



Australian Government

Fair Work
OMBUDSMAN

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

COURT NUMBER Y01716350

BETWEEN

THE FAIR WORK OMBUDSMAN

Plaintiff

and

TOVEK PTY LTD AND URI BURKE

Defendant

TRANSCRIPT OF HEARING: 15 FEBRUARY 2010

Magistrate Magistrate Holzer
For the Plaintiff: Mr Ben Vallence
For the Defendant: Mr Robert Squirrell

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

- HIS HONOUR:
1. This is a penalty hearing in a proceeding brought by the Fair Work Ombudsman against Tovek Pty Ltd trading as CM's Fashion and or Code Male and Uri Burke. The complaint in the proceeding was filed on 11 June 2009 and sought underpayments totalling \$6,941.03. I'm informed and accept the amounts underpaid have now been paid. There was in the proceeding no defence filed for reasons Mr Squirrell, Counsel who appears on behalf of the Defendants, explained to me and which I accept. But there was an amended complaint filed on behalf of the Plaintiff which, putting it colloquially regularised and tidied up some matters in terms of the named Plaintiff and some other matters, which is of no concern today.
 2. I've had a chance to consider a Statement of Agreed Facts which is dated 23 September 2009 and that's been the subject of some submissions by Mr Vallence, who appears on behalf of the Plaintiff and Mr Squirrell as well, who conceded quite properly that there was no issue in terms of the applicable legal principles to which I should have regard today. I won't therefore emphasise or recite those any further than doing so in a cursory and passing manner. There's an affidavit in support of the matter before me, sworn by Joshua Iser on 28 September and there are two Affidavits of Mr Burke, both sworn on the 3rd of November. The material in the Affidavit has been supplemented by Mr Squirrell this morning, without objection by Mr Vallence and again that was a proper course for him to adopt which I thank him.
 3. In particular I've had regard in that context to the most recent profit and lost statement of Tovek Pty Ltd in the year 2008 and perhaps a series of letters from physicians who have been treating Mr Burke for health issues and without going into details of those variously dated September 18th, November 16th and 8th of December last year. All of which I accept have attached to them a degree of sensitivity and explain a. why they had not filed with affidavit material in the court and b. to some extent explain (unable to transcribe)... in terms of the penalty hearing before me today. There are submissions from both the Plaintiff and Defendants that I've had regard to which have been supplemented and spoken to in terms of further submissions by Mr Squirrell and Mr Vallence. The submissions set out both cases fairly, with the position for me and where they differ is perhaps not surprisingly the question in penalty. This is a case that warrants a mid to low range penalty, whereas Mr Squirrell seeks a far lesser degree of penalty, particularly having regard to the consequences of the circumstances of what has occurred and the current capacity to pay of the first named and second named Defendants.
 4. The amounts in issue arise from the employment of Brendan Kelly and Loni Henderson, of which there are said to be 5 separate contraventions from July to about September 2008. I accept that there are no prior matters to take account of and I don't put any great weight on the fact than other unformalised matters that have been

mentioned before me, other than I accept what Mr Squirrell says in relation to the current status of the matters in which he has been aware and I accept that he's had the benefit of a considerable degree of association with Tovek and Mr Burke for the purposes of trying to address the issues that have arisen in relation to a previous dispute with Steven Fishall, Mr Burke's former partner, and also events which arise subsequent to that. I need not go into the details, suffice to say there are other proceedings in the Supreme Court which have demanded attention and which have no doubt been distracting. Those comments are not in any way to denigrate or take away the need for me to address both specific and general deterrence and Mr Vallence has referred me in particular in that regard to the decision of His Honour Justice Gray in the Federal Court of Australia, in the Plancor and Liquor Hospitality Miscellaneous Union decision of 2008. The full citation of which is vol. 171 Federal Court Reports page 357, and particular page 369, paragraph 67, where His Honour dealt with a consideration of the need for a specific and general deterrence.

5. Weighing the various matters as I must today and treating these as an application of the relevant principles to the facts of this case I agree with the submission of Mr Squirrell in this case, general deterrence is probably more important than specific deterrence. That's because of the history in which these matters arose and particularly with regard to the issues that Mr Burke had with Mr Fishall and the subsequent involvement with other employees in his office. It is the case, as Mr Vallence put it, the buck stops with Mr Burke and that's true but in terms of whether or not I need to give appropriate attention to the conduct such as it goes to specific deterrence in this case, I don't think that I do. I think there is a message here that rings loud and clear in Mr Burke's ears and I think he's quite aware and will be from my reasons today that this sort of conduct must not reoccur and I'm sure that it won't. I note that Mr Burke is acknowledging my comment, which I thank him.
6. In terms of how I deal with this, ordinarily my thinking would be pitched at a far higher level than the level in which I propose to impose penalties today and that's a contextual matter based on:
 - a. the explanation given to me for the offending
 - b. the relevant personal considerations which impact and did impact on that period of time in Mr Burke's life and his corporate life as well
 - c. the likelihood of reoccurrence. I don't think, as I've indicated, that there's a significantly high risk, certainly not an inappropriate danger of reoccurrence and I accept that Mr Burke has and will take steps as he's done through Blake Miller to ensure that there is no re-occurrence.
7. Mr Squirrell who put matters before me with commendable remedy and precision urges that I should impose penalties not exceeding a total of \$15,000. \$10,000 I suppose to Tovek and \$5,000 I suppose

to Burke and that's put on a number of bases which I won't recite again. I think I've already touched on those. I don't particularly agree on the analysis but I'm prepared to accept the impetus for those submissions. What I propose to do in the context of this case is impose penalties as follows:

- a. I treat the matters as a continuum arising out of the one course of conduct, but in respect to both employees.
8. Applying the principles, I think I'm doing the best I can and providing a just determination and equally addressing the question of deterrence without it being crushing. I think the appropriate penalty in this case is \$12,000 in respect of Tovek Pty Ltd and \$7,500 in respect Mr Burke's involvement. A total of \$19,500 rather than \$15,000 Mr Squirrell sought. I propose to make orders and declarations of those sought that Mr Vallence has drafted by way of the proposed draft orders. I find the contraventions that are set out in the minutes as having being made out and I make declarations in accordance with paragraphs one to five of the proposed minutes. It's appropriate also that monies be paid into the Consolidated Revenue pursuant to paragraphs six and seven. In terms of the timeline, given my uplift in the amounts that I've ordered today. I propose to extend the period from 60 days to 100 days. I think in all circumstances that is also an appropriate and just way I've left the matter. If there needs to be some further consideration in terms of either further time and or instalment regime I've encouraged Mr Squirrell, your client, to contact the Fair Work Ombudsman as soon as practical if it transpires there's going to be some problem, but I'm hopeful that given the balance that I've sought to strike between the amount of the penalty and the time in which that it be paid, it won't be necessary. So, I make orders with the insertion of paragraph 6 of the proposed minute the figure of \$12,000. I make a further insertion in relation to paragraph 7 of the proposed minute being \$7,500, and I'll change 60 to 100 and I'll sign those minutes as reflecting orders of the court today and date that. A copy of that minute can be made available to both Mr Squirrell and Mr Vallence. Mr Vallence I know your practice is to seek a copy of the Court's transcript, of course that will be available to you today as always so it avoids the need for me to reduce my reasons to writing unless you desperately want me to go away and put pen to paper.

Mr Vallence: No, Your Honour, thankyou.

HIS HONOUR: Is there anything else I need to attend to gentlemen?

Mr Squirrell: Not as far as we're concerned Your Honour.

HIS HONOUR: Thank you. I'll return to you Mr Squirrell the references from Dr Elijah and the profit and loss statement. I won't leave those on the court file given their content. I'll otherwise make orders on the lines that I've indicated. I'll certainly sign the decision sheet. I'll hang onto the Plancor decision for the next occasion. I'm sure there will be a next occasion Mr Vallence.

Mr Vallence: Yes.

HIS HONOUR: I trust no other occasion involving Tovek, Mr Burke or Mr Squirrell.
Perhaps on another matter entirely.

Mr Squirrell: Not if I can have anything to do with it Your Honour.

HIS HONOUR: Thank you though for the way you've dealt with the matter, I appreciate
your assistance. Thank you very much.