Queensland) 2003* (Award) – breaches of Australian Pay and Classification Scale (APCS).

Workplace Relations Act 1996 (Cth), ss.6, 185, 719
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), ss.11, 13 & 25
Fair Work Act 2009 (Cth), s.701
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

CPSU v Telstra Corporation Limited (2001) 108 IR 228
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Cotis v McPherson [2007] FMCA 2060 *Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar* [2007] FMCA 7

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	SANADA INVESTMENTS PTY LTD
File Number:	BRG150 of 2010
Judgment of:	Jarrett FM
Hearing date:	2 June 2010
Date of Last Submission:	2 June 2010
Delivered at:	Brisbane
Delivered on:	9 June 2010

REPRESENTATION

Solicitor for the Applicant:	Ms Dennis
Solicitors for the Applicant:	Corrs Chambers Westgarth
Counsel for the Respondent:	Mr Bickford
Solicitors for the Respondent:	MacDonnells Law

ORDERS

I DECLARE THAT:

(1) The respondent has breached:

(a) an *applicable provision*, as defined in s.717 of the *Workplace Relations Act* 1996 (Cth), binding upon the respondent and comprising a requirement to pay the rates of pay specified in the Australian Pay and Classification Scales, as derived from the Cafe Restaurant and Catering Award – State (Excluding South East Queensland), pursuant to s.182 and 208 of the Act;

(b) an *applicable provision*, as defined in s.717 of the *Workplace Relations Act* 1996 (Cth), binding upon the respondent and comprising a requirement to pay overtime in accordance with a provision of a Notional Agreement Preserving State Award derived from the Cafe Restaurant and Catering Award – State (Excluding South East Queensland), in particular clause 6.4 of the Notional Agreement Preserving State Award;

(c) an *applicable provision*, as defined in s.717 of the *Workplace Relations Act* 1996 (Cth), binding upon the respondent and comprising a requirement to pay "late work rate" in accordance with a provision of a Notional Agreement Preserving State Award derived from the Cafe Restaurant and Catering Award – State (Excluding South East Queensland), in particular clause 5.3.3 of the Notional Agreement Preserving State Award; and

(d) an *applicable provision*, as defined in s.717 of the *Workplace Relations Act* 1996 (Cth), binding upon the respondent and comprising a requirement to pay "weekend penalty rates" in accordance with a provision of a Notional Agreement Preserving State Award derived from the Cafe Restaurant and Catering Award – State (Excluding South East Queensland), in particular clause 6.4 of the Notional Agreement Preserving State Award; and

I ORDER THAT:

(2) Pursuant to section 719(1) of the *Workplace Relations Act* 1996 (Cth), the respondent pay a penalty of $33,600 in respect of the contraventions identified at paragraph 1 above, as follows:

(a) $8,400 for its contravention set out in (1)(a) above;

(b) $8,400 for its contravention set out in (1)(b) above;

(c) $8,400 for its contravention set out in (1)(c) above;

(d) $8,400 for its contravention set out in (1)(d) above.

(3) The penalties payable by the respondent be paid to the Commonwealth Consolidated Revenue Fund by 4.00 pm on 6 September, 2010.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG150 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

SANADA INVESTMENTS PTY LTD
Respondent

REASONS FOR JUDGMENT

1. This is an application for the imposition of pecuniary penalties on the respondent for breaches of:

   a) The *Cafe Restaurant and Catering Award - State (Excluding South East Queensland) 2003* (Award) which operates as a notional agreement preserving State award (NAPSA) under the *Workplace Relations Act* 1996 (Cth); and

   b) the Australian Pay and Classification Scale (APCS) derived from the Award.

2. There are four categories of breaches alleged against the respondent which relate to 181 separate employees. The four categories are:

   a) a failure to pay the correct basic periodic rate of pay;

   b) a failure to pay correct overtime rates;

   c) a failure to pay late work rates; and

   d) a failure to pay weekend penalty rates.

3. The respondent admits the breaches. The issue to be determined in this application is the appropriate penalty for the admitted breaches.

Agreed facts

4. The parties agreed on a statement of facts for the purposes of these proceedings. In addition, at the commencement of the hearing the respondent sought and obtained leave to rely upon an affidavit of Nahoko Sanada, the director of the respondent. The affidavit supplemented the facts the court might take into account in this matter. Although leave to file and read the affidavit was not opposed, the applicant submitted that the evidence should attract very little weight. The applicant did not seek to cross-examine Ms Sanada.

5. The respondent company conducted a retail food business from two locations in Cairns namely:

    i) Sushi Train Cairns Central, Shop 144, McLeod Street, Cairns, Queensland; and

    ii) Sushi Train Cairns City Place, Shop 3, Global Palace Shields Street, Cairns, Queensland.

6. The respondent's workforce typically included Japanese and Korean nationals holding working holiday visas and these employees were often employed by the respondent for a period between 1 to 3 months. In addition, a number of the respondent's workforce had limited knowledge of the English language.

7. Immediately prior to the commencement of the *Workplace Relations Amendments (Work Choices) Act* 2005 (Cth) on 27 March 2006:

    a) the employment of the respondent's employees was governed by the Queensland industrial relations system and subject to the terms of the *Industrial Relations Act* 1999 (Qld) and the applicable awards made under that Act;

    b) the respondent's employees were subject to the terms of the *Cafe Restaurant and Catering Award - State (Excluding South East Queensland) 2003.*

8. The award applied to the respondent and its employees because the respondent:

a) was an employer of employees within the meaning of clause 1.4.1(a) of the Catering Award;

b) operated its business in an area defined by clause 1.5 of the Catering Award as being in the Eastern District of the Northern Division.

c) was bound by the catering Award.

9. As at 27 March, 2006 the effect of the *Work Choices Act* on the respondent with respect to its employees was that the Catering Award ceased to apply as an industrial instrument enforceable under the laws of Queensland. Instead a Notional Agreement Preserving State Awards (a NAPSA) came into operation with respect to the respondent's business pursuant to clause 31 of Schedule 8 of the WR Act.

10. Pursuant to clause 34 of Schedule 8 of the WR Act, the terms of the Catering Award and certain terms of the IR Act are taken to be terms of the Catering NAPSA.

11. At all relevant times from and including 27 March 2008, the respondent was, pursuant to clause 32 of Schedule 8 of the WR Act, bound by the Catering NAPSA.

12. At all relevant times from and including 27 March 2006, under s.182(1) and s.208 of the WR Act, a preserved Australian Pay and Classification Scales (APCS) derived from the Catering Award came into operation and became binding on the respondent in respect of its employees.

13. Between 27 March 2006 and 28 January 2007 the respondent employed persons to prepare and sell food in its business.

14. The Office of Workplace Services (OWS) commenced an investigation into alleged underpayments by the respondent to its employees by conducting an audit of the respondent's time and wage records. As part of the investigation, the OWS asked the respondent to provide

details about the respondent's business and its employees, as well as provide a copy of time and wage records. In or about January, 2007 the respondent provided these documents to the OWS.

15. On 5 February, 2007 the OWS sent a letter to the respondent's lawyers which notified them of the outcome of the investigation. The letter outlined that the records provided by the respondent demonstrated that the respondent appeared to be paying the majority of its kitchen hands and food and beverage attendants less than the minimum wage entitlements due under the Catering NAPSA. This letter also sought for the respondent to:

    a) voluntarily commence paying the correct wages to employees; and

    b) voluntarily self-assess back-payments due to all existing and former employees.

16. On or about 8 February, 2007 the respondent advised the OWS, that it had commenced paying the correct "Award wages" to its employees and that it would conduct a self-assessment of the back payments due to all existing and former employees.

17. In or about March, 2007 the respondent, at the request of the OWS, performed an audit of the outstanding wages owed to its employees during the relevant period. As part of the audit, the respondent conducted a self-assessment in relation to its employees.

18. In March, 2007 the respondent provided the applicant with a table outlining details about the underpayments over the relevant period. In respect of each of the 181 employees the subject of the breaches in this application, the audit:

    a) identified the employee as an employee of the respondent to whom an underpayment was made; and

    b) identified the quantum of back-pay that was assessed for each employee.

19. On 28 March, 2007 the OWS Issued a Breach Notice to the Respondent. The Breach Notice outlined that the respondent:

a) failed to pay wages as prescribed by clause 5.2 of the Award;

b) failed to pay late work rates as prescribed by clause 5.3 of the Award;

c) failed to pay overtime rates as prescribed by clause 6.4 of the Award; and

d) failed to pay weekend rates as prescribed by clause 6.5 of the Award.

20. The Breach Notice also stated that the respondent was required to review the time and wage records for all employees from 27 March, 2006 and pay any amounts owing.

21. During the investigation the respondent provided the applicant with pay records relating to a sample group of its employees including in respect of a number of employees in respect of which this application is now made.

22. Pursuant to s.182(1) of the WR Act, the respondent was required to pay each employee a basic periodic rate of pay for each of that employee's guaranteed hours that was at least equal to the basic periodic rate of pay that is payable under the APCS as derived, in particular from clauses 4.3, 6.2 and 5.3.2 of the Catering Award (including any increases determined either by the Australian Fair Pay Commission, or by the operation of section 207 of the WR Act).

23. The respondent failed to pay the correct basic periodic rate of pay to some or all of its employees during the relevant period resulting in the employees being underpaid.

24. By operation of clauses 4.3.4, 6.1 and 6.4 of the Catering NAPSA, the employees were entitled during the relevant period to be paid overtime for work performed:

a) in excess of 8 hours per day, or, where there was agreement between the employer and the majority of employees concerned, ten hours per day; and/or

b) in excess of 40 hours per week; and/or

c) between midnight and 6.00am; and/or

d) outside the daily and/or weekly rostered hours.

25. By operation of clause 6.4 of the catering NAPSA the respondent was obliged during the relevant period to pay all overtime:

a) worked on a Sunday at the rate of double time; and

b) otherwise, at the rate of time-and-a-half for the first three hours and double time thereafter.

26. The respondent did not pay overtime rates to its employees, where the employees worked:

a) in excess of 8 hours per day, or, where there was agreement between the employer and the majority of employees concerned, ten hours per day: and/or

b) in excess of 40 hours per week; and/or

c) between midnight and 6.00am; and/or

d) outside the daily and/or weekly rostered hours.

27. The respondent failed to pay overtime rates to seven of the sample employees in one or more pay periods in the relevant period.

28. The respondent failed to pay the correct overtime rates to some or all of the employees in respect of which these proceedings are brought during the relevant period resulting in the employees being underpaid.

29. By operation of clause 5.3.3 of the Catering NAPSA, the respondent was obliged during the relevant period to pay each employee who was required to work between the hours of 8.00pm and midnight the amount of $3.65 (Late Work Rate) on each such occasion.

30. The respondent at no point paid a Late Work Rate to any of its employees during the relevant period.

31. The respondent's failure to pay this entitlement resulted in an underpayment to all of the employees who worked between the hours

of 8.00pm and midnight during the relevant period, including all of its sample employees.

32. By operation of clause 6.5 of the Catering NAPSA, the respondent was obliged during the relevant period to pay the employees at a rate of time-and-a-half (Weekend Penalty Rate) for all time worked between midnight Friday and midnight Sunday, where such time was not overtime within the meaning of clause 6.4.

33. The respondent failed to pay some or all the employees the weekend penalty rates during the relevant period resulting in the employees being underpaid. The respondent failed to pay weekend penalty rates to each of the sample employees in one or more pay periods in the relevant period. The respondent failed to pay weekend penalty rates to some or all of the employees in respect of which these proceedings are brought during the relevant period resulting in the employees being underpaid.

34. The respondent conceded during the investigation that the underpayments made to the sample employees were consistent with the types of underpayments made to the respondents remaining employees.

35. The respondent cooperated with the OWS in order to rectify the above underpayments. Following the investigation and the audit, the respondent rectified the underpayments to employees that it was able to locate as follows:

    a) on 13 April, 2007 the respondent made payments to employees it could locate in the amount of $20,191.59;

    b) on 13 April, 2007 the respondent also made payments to employees 11 could locate in the amount of $8,948.20;

    c) on 26 April 2007, the respondent made a payment to an employee, Yumiko Matsu, in the amount of $599.35.

36. During the course of the investigation, the OWS was advised by the respondent that due to the temporary nature of the respondent's workforce the respondent had difficulty contacting some of its former employees in order to rectify the underpayments.

37. In addition to the payments made by the respondent to its employees to remedy the breach, the respondent rectified the underpayments to employees that it was unable to locate by:

a) On 26 April, 2007 sending to the OWS a cheque in the amount of $91,210.12. This cheque was a payment for underpaid wages to employees that were formerly employed by the respondent but that the respondent was unable to locate.

b) On 30 April, 2007 the respondent provided to the OWS a list of last known addresses for those former employees of the respondent who were not contactable at the time and whose underpaid wages have been paid to the Commonwealth Consolidated Revenue by the respondent;

c) On or about 4 May, 2007 the respondent determined that there was a discrepancy in the calculations and the respondent overpaid an amount of $1,188.34 to OWS.

d) On or about 9 May, 2007 the OWS returned the respondent's cheque in the amount of $91,210.12 because the cheque was for the incorrect amount due to a discrepancy in the calculations.

e) On or about 9 May, 2007 the respondent made a payment of $90,021.78 to the Workplace Ombudsman Collector of Public Monies, for employees that were formerly employed by the respondent but that the respondent was unable to locate.

38. The total amount of the underpayments made by the respondent during the relevant period to its employees was $119,760.92 (gross) of which:

a) the respondent paid $29,739.14 directly to its current and former employees that it was able to locate; and

b) the respondent paid $90,021.78 by cheque to the Workplace Ombudsman Collector of Public Monies for the employees that it was unable to locate.

Legislative Framework

39. There is no dispute about the legislative framework against which this application has been made. The respondent does not take issue with the applicant's submissions in this regard, and what follows is taken from the applicant's written submissions.

40. The applicant applies for the imposition of a penalty under s.719(1) of the WR Act. Section 719(1) of the WR Act enables a court of competent jurisdiction to impose a penalty in respect of a breach of an applicable provision by a person bound by the provision. *Applicable provision* is defined in s.717 to include a term of the Australian Fair Pay and Conditions Standard and a collective agreement. The NAPSA may be enforced as if it were a collective agreement.

41. Section 719(2) of the WR Act provides that where two or more breaches of an applicable provision are committed by the same person, and the breaches arose out of a *course of conduct* by the person, the breaches shall, for the purposes of s. 719 of the WR Act, be taken to constitute a single breach of the applicable provision.

42. Section 727 of the WR Act defines "civil remedy provisions" to include breaches under s. 719 of the WR Act.

43. The maximum penalty for a breach of the s. 719(1) is 300 penalty units for a body corporate. 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* provides a *penalty unit* to be $110 dollars.

44. Accordingly, the maximum penalty that may be imposed by the court for each breach of an applicable provision by a body corporate is $33,000.

Transitional Issues

45. There is no dispute about the transitional arrangements that apply to these proceedings. The respondent does not take issue with the applicant's submissions in this regard, and what follows is taken from the applicant's written submissions.

46. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) states that the WR Act continues to apply on or after 1 July 2009 in relation to the contraventions of the WR Act that occurred before 1 July 2009, subject to a contrary intention in that Act itself. There is no contrary intention apparent in the Transitional Act and the WR Act continues to apply to the conduct of the respondent the subject of these proceedings.

47. 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. This includes the provisions which appoint the Workplace Ombudsman as a workplace inspector and provide the Workplace Ombudsman with standing to bring proceedings under the WR Act.

48. However, in order to ensure that continuation and completion of legal proceedings under the WR Act's the Transitional Act provides than 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. The Fair Work Ombudsman is a fair work inspector by virtue of s.701 of the *Fair Work Act* 2009 (FW Act).

49. The Fair Work Ombudsman has standing to bring this proceeding pursuant to s. 719 of the WR Act under Schedule 18, Part 3 of the Transitional Act. The Court has the power to impose a penalty on the respondent by virtue of s.727 of the WR Act pursuant to s. 719(1) with respect to each breach of an applicable provision.

Consideration

50. The respondent suggests that I should approach the assessment of the relevant penalties by applying s.16A of the *Crimes Act – Matter to which court to have regard when passing sentence etc.* It seems to me that section is not applicable because:

    a) It applies when sentencing a person for a federal offence; and

    b) I am being asked to assess a civil penalty pursuant to a *civil penalty provision* as that term is defined in the WR Act.

51. In any event, counsel for the respondent did not suggest there was any meaningful difference in the approach under s.16A of the *Crimes Act* and the approach generally accepted in this court as explained in *Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar* [2007] FMCA 7 and the cases following it.

52. The parties agree that the contraventions are to be assessed for penalties as four distinct and separate breaches of applicable provisions.

53. The parties agree that:

a) It is necessary to identify the separate contraventions involved. Each breach of each separate obligation found in the NAPSA and the Catering Award in relation to each employee is a separate contravention of a term of an applicable provision for the purpose of s 719 and the breach of the APCS is a separate contravention;

b) 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 respondent 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 respondent actually did, and this task is distinct from and in addition to the final application of the totality principle;

c) The court will then consider an appropriate penalty to impose in respect of each course of conduct having regard to all the circumstances of the case;

d) Having fixed an appropriate penalty for each group of contraventions or course of conduct, the court should take a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches. The court should apply an "instinctive synthesis" in making this assessment . This involves an application of the totality principle.

54. I identify the four categories of breaches as follows:

a) a breach of s.182 of the WR Act by failing to pay the correct basic periodic rate of pay under the Australian Pay and Classification Scale (APCS);

b) a breach of clause 6.4 of the NAPSA by failing to pay the correct overtime rates;

c) a breach of clause 5.3.3 of the NAPSA by failing to pay late work rates; and

d) a breach of clause 6.5 of the NAPSA by failing to pay the correct penalty rates for weekend work.

55. The principal objects of the WR Act emphasise the importance of an effective safety net of minimum terms and conditions of employment together with effective enforcement of those minimum standards. The provisions concerning compliance, at Part 14 of the WR Act is one of the ways that the WR Act seeks to give effect to this principal object. The importance of this 'safety net' is reflected not only in the magnitude of the maximum penalties available in respect of any breach of an applicable provision, but also in the Legislature's increase of those maximum penalties in August, 2004:

a) Maximum penalty for Individuals Increased from $2,000 to 60 penalty units ($6,600)

b) Maximum penalty for bodies corporate increased from $10,000 to 300 penalty units ($33,000).

56. The provisions emphasise the importance of employers complying with their obligations and affording rights to employees under industrial instruments. The respondent, in its written submissions, accepts the correctness of these propositions.

57. I accept that the relevant considerations when fixing penalties in this case include:

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;

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) 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;

k) Deterrence.

58. Compliance with the APCS and the provisions of the NAPSA is important and should not be ignored by employers. The applicant submits that the nature and extent of the respondent's conduct was significant because:

a) the underpayments related to 181 employees (these employees are listed at Annexure A);

b) the breaches occurred over the period from 27 March 2006 and 28 January 2007 (the Relevant Period). which is a 10 month period; and

c) the amount of the underpayments to the employees were significant and totalled $119,760.92.

59. The relevant employees have been disadvantaged by the respondent's failure to pay the correct wages and entitlements under the APCS and the NAPSA. I accept that there is nothing to indicate that the contraventions would have not continued had the applicant not conducted an investigation into the respondent in or about December, 2006.

60. The employees affected were particularly vulnerable because:

a) the employees typically included Japanese and Korean nationals holding working holiday visas;

b) the employees were often transient employees that were employed by the respondent for a short period between 1 to 3 months;

c) a number of the respondent's workforce had limited knowledge of the English language.

61. The total underpayment of $119,760.92 is a significant underpayment. The amount has been paid in part to the employees entitled to payments and the balance (in respect of employees not able to be found) has been paid to the Workplace Ombudsman Collector of Public Monies. I accept that this is a significant factor when assessing penalty.

62. The employees who were unable to be located, however, have been particularly disadvantaged by the respondent's failure to pay the correct wages and entitlements under the APCS and the NAPSA because they have not received their outstanding monies. In this respect, I consider that it is important to not give undue weight to the fact that the respondent has made a payment to the Workplace Ombudsman Collector of Public Monies, for employees that have not been located. Those employees are without their entitlements and that highlights the disadvantage to that group of employees. They have been deprived of the protection of the Act by the respondent's conduct.

63. The evidence with respect to the size of the company (or the size of each of the Sushi Train businesses) is limited. Ms Sanada gives evidence that the company operates three Sushi Train stores in Cairns and pays in excess $680,000 per annum in rent. It has a superannuation obligation to its eligible employees of $151,000 per annum (I presume it is per annum although her affidavit does not specify that period). Assuming a compulsory employer superannuation contribution of 9% per annum that would mean an annual payroll in respect of eligible employees in excess of $1,670,000. In addition, Ms Sanada swears that in 2007 the company sourced and used local produce to the value of $1,400,000. Thus, to cover its rent, wages,

superannuation and local produce, the respondent's turnover must be at least $3,800,000 per annum.

64. Ms Sanada swears that the respondent is now one of the leading restaurant operators in Cairns, employing 38 full-time and part-time employees. Thus, it seems to be the case that the respondent is no small concern and has a sizable business interests.

65. The respondent submits that it does not operate a large and highly profitable business. It submits that the catering industry in which the respondent operates is highly competitive. These submissions are, however, inconsistent with the evidence referred to above from Ms Sanada.

66. She gives no evidence as to the profitability of the respondent's business, although I would expect that she is in a position to do so.

67. I accept the applicant's submissions that regardless of the size of the business it does not absolve the respondent of its legal responsibility to comply with the law in relation to the employment of its employees:

68. In *Cotis v McPherson* [2007] FMCA 2060 at para [17] Federal Magistrate Driver made clear that the issue of the deliberateness of the breaches is to be judged against something of a sliding scale where recklessness is as much a relevant factor as deliberate intention to breach:

> *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. Ms Sanada gives evidence that she became in involved in the respondent's business in 2004 when she became a director of the respondent. She says that the respondent has for "many years" had a

General Manager. One of the responsibilities of the General Manager was to ensure that employees were paid their full entitlements by way of wages and other benefits. The respondent had a General Manager at the time of the offences. Ms Sanada does not say if that person is still in the employ of the respondent. The General Manager did not give evidence in these proceedings.

70. Ms Sanada swears that at the time of the offences she had a limited knowledge of Australian law and her English skills were poor. She had the care of her teenage children, two of whom resided in Japan. She therefore spent much time travelling between Australia and Japan.

71. She swears that she "relied a lot upon my General Manager and administrative staff and delegated most of the administrative work, including administering and managing pay rolls, to my office staff.".

72. She swears that during the period when the offences occurred, she was not aware that there were minimum rates of pay prescribed by the applicable Award. She was not even aware of the existence of Awards in Australia or the fact that there are minimum payments applicable to employees in Australia. She swears that she erroneously believed, during the period from 27 March 2006 to 28 January 2007 that the respondent's employees had been correctly paid.

73. The applicant submits that the respondent's contraventions evidence at least a reckless disregard for its statutory obligations as an employer. I agree. That is the most benevolent view. There is no evidence about the involvement of the respondent's senior managers in respect of the breaches. Given that Ms Sanada was moved to swear an affidavit which was filed by leave on the morning of the hearing, the absence of any direct evidence from the General Manager about the pay arrangements for the relevant period might lead to a more significant inference, but I do not draw that inference.

74. The respondent has fully cooperated with the applicant throughout the investigation. Following the investigation and the audit conducted by the applicant, the respondent sought to rectify the total underpayments. In addition, the respondent has changed its practices by entering into a collective agreement with its employees which has ensured no further breaches have occurred.

75. It is well established that deterrence is a relevant factor in the imposition of a penalty. The applicant referred me to the following passages about the significance of the role of general deterrence in determining the appropriate penalty:

Lander J. in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at para 183:

> *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.*

Finkelstein J in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at [9]:

> *....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 act as a warning to others not to engage in similar conduct.*

76. I accept the applicant's submissions that the court should have regard to the message sent, in the imposition of penalties, to employers and the community generally that underpayment of wages will not be tolerated and this is particularly the case where vulnerable employees are involved.

Penalty

77. In my view when all the factors are considered the breaches are in the moderate range of seriousness. These were vulnerable employees, many of whom are now without their entitlements even thought the respondent has sought to rectify the underpayments.

78. The respondent points out that it has suffered adverse publicity in the Cairns area in relation to these matters, but there is no evidence about any effect that publicity has had upon the profitability of its businesses.

79. In my view penalties for each of the four breaches should be assessed at $12,000 per breach or $48,000 in total. Taking into account the co-operation and admissions of the respondent from the outset of the investigations in this matter there should be a discount of 30% - the respondent's co-operation was early and fulsome. Applying that discount, the penalty for each breach is $8,400.00.

80. The aggregate penalty is $33,600.00. Given the evidence of Ms Sanada I have referred to above I do not consider that the aggregate penalty is likely to have a "crushing effect" upon the respondent. Her evidence is not to that effect.

81. The respondent seeks time to pay. Again by reason of the evidence of Ms Sanada I am not satisfied that the respondent's financial position is such that an overly long period is necessary. I will allow the respondent three months to pay.

82. I make the orders set out at the commencement of these reasons.

I certify that the preceding eighty-two (82) paragraphs are a true copy of the reasons for judgment of Jarrett FM

Associate: 

Date: 9 June 2010