

**INDUSTRIAL RELATIONS COURT (SA)**

FAIR WORK OMBUDSMAN

v

SIMDO PTY LTD (First Respondent)

and

CREEK, Donna (Second Respondent)

**JURISDICTION:** Federal Penalty Matter

**FILE NO/S:** 4616 of 2009

**HEARING DATES:** 1 March 2010

**JUDGMENT OF:** Industrial Magistrate M Ardlie

**DELIVERED ON:** 1 April 2010

**CATCHWORDS:**

*Penalty hearing – Various contraventions: underpayment, Sunday penalty rate, three hour minimum engagement, one hour minimum engagement, public holiday payment, overtime payment, frequency of payment, superannuation contributions, record keeping, obligation to make and keep records relating to employees, conditions of records, general records, overtime records, pay records, annual leave records, superannuation contribution records, termination of employment records, payslips, payslips timing – **Held:** Orders made regarding payment of outstanding entitlements plus interest – Penalties imposed for the various contraventions – After discount and the application of the totality principle: Penalty as against the first respondent of \$120,000; Penalty as against the second respondent of \$25,000 - Ss 182(1), 185(2), 185(3), 189(2), 717, 718(1), 719, 722(1), 841(a) Workplace Relations Act 1996, Regs 14.3(2), 14.4, 19.4, 19.5, 19.8, 19.9, 19.11, 19.12, 19.13, 19.14, 19.20(1), 19.20(2) Workplace Relations Regulations 2006, Cls 6.4.2, 4.5.2, 4.5.4, 6.4.4, 6.2, Schedule 3 Cl 3.3, Schedule 8 Cl 43, Notional Agreement Preserving a State Award (NAPSA) SA Health Fitness and Recreation Award (Award)*

*Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170

These reasons for decision are uncorrected and subject to revision before external publication and distribution.

*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7

*Cotis v MacPherson* [2007] FMCA 2060

*Cameron v The Queen* [2002] 209 CLR 339

*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8

**REPRESENTATION:**

Counsel:

Applicant: Mr G Edmonds-Wilson with Ms N Haig

Respondent: Ms Donna Creek

Solicitors:

Applicant: Hunt & Hunt

Respondent: N/A

## Introduction

- 1 The Workplace Ombudsman by summons dated 1 July 2009 alleged that the first respondent, Simdo Pty Ltd (“Simdo”) operated a health and fitness centre at Mt Gambier. The second respondent Donna Creek (“Creek”) was a Director of Simdo for the relevant period, namely 27 March 2006 to on or about 29 February 2008.
- 2 The summons alleged that there were contraventions of workplace laws in relation to six employees of Simdo who were either casual or part-time employees.
- 3 The contraventions related to:
  - underpayments of entitlements to the six employees;
  - non-payment of superannuation contributions;
  - failures to pay some employees in accordance with frequency of payment obligations;
  - failure to issue pay slips; and
  - failure to comply with record keeping obligations as an employer.
- 4 On 2 September 2009 leave was given to amend the name of the applicant from Workplace Ombudsman to the Fair Work Ombudsman. The transitional Act<sup>1</sup> pursuant to Pt 3 of Sch 18, s 13(1) provides that for the purposes of the application of the Act in relation to conduct that occurred before the Act repeal day (1 July 2009) an application that could have been made or continued by a Workplace Inspector may be made or continued on and after the repeal day by a Fair Work Inspector.
- 5 The transitional Act further provides in Pt 3 of Sch 2, s 11(1) that the Act continues to apply on and after the Act repeal day in relation to conduct that occurred before the Act repeal day.
- 6 The applicant as against Simdo seeks orders that Simdo pay to each of the employees all amounts owed to them pursuant to s 719(6) of the *Workplace Relations Act 1996* (Cth) (“the Act”), together with interest pursuant to s 722(1) of the Act.
- 7 In addition against Simdo and Creek the applicant seeks the imposition of penalties pursuant to s 719(1) of the Act and reg 14.4 of the

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<sup>1</sup> *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Regulations. The applicant also seeks an order that under s 841(a) of the Act any penalty imposed on the respondents be paid to the Commonwealth of Australia.

8 Simdo in a defence dated 10 November 2009 admitted the matters pleaded in the applicant's statement of claim. In addition it stated:

- Simdo was registered as a company on 8 February 2005;
- the Directors of Simdo were Creek and Simon Golebiowski ("Golebiowski") effective from 8 February 2005;
- Golebiowski resigned as a Director effective on 17 October 2006;
- Creek ceased to be a Director of Simdo on becoming bankrupt on 25 July 2008;
- the status of Simdo is "strike-off action in progress" with a review date of 8 February 2010.

9 In a letter dated 4 January 2010 from Australian Securities and Investments Commission (ASIC)<sup>2</sup> an application made to defer the deregistration of Simdo was approved and the period remaining before deregistration is due to occur has been extended by 180 days from the date (4 January 2010) of the notice.

10 Creek by a defence dated 10 November 2009 admitted the matters pleaded in the applicant's statement of claim with the following qualifications:

- Creek at no time deliberately or knowingly breached or caused to be breached any provisions of the Act;
- Creek sold the business by contract dated 29 February 2008 and settlement of the sale occurred on 18 March 2008;
- Creek caused the whole of the net proceeds of the business sale (\$38,000) to be paid to Tanya Opie, Annette Iturbe and Jacqueline Annett and believed that by such payment she had discharged all legal and equitable responsibility to those persons;
- on 3 March 2008 a notice to produce documents pursuant to s 169(2)(C) of the Act was issued some three days subsequent to the business sale;

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<sup>2</sup> See Exhibit A1.

- on 5 June 2008 Creek applied to ASIC to deregister Simdo;
- Creek was precluded by the fact of the business sale from taking any action to remedy the matters alleged in the statement of claim;
- Creek was declared bankrupt on 25 July 2008.

11 The applicant replied to the defence of Creek. Relevant matters put in issue by the reply were as follows:

- the applicant denies that Creek caused the whole of the net proceeds of the business sale to be paid solely to Tanya Opie, Annette Iturbe and Jacqueline Annett and says that Creek has provided to the applicant documentary evidence that the net proceeds of the business sale were distributed to twelve staff members;
- Creek personally arranged for the distribution of the proceeds of the sale of business;
- Creek knew or ought to have known that by such distribution of the proceeds of the sale of the business she had not discharged all legal and equitable responsibility to staff and amounts remained outstanding;
- the settlement of the sale of the business occurred on 18 March 2008 and the notice to produce documents referred to in Creek's defence was issued on 3 March 2008.

### **Evidence relied upon**

12 The applicant at the hearing of this matter in relation to penalty relied upon the following:

- the letter from ASIC dated 4 January 2010 relating to the deferral of de-registration of Simdo<sup>3</sup>;
- the affidavit of Natalie Claire Goldsworthy ("Goldsworthy"), inspector employed by the Australian Government with the Fair Work Ombudsman sworn on 23 February 2010<sup>4</sup>;
- amended calculations in relation to the entitlements of six employees<sup>5</sup>;

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<sup>3</sup> See Exhibit A1.

<sup>4</sup> See Exhibit A2.

<sup>5</sup> See Exhibit A3.

- the admission of the allegations contained in the statement of claim by both Simdo and Creek in the defences filed on their behalf;
- applicant's written submissions on penalty dated 1 March 2010; and
- applicant's written submissions as to numbers of contraventions and level of seriousness.

13 Creek and Simdo had representation initially and for the filing of a defence. Creek then represented herself and Simdo and appeared at the hearing of this matter and made submissions in relation to the matter generally and in particular in relation to penalty. I set out below a summary of the submissions made by Creek. Apart from these submissions and the defence no further evidence was put before the Court by the respondents.

#### **Summary of submissions made by Creek**

- 14 Her first full-time employment in Mt Gambier (she was born and raised in Mt Gambier) was as a junior office assistant. She studied after hours and completed a Certificate III in Accounting including Introduction to Accounting, Implementing and Operating GST and various computer software packages.
- 15 In 1995 she was appointed to a position as Office Manager. Her duties as Office Manager included preparing and maintaining employee's payroll, superannuation and WorkCover records together with customer invoicing and compilation of the internal accounting system.
- 16 She always had an interest in sporting activities and completed courses and became certified as a group fitness leader and resigned from her position as Office Manager, went to Adelaide for some ten months and then returned to Mt Gambier entering full-time into the fitness industry as an employee. She continued in the fitness industry in both Adelaide and Perth and in February 2004 returned to Mt Gambier to be with her de facto Golebiowski and to be close to her immediate family.
- 17 Together with Golebiowski she purchased a business known as the XY Gym in November 2004. On 10 January 2005 she and Golebiowski commenced trading as Bounce Fitness Club in a partnership arrangement. In March 2005 Cindy Patsell a friend of Creek invested funds into the business on the basis that she was to own a share of the business. The business would continue as a business partnership between the three persons involved.

- 18 In late 2005 she received correspondence from solicitors representing Bounce Squash and Fitness Centre in Melbourne advising that the partnership was in breach of the trademark Bounce. The partnership briefed a lawyer in Melbourne specialising in trademarks and began the lengthy process of disputing this allegation.
- 19 In February 2006 advice was received that this was a difficult matter to win and the partnership decided to register the business as Tonic Health Club.
- 20 The dispute over the trade mark which involved legal costs together with the cost of organising a new logo, changing printing, stationery and sign writing proved to be a costly exercise. Patsell advised that she no longer wanted to be part of the partnership and resigned leaving Creek and Golebiowski with the problem of funding the outstanding costs associated with the litigation and changes.
- 21 Patsell communicated to club members and other persons in Mt Gambier that Golebiowski and Creek were intending to shut the business and these actions had a massive impact on memberships which in turn created cash flow problems.
- 22 Despite attempts to attract investors in the business it was ultimately recommended that the business should be sold.
- 23 An agreement was reached for the sale of the business in the sum of \$38,000 which included the business name, all plant and equipment of the business that was unencumbered and the good will of the business. The incoming purchaser was to take over all existing encumbered plant and equipment by way of the assignment or refinancing of existing finance agreements relating to such plant and equipment together with trade creditors.
- 24 The \$38,000 represented a pre-calculated amount that had been worked out by Creek as being the amount required to pay employees' wages up to the close of business at the end of February 2008.
- 25 All of the settlement proceeds in the amount of \$38,000 were disbursed to employees. If the business had been placed in liquidation it was unlikely that there would have been any consideration available for outstanding wage payments. Creek and Golebiowski gained nothing from the sale.
- 26 Creek was contacted on 27 February 2008 by Inspector Goldsworthy on behalf of an employee Jaqueline Annett regarding Annett's complaint over payment of wages. Goldsworthy requested various information to enable her to investigate Annett's claim.

- 27 Creek supplied calculations of employee's pays to Goldsworthy.
- 28 Creek said Goldsworthy arrived at the business premises on 3 March 2008 without any prior notice and served a notice to produce documents by 18 March 2008.
- 29 Creek said she complied with the notice to produce documents to the best of her ability.
- 30 Creek was declared bankrupt on 25 July 2008.
- 31 Her employment relationship with the incoming purchaser deteriorated and Creek decided to move from Mt Gambier to Melbourne resulting in her relationship breaking up with Golebiowski, as well as severance from her family and the loss friends.
- 32 Patsell's resignation at short notice and the circumstances leading up to and resulting in her resignation created cash flow problems which resulted in delay as to payment of employee wages. Employees were always kept informed of these circumstances.
- 33 Creek said that she kept records as to the outstanding amounts that were due to each employee.
- 34 She maintained that her calculations of all outstanding entitlements equated to the sale price of the business, her intention being that all employees of the business would be paid out.
- 35 She maintained that she did her best to cooperate with Inspector Goldsworthy.
- 36 Funds that were initially advanced to the business by her and Golebiowski and the respective families were irrecoverable. The adverse publicity generated in the press and media has impacted upon her health and wellbeing.
- 37 Whilst there are a number of contraventions it should be considered as one breach.
- 38 There is no financial ability to make restitution.
- 39 Every dollar of the \$38,000 was paid towards employee entitlements.
- 40 There are no assets relating to Simdo.
- 41 Her current earnings are \$32,000. Whilst bankrupt she is unable to earn over \$42,000 gross per year.

- 42 She is currently employed as a membership sales consultant for a fitness club. She lives in rental accommodation and pays a \$150 per week. She pays \$350 a month to her parents in relation to car repayments. Her parents had to fund her to buy a car.
- 43 Her general living expenses food and the like vary between \$100 and \$200 per week.
- 44 The bankruptcy finishes in 2011.

### **Consideration**

- 45 Dealing firstly with the submissions made by Creek I find that whilst she kept some records of employees in the business, such record keeping was totally inadequate. Creek was wrong in her assessment that the \$38,000 derived from the sale of the business represented the full amount to pay all employee entitlements as of the close of business. I accept that the \$38,000 was dispersed to certain employees but there remained outstanding entitlements in relation to six employees.

- 46 The details of the outstanding amounts are<sup>6</sup>:

Jacqueline Annett:	\$6,016.70
Tania Opie:	\$2,023.60
Susan McPartlan:	\$6,895.02
Vicky Carrison:	\$2,273.29
Tracey Sturges:	\$655.23
Annette Iturbe:	\$3,864.35

- 47 Creek did not dispute these amounts.
- 48 Whilst she may have kept some records those records were clearly deficient. This is surprising given that she described her occupation prior to entering into the fitness industry as being that of an office manager. She said her duties in that role included preparing and maintaining employee's payroll, superannuation and WorkCover records.
- 49 Creek and her partners unfortunately became embroiled in legal proceedings concerning the alleged breach of trademark. No doubt the cost involved impacted upon the cash flow of the business. In addition the withdrawal of a partner from the business leaving Creek and Golebiowski to fund outstanding costs and expenses associated with the

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<sup>6</sup> See Exhibit A3.

rebadging of the business must have contributed to the downfall of the business. Unfortunately the business continued to operate and staff continued to perform duties. The staff were not being paid or properly paid and the only alternative open to Creek at that stage was closure of the business. However she endeavoured to attract investors to the business and delayed the closure or the sale of the business thereby compounding the problem.

- 50 The business was badly run on a number of fronts as appears from the number of contraventions that have been alleged and which have been admitted.
- 51 Creek had the primary managerial responsibility of Simdo and its employees. She was the sole director of Simdo from 17 October 2006 and was fully aware of the means by which Simdo maintained its records and paid its employees and the extent to which Simdo kept records. The admissions by Creek in her defence and by inference from her submissions are such that she is to be treated as having contravened each of the civil remedy provisions contravened by Simdo. Section 728(1) of the Act provides:

“A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision”.

I find that Creek aided, abetted, counselled or procured the various contraventions and by act or omission directly or indirectly was concerned in or party to the various contraventions<sup>7</sup>.

- 52 Recognition must be given to the respondents' formal admission of the contraventions in the defences filed. I also accept that Creek has lost a substantial amount of money due to the failure of the business and has been declared bankrupt. At a personal level she has also lost heavily given the break up of her relationship with her de facto of some years as well as severance from her family and the loss of friends.
- 53 The applicant accepts that there has been a degree of cooperation and a small degree of contrition on the part of the respondents. Against this the applicant points to the information received from Creek that additional records that should have been produced earlier in response to notices to produce were made available at a very late stage in the proceedings. The respondents have not rectified the underpayment. The respondents' actions in continuing to trade when it was clear that employees could not be paid exhibited a blatant disregard for their obligations and employee's welfare.

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<sup>7</sup> See s 728(2) of the Act.

- 54 The applicant maintained that there has been minimal contrition and cooperation and submits that in all the circumstances the respondents should only be entitled to a discount at the lower end of the scale to reflect their admission of the contraventions.
- 55 The applicant accepts that the financial position of Creek given her bankruptcy is relevant in the sense of limiting the extent to which she can take steps to rectify Simdo's underpayment contraventions.
- 56 Section 719 of the Act relates to imposition and recovery of penalties. Section 719 includes the following subparagraphs:
- (1) "An eligible court (being this court) may impose a penalty in accordance with this Division on a person if:
    - (a) the person is bound by an applicable provision (applicable provision includes an award); and
    - (b) the person breaches the provision;
  - (2) Subject to subsection 3, where:
    - (a) two or more breaches of an applicable provision are committed by the same person; and
    - (b) the breaches arose out of a course of conduct by the person; the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term."
- 57 The Full Court of the Federal Court<sup>8</sup> dealt with an argument that s 719(2) required the Court to treat all of the alleged breaches as a single breach because they arose out of the course of conduct by *Plancor*. The Court had this to say<sup>9</sup>:

"The course of conduct provision can not be applied in this way. By its specific terms, s 719(2)(a) relates to two or more breaches 'of an applicable provision'. An applicable provision is defined relevantly in s 717(a)(iv) as being 'a term' of a collective agreement. This meaning is confirmed by the concluding words of s 719(2), which signify that the multiple breaches must 'be taken to constitute a single breach of the term'. It is only multiple breaches of a single term, arising from a course of conduct, that are required to be treated as a single breach of that term. In particular cases, there might be a dispute as to what amounts to a 'term' of an instrument, particularly when provisions are segmented by means of numbering and lettering. There can be no such argument in the

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<sup>8</sup> *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170

<sup>9</sup> Per Gray J para 33.

present case. The terms of the Award on which the Union relied clearly imposed separate obligations.”

- 58 Subsection 3 of s 719 provides that subsection 2 does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision. The respondents here have not had a penalty imposed prior to this.
- 59 Subsection 4 of s 719 provides that the maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is 60 penalty units for an individual or 300 penalty units for a body corporate. Section 4 of the Act states that a penalty unit has the meaning given by s 4AA of the *Crimes Act 1914* (Cth). The *Crimes Act* provides that unless a contrary intention appears a penalty unit is \$110. The maximum penalty that can be imposed upon Simdo for each contravention is \$33,000 and for Creek \$6,600.
- 60 The relevant considerations for an assessment of penalty are helpfully summarised in the applicant’s written submissions on penalty. Reference is made to there being at least three purposes for imposing civil penalties namely punishment, deterrence and rehabilitation<sup>10</sup>.
- 61 The considerations that need to be addressed when considering penalties have been referred to in a number of decisions<sup>11</sup>. The list of considerations referred to in *Harrington Corporation* are not meant to be exhaustive. Matters relevant to my considerations as to the penalties to be imposed are as follows:
- the nature and extent of the conduct which led to the breaches;
  - the circumstances in which the conduct took place;
  - any loss or damage sustained as a result of the contraventions;
  - whether the contraventions are distinct or arose out of the one course of conduct;
  - the size of the business enterprise involved in the contraventions;
  - whether or not the contraventions were deliberate;
  - the nature and extent of the contravener’s contrition;

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<sup>10</sup> *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, Full Court of the Federal Court, per Lander J para 93.

<sup>11</sup> One such decision is *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 pars 19-22, 36-37, 50, 59, per Mowbray FM.

- whether the contravener has cooperated with the enforcement authorities;
- the need for specific and general deterrence;
- whether the contravener has admitted the breaches of the applicable provisions;
- the totality principle.

62 I have already referred to the conduct which led to the contraventions to some extent. I express concern that Creek with some experience as an office manager and in office systems and knowledge of what is required as far as information is concerned relating to employees did such a poor job in maintaining employee records and facilitating proper and regular payments to employees. Whilst Creek may have been distracted by partnership problems, trademark problems and cash flow issues these distractions should not have prevented Creek from carrying out her duties in relation to employees of the business. The contraventions can only be described as extensive. They involved under payment or non-payment of entitlements arising from overtime, penalty rates, minimum hourly rates, superannuation contributions and minimum engagement periods. Also there was a failure to pay employees with regularity to which they were entitled and the record keeping and the issuing of payslips was either non-existent or inadequate. Further such contraventions extended over the relevant period which is just over 23 months.

63 The failure to make payment of wages and superannuation contributions can only be regarded as deliberate. Simdo should have ceased trading when it realised that it could not pay its employees instead of allowing them to continue to perform work and not pay them or incorrectly pay them.

64 Another example of the respondents' failure to take their obligations under Commonwealth workplace laws seriously was the record keeping and payslip obligations. The lack of compliance by the respondents with respect to record keeping and payslip obligations meant that the records were not in a condition to enable an inspector to determine what the various employee's entitlements were and whether those employees were in fact receiving their correct entitlements. Further the respondent generated payslips for payments they knew had not been made to employees. The majority of payslips which related to payments made to the employees by Simdo were inaccurate in some way.

65 The applicant submits that the employees should be considered vulnerable. Iturbe was particularly vulnerable being a junior and

eventually a trainee. The employees were all young women aged between 18 and 35 at the time of the contraventions. It would seem that they were willing to work for little or no pay in order to get a start in the fitness and health industry. The fact that the employees continued to work for Simdo given the circumstances indicates that they were loyal employees and perhaps vulnerable in their employment and reluctant to do anything about the respondent's conduct.

- 66 During the relevant period Simdo did not keep a record in relation to each of its employees. Its practice was to enter some details on MYOB. The respondents either deliberately chose to disregard their obligations or as the applicant suggests were reckless or indifferent in ascertaining and complying with their obligations. I say again that Creek with experience as an office manager would have been well aware of her obligations as far as employee records and payments were concerned so in my view the conduct in failing to comply with the obligations imposed at law must be regarded as deliberate.
- 67 The consequences of the contraventions are significant with the six employees remaining out of pocket for varying amounts as detailed above. The amounts are not insignificant and have been outstanding for a considerable period of time. There has been no attempt to pay these amounts.
- 68 It is accepted by the applicant that the respondents have not engaged in similar previous conduct and therefore should be treated as first time contraveners.
- 69 A further matter to be considered in deciding penalty is the need for specific and general deterrence. Specific deterrence relates to the contravening party and general deterrence refers to the need to deter others in the community generally from carrying out similar contraventions.
- 70 Breaches of industrial laws have been treated seriously resulting in significantly increased penalties in recent years. The applicant submits that the contraventions in this matter were ongoing and many of them were serious contraventions. The applicant also submitted that many of the contraventions were wilful in the sense of being deliberate or intentional because Simdo by its director Creek must have known at the very least that employees ought to have been paid and that accurate records should have been kept and she should have known the correct rates to be paid and what records to be kept. If they did not then it should be inferred that they were wilfully ignorant.
- 71 The financial resources of the respondents have been referred above. Creek was declared bankrupt on 25 July 2008. Simdo, has according to

- Creek, no assets. There is nothing to suggest that this is not the correct position.
- 72 Creek in her submissions put before the Court what her present financial position was. Clearly Simdo and Creek will have difficulty in paying outstanding amounts and penalties.
- 73 A penalty under s 719 of the Act is a penalty imposed by a court in respect of an offence against Commonwealth law and hence is not a provable debt for the purposes of s 82(3) of the *Bankruptcy Act 1966* (Cth)<sup>12</sup>.
- 74 The financial circumstances of the respondent will need to be taken into consideration when determining the quantum of penalty to be imposed.
- 75 The respondents' admitted guilt and thereby avoided the time and expense of a full hearing. Simdo made some repayments to several employees at the time of the sale of the business. Creek cooperated to some extent with the applicant's officers during the course of the investigations but such cooperation was not to the fullest extent<sup>13</sup>.
- 76 The mere fact of entering a guilty plea should be considered in the light of what the High Court has said about how a plea of guilty may be taken into account in mitigation:
- “Leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And once that rationale is accepted the respondent's suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a “fast track” plea must be rejected. Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity”<sup>14</sup>.
- 77 The respondents are entitled to a discount but such a discount will be at the lower end of the scale.

### **Penalties**

- 78 I turn now to the penalties to be imposed and the orders to be made in relation to this matter based on the observations I have made above.
- 79 There were contraventions of the provisions of s 182(1), 185(2) and 185(3) of the Act. There were two or more breaches of these provisions

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<sup>12</sup> *Cotis v MacPherson* [2007] FMCA 2060 para 10 per Driver FM.

<sup>13</sup> See Affidavit of Natalie Clare Goldsworthy – Exhibit A2.

<sup>14</sup> *Cameron v The Queen* [2002] 209 CLR 339 at 345 - 346 at para 22.

and pursuant to s 719(2) the Court is entitled to group the separate contraventions. This results in two separate contraventions as against Simdo each attracting a maximum penalty of \$33,000 and as against Creek two separate contraventions each attracting a maximum penalty of \$6,600. I regard the underpayment contraventions as being serious contraventions. As against Simdo I would impose a total penalty of \$40,000. As against Creek I would impose a total penalty of \$8,000. All penalties are subject to the application of a discount and also consideration of the overall penalty.

- 80 The next contravention relates to a breach of the Notional Agreement Preserving a State Award (NAPSA) (SA Health Fitness and Recreation Award) in particular NAPSA cl 6.4.2 relating to Sunday penalty rates. This contravention is a single course of conduct and as against Simdo attracts a maximum penalty of \$33,000 and as against Creek \$6,600. There is one contravention therefore one penalty to be imposed as against the respondents. I consider the seriousness of this contravention to be in the mid range. I would impose as against Simdo one penalty of \$10,000 and as against Creek one penalty of \$2,000.
- 81 The next contravention involves the three-hour minimum engagement as contained in NAPSA cl 4.5.2. This involves a single course of conduct. The maximum penalty relating to Simdo is \$33,000 and to Creek \$6,600. I regard this as in the mid range of seriousness and impose as against Simdo a penalty of \$10,000 and as against Creek \$2,000.
- 82 The next contravention relates to the one-hour minimum engagement as contained in NAPSA cl 4.5.4. I accept that this is at the bottom end of the range of seriousness. The maximum penalty as against Simdo is \$33,000 and as against Creek \$6,600. The penalty imposed upon Simdo is \$1,500 and as against Creek \$500.
- 83 The next contravention relates to public holiday payments pursuant to NAPSA cl 6.4.4. Again this is one contravention involving a single course of conduct. I accept that the seriousness of the contravention is at the lower end of the scale. The maximum penalty as against Simdo is \$33,000 and as against Creek \$6,600. I impose a penalty upon Simdo of \$1,500 and as against Creek \$500.
- 84 The next contravention relates to overtime payments pursuant to NAPSA cl 6.2. I accept that the seriousness of this contravention is at the lower end of the scale and involves a contravention constituting a single course of conduct. The maximum penalty as against Simdo is \$33,000 and as against Creek is \$6,600. I impose a penalty upon Simdo of \$1,500 and as against Creek \$500.

- 85 The next contravention relates to the frequency of payment pursuant to s 189(2) of the Act. This involves a contravention constituting a single course of conduct. I accept that the degree of seriousness is at the high end of the scale. The maximum penalty as against Simdo is \$33,000 and as against Creek is \$6,600. I impose a penalty upon Simdo of \$20,000 and as against Creek \$4,000.
- 86 The next contravention relates to superannuation contributions pursuant to NAPSA Sch 3 cl 3.3. This constitutes one contravention involving a single course of conduct. I accept that this is a very serious contravention involving all employees throughout the relevant period. The maximum penalty as against Simdo is \$33,000 and as against Creek is \$6,600. I impose a penalty of \$25,000 in relation to Simdo and as against Creek \$5,000.
- 87 The next contravention relates to the obligation to make and keep records relating to employees as contained in Workplace Relations Regulation 19.4. The records were either not kept in accordance with the regulation or no records were made. One single course of conduct is involved regarding the contravention. I accept that this is towards the top of the range as far as the seriousness of the contravention is concerned. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 88 The next contravention related to the condition of records pursuant to Workplace Relations Regulation 19.5. The records that were kept were not in a condition required by this regulation. This related to all employees. The contravention was a single course of conduct and I accept that it was at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500 and as against Creek \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 89 The next contravention relates to general records pursuant to Workplace Relations Regulation 19.8. Either no records were made or kept in accordance with the regulation or such records that were made did not record the details required by the regulation and this related to all employees. I accept that this is in the high range as far as seriousness is concerned. The maximum penalty as against Simdo is \$5,500 and as against Creek \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 90 The next contravention relates to overtime records pursuant to Workplace Relations Regulation 19.9. No records were kept. It was a single course of conduct involving contravention at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500

and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.

- 91 The next contravention relates to pay records pursuant to Workplace Relations Regulation 19.11. There were four separate contraventions. The degree of seriousness I accept as being high. The maximum penalty as against Simdo for each of the four contraventions is \$5,500 and as against Creek for each of the four contraventions \$1,100. I impose a penalty of \$13,200 in relation to Simdo and as against Creek I impose a penalty of \$2,640.
- 92 The next contravention relates to annual leave records as referred to in Workplace Relations Regulation 19.12. No records were kept. The contravention is at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 93 The next contravention relates to superannuation contribution records pursuant to Workplace Relations Regulation 19.13. No records were kept. I accept that this is at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 94 The next contravention relates to termination of employment records pursuant to Workplace Relations Regulation 19.14. No records were kept. I accept that this is at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 95 The next contravention relates to payslips pursuant to Workplace Relations Regulation 19.20(1). This contravention related to the entire relevant period. I accept that the degree of seriousness is at the high end of the range. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.
- 96 The next contravention relates to the payslips timing pursuant to Workplace Relations Regulation 19.20(2). This concerned all employees throughout the relevant period and is at the high end of the range of seriousness. The maximum penalty as against Simdo is \$5,500 and as against Creek is \$1,100. I impose a penalty of \$3,300 in relation to Simdo and as against Creek \$660.

### **The appropriate penalty – discount and the totality principle**

- 97 The respondents are entitled to a discount in relation to their admissions as contained in their defences filed herein. Due to all of the circumstances that I have referred to above the discount I intend to apply is at the lower end of scale. I apply a discount of 15%.
- 98 After application of the discount the total penalty as against Simdo is \$129,540 (\$152,400 reduced by 15% to \$129,540). The total penalty as against Creek is \$26,979 (\$31,740 reduced by 15% to \$26,979). I am required to now consider whether the overall penalties are just and appropriate.
- 99 As indicated by His Honour Justice Gray<sup>15</sup>:

“What the Magistrate was required to do in the present case was to determine an appropriate level of penalty for each contravention, as if it were a separate offence, and then to look at the aggregate of those penalties in the light of the overall conduct of the appellant, to form a view as to whether that aggregate was out of proportion to that overall conduct.”

- 100 I have made reference to the conduct of the respondent and I have also referred to the range of seriousness in the various contraventions. I consider that the total or aggregate penalties should be only slightly reduced given the nature of the contravening conduct.
- 101 The final total penalty imposed upon Simdo is \$120,000 and is payable to the Commonwealth of Australia pursuant to s 841(a) of the Act. The final total penalty imposed upon Creek is \$25,000 and is payable to the Commonwealth of Australia pursuant to s 841(a) of the Act.

### **Orders**

- 102 Pursuant to s 719(6) of the Act Simdo to pay Jacqueline Annett the sum of \$6,016.70 for outstanding entitlements plus the sum of \$420.00 being lump sum interest on the sum pursuant to s 722(1).
- 103 Pursuant to s 719(6) of the Act Simdo to pay Tania Opie the sum of \$2,023.60 for outstanding entitlements plus the sum of \$140.00 being lump sum interest on the sum pursuant to s 722(1).
- 104 Pursuant to s 719(6) of the Act Simdo to pay Susan McPartlan the sum of \$6,895.02 for outstanding entitlements plus the sum of \$480.00 being lump sum interest on the sum pursuant to s 722(1).

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<sup>15</sup> *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at para 23.

- 105 Pursuant to s 719(6) of the Act Simdo to pay Vicky Carrison the sum of \$2,273.29 for outstanding entitlements plus the sum of \$160.00 being lump sum interest on the sum pursuant to s 722(1).
- 106 Pursuant to s 719(6) of the Act Simdo to pay Tracey Sturges the sum of \$655.23 for outstanding entitlements plus the sum of \$45.00 being lump sum interest on the sum pursuant to s 722(1).
- 107 Pursuant to s 719(6) of the Act Simdo to pay Annette Iturbe the sum of \$3,864.35 for outstanding entitlements plus the sum of \$270.00 being lump sum interest on the sum pursuant to s 722(1).

**Time to pay**

- 108 The applicant in its written submissions submits it would be appropriate for the Court to specify a date by which the payments are to be made.
- 109 I agree that time to pay should be allowed. Simdo has no assets and realistically I do not expect its obligations to be met. Creek is currently bankrupt, has limited income and virtually no assets. I will afford her a lengthy period of time to pay the penalties I have imposed upon her.
- 110 Simdo to pay the outstanding entitlements together with the interest to the parties hereunder within six calendar months from 1 April 2010:

Pursuant to s 719(6) of the Act Simdo to pay Jacqueline Annett the sum of \$6,016.70 for outstanding entitlements plus the sum of \$420.00 being lump sum interest on the sum pursuant to s 722(1).

Pursuant to s 719(6) of the Act Simdo to pay Tania Opie the sum of \$2,023.60 for outstanding entitlements plus the sum of \$140.00 being lump sum interest on the sum pursuant to s 722(1).

Pursuant to s 719(6) of the Act Simdo to pay Susan McPartlan the sum of \$6,895.02 for outstanding entitlements plus the sum of \$480.00 being lump sum interest on the sum pursuant to s 722(1).

Pursuant to s 719(6) of the Act Simdo to pay Vicky Carrison the sum of \$2,273.29 for outstanding entitlements plus the sum of \$160.00 being lump sum interest on the sum pursuant to s 722(1).

Pursuant to s 719(6) of the Act Simdo to pay Tracey Sturges the sum of \$655.23 for outstanding entitlements plus the sum of \$45.00 being lump sum interest on the sum pursuant to s 722(1).

Pursuant to s 719(6) of the Act Simdo to pay Annette Iturbe the sum of \$3,864.35 for outstanding entitlements plus the sum of \$270.00 being lump sum interest on the sum pursuant to s 722(1).

- 111 The penalty for the contraventions imposed upon Simdo and payable to the Commonwealth of Australia namely \$120,000 is to be paid within six calendar months from 1 April 2010.
- 112 The penalty imposed upon Creek and payable to the Commonwealth of Australia namely \$25,000 is to be paid within 36 calendar months from 1 April 2010.

### **PUBLICATION OF THESE REASONS**

It is the practice of this Court to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Court's usual practice.