IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE

INDUSTRIAL DIVISION

Case No. X03588584

THE FAIR WORK OMBUDSMAN	Plaintiff
v	
SPECIALIST SECURITY MANAGEMENT PTY LTD (ACN 107 754 496)	First Defendant
SPECIALIST AUSTRALIAN SECURITY GROUP PTY LTD (ACN 094 807 173)	Second Defendant
PETER ALAN KILFOYLE	Third Defendant

MAGISTRATE:	K. HAWKINS
WHERE HELD:	MELBOURNE
DATE OF HEARING:	23 JULY 2009
DATE OF DECISION:	26 AUGUST 2009

REASONS FOR DECISON

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr Valance	Office of the Fairwork Ombudsman
For the Defendant	Mr Hurley	

HER HONOUR:

THE APPLICATION

1. On 17 December 2008, the Plaintiff filed a Complaint and Statement of Claim in this Court in respect of the First and Second Defendants ("the employers") allegedly underpaying Mr Shaun Bowen, and the Third Defendant, Mr Peter Kilfoyle, a director of the employers, allegedly being involved in these underpayments.

2. The Plaintiff is seeking orders under s.719 of the *Workplace Relations Act 1996* (**the Act**) and s.178 of the Act prior to its amendment by the *Workplace Relations Amendment (Work Choices) Act 2005* (**the pre-reform Act**), imposing pecuniary penalties on the Defendants for contraventions of the *Security Employees Victorian Common Rule Award 2005* (**Award**) and the Australian Fair Pay and Conditions Standard (**AFPCS**), which included a preserved Australian Pay and Classification Scale (**APCS**) derived from the Award.

ADMITTED CONTRAVENTIONS

3. On the basis of the facts set out below, the Defendants each admit to contravening the relevant provisions (set out in detail below) by failing to pay relevant minimum hourly rates of pay; casual loading; penalty rates for weekend and public holiday work; overtime; minimum hours of work and annual leave upon termination of employment.

4. The Defendants initially admitted that these contraventions resulted in underpayments to Bowen in the sum of $15,929.56, if at all times Bowen was employed as a Level 2 under the Award. Until hearing the Defendants denied that Bowen was at any time employed other than as a level 2 security officer. At hearing they conceded that

Bowen was correctly classified as a level 3 security officer, and was therefore underpaid $26,485.37 over a three year period.

5. Mr Kilfoyle admits to being involved in the contraventions of the various applicable provisions.

THE PARTIES

6. The Plaintiff is duly appointed under s.166D(1) of the Act, and is a Workplace Inspector by virtue of s.167(1A) of the Act.

7. At all relevant times, the First and Second Defendants were corporations pursuant to the *Corporations Act 2001* (Cth), and were engaged in the business of providing security services in the State of Victoria.

8. At all relevant times, Mr Kilfoyle was:

   a. the sole Director of the First and Second Defendants;

   b. the Secretary of the First and Second Defendants;

   c. the sole shareholder of the First Defendant;

   d. responsible for the overall direction, management and supervision of the First and Second Defendant's operations;

   e. responsible for setting and adjusting pay rates and wages for employees of the First and Second Defendants;

   f. responsible for making payments of wages to the employees of the First and Second Defendants; and

   g. the directing mind and will of the First and Second Defendants.

9. The Second Defendant effectively took over the employment from the First Defendant. The two Defendants should effectively be treated as a single entity for the purpose of determining penalty. The Third Defendant is the directing mind and will of the first and

second defendants.

10. From at least 5 January 2005 to 25 June 2006, the First Defendant employed Bowen as a casual "Security Guard". From 26 June 2006 to 21 January 2008, the Second Defendant employed Bowen as a casual "Security Guard".

11. On 18 April 2006, Bowen obtained the qualification of a Certificate III in Security Operations.

12. During his employment with the First and Second Defendants, Bowen:

    a. performed general security duties;

    b. generally worked between 30 and 50 hours per week, on various days Monday to Sunday;

    c. worked on public holidays; and

    d. was paid fortnightly by bank deposit.

13. Bowen was never provided with, nor took, paid annual leave during his employment with the First and Second Defendants. Bowen has not been paid any amount by either of the First or Second Defendants referable to accrued annual leave, upon the cessation of his employment with each of them in June 2006 and January 2008 respectively.

14. When Bowen first commenced employment with the First Defendant (on 29 August 2002), he had just turned 28. He was 32 when he first commenced employment with the Second Defendant.

15. Proper classification of the work performed by Mr Bowen, and whether he was entitled to accrue annual leave during the course of his employment remained in dispute until shortly before hearing. The only matter now remaining for determination by the Court is what if any penalties ought be imposed for the breaches conceded.

THE UNDERPAYMENTS

16. During his employment with the First Defendant between 1 January 2005 and 25 June 2006, Bowen was paid the following hourly rates of pay before taxation, for each hour worked:

    a. $15.76 for each normal hour of work on the days Monday to Friday;

    b. $22.17 for each hour of work on a Saturday;

    c. $28.59 for each hour of work on a Sunday; and

    d. $25.66 for each hour of work on a public holiday.

17. During his employment with the Second Defendant between 26 June 2006 and 21 January 2008, Bowen was paid the following hourly rates of pay before taxation, for each hour worked:

    a. $15.76 for each normal hour of work on the days Monday to Friday from 26 June 2006 until 11 November 2007;

    b. $19.24 for each normal hour of work on the days Monday to Friday from 12 November 2007 until 21 January 2008;

    c. $22.17 for each hour of work on a Saturday;

    d. $28.59 for each hour of work on a Sunday; and

    e. $28.59 for each hour of work on a public holiday.

18. As a consequence of the above, Bowen was underpaid wages of $17,138.60. The First Defendant failed to pay, (or transfer an entitlement to) annual leave to the Second Defendant $4,487.63. the Second Defendant failed to pay an additional entitlement to accrued annual leave of $4,859.14 upon termination of employment. The total underpayment was $26,485.37.

19. The Defendants consented to Orders made by the Court on 15 April 2009 to repay to Bowen $15,929.56, by way of instalments. This is the amount he would have been entitled to had he been correctly classified as a Level 2 Security Officer.

INVESTIGATION

20. Despite extensive prelitigation steps taken by the Plaintiff in an attempt to secure voluntary compliance, no action was taken by the Defendants to rectify the alleged underpayments, and no amounts were paid to Bowen

INSTITUTION OF PROCEEDINGS

21. On 17 December 2008, the Plaintiff filed a Complaint and Statement of Claim in this Court.

22. The Defendants filed a Defence late by consent on 4 March 2009.

23. On 15 April 2009 the matters in dispute were narrowed by consent.

24. The Plaintiff submits that penalties ought be imposed upon the Defendants in respect of their breaches of the *Workplace Relations Act 1996* (Cth) (**WR Act**), and an award made under the provisions of that Act as it stood prior to the substantial reforms commencing on 27 March 2006 (**pre-reform WR Act**).

25. It submits that this is a case which warrants the imposition of penalties towards the lower-middle of the range for the admitted contraventions of the various provisions involved.

26. In respect of penalty, the Plaintiff relies upon the Statement of Agreed Facts, dated 14 May 2009; the affidavit of Zeljko Kovacevic, affirmed on 20 May 2009; and the affidavit of Shaun Leigh Bowen, sworn 21 May 2009.

LEGISLATIVE PROVISIONS RELATING TO PENALTY

27. This prosecution is brought under the pre-reform WR Act and the WR Act, in relation to breaches of the Award[1] and the WR Act.

28. On 27 March 2006, the terms of the Award that dealt with matters for which provision was made in the AFPCS, ceased to be allowable award matters, and as such, ceased to have effect.[2] For present purposes, this included all terms providing for basic rates of pay and casual loadings.

29. Under s. 178(5) of the pre-reform WR Act[3] and s.718(1) of the WR Act, the Plaintiff (as an Inspector appointed under the WR Act)[4] has standing to bring this complaint.[5]

30. Section 178(1) of the pre-reform WR Act enabled a court of competent jurisdiction[6] to impose a penalty in respect of a breach of an award or order of the Commission by a person bound by that award or order.

31. Section 178(2) provided that where two or more breaches of a term of an award or order were 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.178, be taken to constitute a single breach of the term.

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1 The Award is in fact a declaration of common rule issued by the Commission, which provides that the terms of the underlying award (*Security Employees (Victoria) Award 1998*) form part of the Award. The Declaration is itself an award of the Commission (see clause 10 of the Declaration and s.4 of the pre-reform WR Act).

2 See ss.516(1) and 525(1) of the WR Act. The relevant exception to this being preserved award terms.

3 The complaint insofar as it relies on the pre-reform WR Act, is maintainable despite the repeal of Part XV of the pre-reform WR Act: see Regulation 2.1 in Division 1 of Part 2 of Chapter 7 of the *Workplace Relations Regulations 2006* (**WR Regs**), and also Regulation 2.19 in Division 13 of Part 2 of Chapter 7 of the WR Regs.

4 Section 167(1A) of the WR Act.

5 The Plaintiff's standing to bring this complaint under the pre-reform WR Act, despite its repeal, derives from Regulation 2.14 of Division 12 of Part 2 of Chapter 7 of the WR Regs.

6 Defined to include this Court: s.177A, in conjunction with s.4(1) of the pre-reform WR Act.

32. Section 719(1) of the WR Act enables an eligible court[7] 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 AFPCS and a term of an award.

33. Section 719(2) provides that where two or more breaches of a term 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, be taken to constitute a single breach of the provision.

34. The maximum penalty that may be imposed by this Court on the First and Second Defendants, applicable to each of the breaches of the Award and the AFPCS during the whole of the relevant period, is $33,000.[8] The maximum penalty that may be imposed on the Third Defendant applicable to each of the breaches of the Award and the AFPCS, for the whole of the relevant period on and from 27 March 2006, is $6,600.[9]

THE COURT'S APPROACH TO DETERMINING PENALTY

35. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the Award and the AFPCS in relation to Mr Bowen, is a separate contravention of a term of an award, order or applicable provision for the purposes of s.178 of the pre-reform WR Act and s.719 of the WR Act.[10]

36. However, s.178(2) and s.719(2) provide for treating multiple breaches, involved in a course of conduct, as a single breach.

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7 Also defined to include this Court: see s.717 of the WR Act.

8 See s.178(4)(b) of the pre-reform WR Act and s.719(4)(b) of the WR Act.

9 See s.178(4)(b) of the pre-reform WR Act and s.719(4)(a) of the WR Act.

10 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J) (**McIver**).

37. The parties agree that the separate contraventions set out above each constitute a course of conduct which have been committed by each of the three defendants.

38. Second, the Court will then consider an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as a course of conduct), having regard to all of the circumstances of the case.

39. Third, 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 Defendants 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 Defendant did.[11] This task is distinct from and in addition to, the final application of the "totality principle".[12]

40. Fourth and finally, having fixed an appropriate penalty for each separate contravention, 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.[13] The Court should apply an "instinctive synthesis" in making this assessment.[14] This is what is known as an application of "the totality principle".

41. The parties agree that the contraventions of the Defendants[15] are able to be categorised as falling into the following categories:

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11 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (**Merringtons**).

12 *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] (Stone and Buchanan JJ) (**Mornington Inn**).

13 See *Kelly v Fitzpatrick* (2007) 166 IR 14 at 21-2 [30] (Tracey J) (**Kelly**); *Merringtons*, supra at 567 [23] (Gray J), 576 [71] (Graham J) and 583 [102] (Buchanan J).

14 *Merringtons*, supra at 567-8 [27] (Gray J) and 572 [55] and 577 [78] (Graham J).

15 Insofar as the Third Defendant is concerned, only those breaches on and from 27 March 2006 are relevant.

a. failure to pay the guaranteed casual loading percentage to casual employees for hours of work on the days Monday to Friday, on and from 27 March 2006 (breach of s.185(2) of the WR Act, as a term of the AFPCS);

b. failure to pay the required hourly rate of pay to casual employees for hours of work on the days Monday to Friday that were subject to shift penalties (breach of clauses 12.4.2 and 18.2.1(a) of the Award);

c. failure to pay the required hourly rate of pay to casual employees for hours of work on Saturdays (breach of clauses 12.4.2 and 24.1.1 of the Award);

d. failure to pay the required hourly rate of pay to casual employees for hours of work on Sundays (breach of clauses 12.4.2 and 24.1.2 of the Award);

e. failure to pay the required hourly rate of pay to casual employees for hours of work on public holidays (breach of clause 26.7.2 of the Award);

f. failure to pay the required hourly rate of pay to casual employees for overtime hours of work on the days Monday to Friday (breach of clause 23.2.1 of the Award);

g. failure to pay the required hourly rate of pay to casual employees for overtime hours of work on Saturdays (breach of clause 23.2.2 of the Award);

h. failure to pay the required hourly rate of pay to casual employees for overtime hours of work on Sundays (breach of clause 23.2.3 of the Award);

i. failure to pay the minimum payment of four hours to an employee when the employee is called up for duty (clause 25 of the Award); and

j. failure to pay upon termination of employment, Mr Bowen's accrued annual leave entitlement (clause 27.6.1 of the Award).

42. Apart from the annual leave breaches (clause 27.6.1 of the Award), each term was breached repeatedly by the Defendants in respect of Bowen.

43. The Plaintiff accepts however, that the Defendants have the benefit of s.178(2) of the pre-reform WR Act and s.719(2) of the WR Act, in relation to each of these repeated breaches of the terms of the Award and the AFPCS.[16]

44. Therefore, the Plaintiff submits the Court should consider that the maximum penalty it could impose in this matter on the First Defendant is $330,000, constituted as follows:

    a. three breaches of clause 12.4.2 of the Award;[17]

    b. one breach of s.185(2) of the WR Act (as a term of the AFPCS);

    c. one breach of clause 18.2.1(a) of the Award;

    d. one breach of clause 24.1.1 of the Award;

    e. one breach of clause 24.1.2 of the Award;

    f. one breach of clause 26.7.2 of the Award;

    g. one breach of clause 23.2.1 of the Award; and

    h. one breach of clause 27.6.1 of the Award.

45. The Plaintiff submits the Court should consider that the maximum penalty it could impose in this matter on the Second Defendant is $429,000, constituted as follows:

    a. one breach of s.185(2) of the WR Act (as a term of the AFPCS);

    b. one breach of clause 18.2.1(a) of the Award;

    c. one breach of clause 24.1.1 of the Award;

    d. one breach of clause 24.1.2 of the Award;

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16 Each repeated breach is treated as part of the same course of conduct (see *Quinn v Martin* (1977) 16 ALR 141 at 143-5 (Smithers, Evatt and Keely JJ) and *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-7 (Gray J, Northrop J agreeing)).

17 One each for the shift rate, Saturday rate and Sunday rate prior to 27 March 2006.

e. one breach of clause 26.7.2 of the Award;

f. two breaches of clause 23.2.1 of the Award;

g. two breaches of clause 23.2.2 of the Award;

h. two breaches of clause 23.2.3 of the Award;

i. one breach of clause 25 of the Award; and

j. one breach of clause 27.6.1 of the Award.

46. Further, the Plaintiff submits the Court should consider that the maximum penalty it could impose in this matter on the Third Defendant is $92,400, constituted as follows:

a. one breach of s.185(2) of the WR Act (as a term of the AFPCS);

b. one breach of clause 18.2.1(a) of the Award;

c. one breach of clause 24.1.1 of the Award;

d. one breach of clause 24.1.2 of the Award;

e. one breach of clause 26.7.2 of the Award;

f. two breaches of clause 23.2.1 of the Award;

g. two breaches of clause 23.2.2 of the Award;

h. two breaches of clause 23.2.3 of the Award;

i. one breach of clause 25 of the Award; and

j. two breaches of clause 27.6.1 of the Award.

47. It is not inappropriate to consider the maximum penalties that could be imposed on the Defendants, as part of the comparative exercise of assessing where the current contraventions sit.[18]

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[18] *Mornington Inn*, supra at [88] (Stone and Buchanan JJ).

FACTORS RELEVANT TO PENALTY

48. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act has been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*,[19]: That summary was adopted by Tracey J in *Kelly*.[20] While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.[21] Each aspect of that `checklist' is considered below:

Circumstances and the nature and extent of the conduct

49. Mr Bowen was first employed by the First Defendant on 29 August 2002. In 2005 Mr Kilfoyle's business interested became centralised in Melbourne and he wanted to divest the company of the contract at Ballarat upon which Mr Bowen worked. On 5 January 2005 the Defendant submits that it reached an arrangement with Bowen that he would take over the Alstom contract at the Ballarat Rail yards. As he did not have insurance or a licence, he was to continue to operate through the First and later the Second Defendant. On 25 June 2006 Bowen's employment was transferred to the Second Defendant. On 21 January 2008 Mr Bowen left the employment of Second Defendant when it transferred the Alstom contract (and Bowen) to an unrelated entity, Southern Protection.

50. The Defendants primary submission is that Mr Bowen was employed in circumstances where the First Defendant was in the process of leaving the Alstrom Contract and "employed" Bowen because Bowen was unable to arrange his affairs to conduct this contract on his own account when this contract was to be disposed of by the Defendants and Mr Bowen's wife was expecting a child.

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19 [2007] FMCA 7 at [26]-[59].

20 Supra, at [14].

51. The Defendants submit they should be assessed to penalty as employers (and associated parties) who have laboured under misapprehensions of law and not out of malice, spite or a desire to profit.

52. The Defendants characterised the conduct as arising out of a `unique situation' where the employee in question was offered a `business opportunity'. Mr Kilfoyle described *"trying to help a friend who had been ripped of in the past and would otherwise be on the dole queue"*.

53. Vunerablility is no justification to further exploit an employee. It is this type of situation that the *Workplace Relations Act* expressly seeks to outlaw. To continue business in a context where the purchaser refuses to pay a price which permits the payment of minimum wages is akin to a corporation trading whilst insolvent. Our system of wage regulation is designed to prevent market forces from reducing the working wage below statutory minima – to protect vulnerable workers from exploitation.

54. The contravening conduct in relation to each employer extended over the entire duration of Mr Bowen's employment with them. The Defendants took the benefits of characterising Mr Bowen as a casual employee (the provision of no leave and freedom of working hours/arrangements), but refused to take the burdens that went with it (casual penalties).

55. The Defendants made no attempt to pay shift penalties, although Mr Bowen regularly (almost entirely) worked hours during the week that attracted such penalties under the Award.

56. In Court Mr Kilfoyle acknowledged he was aware of the application of the Award to the employment of Mr Bowen, and of the obligations contained therein. He acknowledged

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[21] *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11] (unreported, Federal Court of Australia, 3 October 2007, Gyles J); *Merringtons*, supra at 580 [91] (Buchanan J).

that the payment received by the Defendants for Mr Bowen's labour was insufficient to permit the payment of Award wages. He left it up to Mr Bowen to attempt to negotiate a better price. Yet he allowed his companies to continue to be party to an arrangement in breach of the law. It is not surprising that no other company would take over the contract Mr Bowen worked at for the return.

57. It is clear that the Defendants were aware of the existence of weekend and other penalties, but decided to pay under those amounts to maintain a competitive advantage over the competition. The Defendants deny this assertion. I have no evidence to allow the Court to conclude whether the arrangement in effect gave any of the Defendants such an advantage.

58. The Defendants were aware that the Award-based rates of pay increased over time, whilst no attempt was made to increase the rates actually paid until late 2007.

59. The Defendants' excuse: that the amounts paid were in accordance with an agreement Mr Bowen made himself, is if anything, submits the Plaintiff is a factor deserving a higher penalty than might otherwise be the case.

60. One cannot "contract out" of Award rates, and it should not be assumed that the general public (or at least small business owners) are not aware of this. The ubiquitous nature of Award obligations and their role in determining minimum rates of pay in almost all industries for many years, should lead to the conclusion that determining rates of pay without regard to those Award rates, involves an element of deliberateness, or at least wilful disregard.

61. Indeed, any attempt to ascertain the appropriate payment obligations would have borne fruit. It is not acceptable to commence a business and hire employees, without taking proper, adequate legal advice as to the scope of liabilities and obligations to those persons.

62. The Plaintiff submits this is by no means the worst case before this Court. Most of the underpayments arose from a failure to pay adequate penalties. However, in the context of casual employment, the basic rate of pay was never sufficient to meet the Award obligations.

Nature and extent of loss or damage

63. There is no evidence to suggest that Mr Bowen was particularly well versed in industrial and employment matters, or the exercise of his rights under relevant industrial instruments.

64. The amounts of the underpayments to Mr Bowen were significant, particularly when annual leave is added in.

Similar previous conduct

65. There is no evidence of any other contraventions by either of these Defendants.

Whether the breaches arose out of the one course of conduct

66. Components of the contravening conduct has been characterised as part of a course of conduct, thereby minimising the number of contraventions that can be prosecuted.

67. The conduct of Mr Kilfoyle led each of the First and Second Defendants to contravene the Award/WR Act. Whilst each Defendants is capable of being penalised, in this case this linkage is relevant to the penalty for each Defendant.[22]

Size of the business

68. During the relevant periods of Bowen's employment, the First Defendant employed approximately 15 people of whom approximately 10 were full time until 2007 when the

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22 "*...it is a logical consequence of the decision in* Salomon's Case": *Hamilton v Whitehead* (1988) 166 CLR 121 at 128.

Second Defendant employed them. They were both run by the Mr Kilfoyle as Director/Manager.

69. The average annual revenue of the First Defendant over the last 3 financial years has been:

- 2006: gross income of $ 1,200,000 and a loss of $ 2716;
- 2007: gross income of $ 55,000 and a loss of $1286
- 2008: the First Defendant did not trade.

70. The average annual revenue of the Second Defendant over the last 3 financial years has been:

a. 2006; gross income of $ 2,282,000 and a profit of $ 143,000;

b. 2007; gross income of $ 2,368,415 and a profit of $ 105,497;

c. 2008; gross income of $ 2,606,108 and a profit before tax of $ 589,205 and after tax of $ 411,904.

71. The Defendants submit these figures are deceptive. The First and Second Defendants are accounted for and taxed on an "accruals basis" i.e. on income "written" which does not equate to cash received.

72. Mr Wilson gave evidence that the Second Defendant also has obligations to the Australian Taxation Office and has an equity of approximately $80,000 as at 30 June 2008.

73. Mr Wilson, the external accountant for the Defendants gave evidence. He concluded that as at the end of the 2008 financial year the cash position of the Second Defendant was not healthy. That company is supported in a group sense by another business run by Mr Kilfoyle. That business imports weapons from Germany for military and police

application. Contracts are sporadic, and that company has seen a number of lean years.

74. It is submitted by the Defendants that were the Court to impose more than a minimal penalty it would be crushing, and 'push both businesses over the edge'. However the evidence demonstrates that overall profits are cyclical. I am not satisfied from the figures presented that the the business would not survive the impost of more than a nominal penalty.

75. The apparent small size of the businesses and lack of dedicated human resources personnel is not a particularly relevant matter on the question of penalty. No reduction should be afforded to the Defendants because of this.[23]

76. Mr Kilfoyle gave evidence that he draws a wage of $55,000 per annum from the Second Defendant. He has no assets and has regular outgoings of $1800 per month.

Deliberateness of the breaches

77. Mr Kilfoyle gave evidence of his mistaken understanding that annual leave was not payable to casuals within the security evidence. He tendered a letter from the Workplace Authority obtained on 23 July 2009 which confirmed this misunderstanding. As this letter was obtained well after legal proceedings were commenced (and days before the ultimate hearing) it is clearly not advice relied upon during the employment of Mr Bowen. I do accept that in relation to the annual leave liability the Defendants genuinely held a mistaken belief that they were not obliged to pay or make provision for annual leave payments. Of concern however is their failure to discuss with the Plaintiff or seek independent advice about the issue when the obligation was initially brought to their attention, well before this matter reached Court.

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[23] See *Cotis v MacPherson* (2007) 169 IR 30 at [16] (Driver FM) (**Cotis**) and *Kelly*, supra at 21 [28].

78. With respect to all other entitlements Mr Kilfoyle was aware of the Defendants obligations under the Award. He deliberately chose to disregard the requirements of the law.

79. In an industry where non-compliance with minimum entitlements can bring a significant competitive advantage over the larger, more visible players, there existed a strong motive for adopting a payment structure in the way the Defendants did in this case.

Involvement of senior management

80. Mr Kilfoyle was the "directing mind and will" of the First and Second Defendants. The First and Second Defendants did not act, except through the Third Defendant.

Contrition, corrective action, co-operation with authorities

81. The Defendants characterise their contrition in the context of a desire to assist Mr Bowen. Mr Kilfoyle expressed a desire in Court to "avoid such a situation in the future". This statement was made in the context of frustration that his conduct was brought into question rather than any real acceptance of wrongdoing.

82. The Plaintiff submits there is no evidence of any contrition shown by the Defendants for their contraventions. Mr Kilfoyle continued to avoid contrition in Court, in essence blaming the entirety of the conduct on Mr Bowen himself.

83. Moreover, the Defendants have taken limited corrective action. They only took steps to commence repaying Mr Bowen on 15 April 2009, well after legal proceedings had commenced. Had it not been for this prosecution I infer that Mr Bowen would have seen none of the money he is owed.

84. The Defendants put the Plaintiff through significant time and expense in pursuing the matter through the investigative process, the legal compliance process and the curial process, only to admit most of the relevant contraventions "on the doorstep of the Court". This is relevant to the deduction to be afforded to the Defendants for their "pleas".

85. The Defendants have provided some co-operation to the Plaintiff in admitting most of the contraventions (albeit at the last moment) and settling a Statement of Agreed Facts.

Ensuring compliance with minimum standards

86. An important consideration in the present case. One of the principal objects of the WR Act (at all times) has been the maintenance of an effective safety net, and effective enforcement mechanisms.

87. The substantial penalties set by the legislature for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards.

Specific and general deterrence

88. The Defendant submits that its conduct must be assessed in the contemporary labour market where those who are employees on one day can be contractors another. In my view this does not diminish the responsibility of an employer.

89. General deterrence is an important factor, regardless of the size of the First and Second Defendants and their financial position. The law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others.[24]

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[24] See 21 [28] of *Kelly*, supra, and the cases cited therein. See also *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 559-60 [93] (Lander J).

90. There is a need, to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations).

91. The Defendants submit there is no need for specific deterrence as the Defendants have no prior history and Bowen is no longer an employee.

92. However the Defendants continue to employ at least 10 workers. They need to be left in no doubt that failing to comply with minimum obligations, or make any attempt to so comply, will not be tolerated.

Grouping of contraventions

93. The Plaintiff accepts that there is a case for a grouping or other reduction in the amounts assessed as appropriate penalties for each of the contraventions of the Award and 185(2) of the WR Act. Despite ss.178(2) and 719(1), they remain separate contraventions, but do overlap with each other or involve the potential punishment of the Defendants for the same or substantially similar conduct.

94. The Defendant submits that the effect of s. 719(2)(b) of the *Workplace Relations Act* is that all of the breaches should be treated as arising from one conduct: - the arrangement between Bowen and Kilfoyle. They submit that each of the eleven contraventions occurred because of the arrangement that commenced in January 2005 and that each of the eleven is a different expression of the one course of conduct. They further submit that the effect of s 719(2)(b) is that Defendants should be penalised for one breach or if the court concludes there are three contraventions (one for each Defendant) the penalty should be analysed on the basis there is one course of conduct. The Defendants submit a figure of 10 % of the maximum (on their

submission of $33,000 for the First two Defendants and $6600 for the Third Defendant) is an appropriate penalty.

95. I do not accept this approach as correct in law. I accept that repeated breaches of the same provision ought be treated as a course of conduct, but simply because the conduct concerns a single employee does not render the employer liable for a single penalty alone. Relevantly Gray J in *Gibbs v City of Altona*[25] explains how this section is to be construed: *"The object of s.178(2)* [the predecessor to s.719(2)(b)]*appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another. This reasoning leads to the conclusion that each separate obligation found in an award is to be regarded as a "term", for the purposes of s.178 of the Act.(...) If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others."*

96. I accept the submission of the Defendant that he circumstance that the business was transferred from the First to the Second Defendant in 2006 should not attract a "doubling" of the penalty for "inherited' conduct.

[25] (1992)37 FCR 216

Totality principle and "instinctive synthesis" test

97. Having fixed an appropriate penalty for each contravention 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.

Conclusion

98. There is considerable overlap between the types of contraventions admitted. To impose a separate penalty in respect of each would result in a disproportionately high penalty. Applying an "instinctive synthesis" to the final penalty I consider that an appropriate response is to impose penalties for each of the six distinct groups only. They are minimum rate of pay; casual loadings; weekend and public holiday loadings; overtime; minimum call out hours and failure to pay annual leave upon termination.

99. The conduct leading to the breaches in respect of the first four of these groups is far more expansive than the latter two. Taking that into account and having regard to all the factors discussed above, I conclude the conduct is deserving of an aggregate penalty of 15% of that applicable to these six groups. That is a penalty of $29,700 for the corporate defendants and $5,940 for Mr Kilfoyle. So that the corporate defendants are not penalised by the change of corporate identity, they are to be jointly and severally liable for that debt.

KATE HAWKINS

MAGISTRATE

ORDERS:

THE COURT DECLARES THAT:

1. The First Defendant contravened the following applicable provisions of the *Security Employees Victorian Common Rule Award 2005* ('Award') and the Australian Fair Pay and Conditions Standard ('AFPCS') contained in the *Workplace Relations Act 1996* ('WR Act'):

    a. Three breaches of clause 12.4.2 of the Award

    b. One breach of s.185(2) of the WR Act (as a term of the AFPCS)

    c. One breach of clause 18.2.1(a) of the Award

    d. One breach of clause 24.1.1 of the Award

    e. One breach of clause 24.1.2 of the Award

    f. One breach of clause 26.7.2 of the Award

    g. One breach of clause 23.2.1 of the Award; and

    h. One breach of clause 27.6.1 of the Award.

2. The Second Defendant contravened the following applicable provisions of the *Security Employees Victorian Common Rule Award 2005* ('Award') and the Australian Fair Pay and Conditions Standard ('AFPCS') contained in the *Workplace Relations Act 1996* ('WR Act'):

    a. One breach of s.185(2) of the WR Act (as a term of the AFPCS)

    b. One breach of clause 18.2.1(a) of the Award

    c. One breach of clause 24.1.1 of the Award

    d. One breach of clause 24.1.2 of the Award

    e. One breach of clause 26.7.2 of the Award

f. Two breaches of clause 23.2.1 of the Award

g. Two breaches of clause 23.2.2 of the Award

h. Two breaches of clause 23.2.3 of the Award

i. One breach of clause 25 of the Award

j. One breach of clause 27.6.1 of the Award

3. The Third Defendant contravened the following applicable provisions of the *Security Employees Victorian Common Rule Award 2005* ('Award') and the Australian Fair Pay and Conditions Standard ('AFPCS') contained in the *Workplace Relations Act 1996* ('WR Act'):

a. One breach of s.185(2) of the WR Act (as a term of the AFPCS)

b. One breach of clause 18.2.1(a) of the Award

c. One breach of clause 24.1.1 of the Award

d. One breach of clause 24.1.2 of the Award

e. One breach of clause 26.7.2 of the Award

f. Two breaches of clause 23.2.1 of the Award

g. Two breaches of clause 23.2.2 of the Award

h. Two breaches of clause 23.2.3 of the Award

i. One breach of clause 25 of the Award

j. Two breaches of clause 27.6.1 of the Award

THE COURT ORDERS:

4. Pursuant to section 178(6) of the pre-reform *Workplace Relations Act 1996* and section 719(6) of the *Workplace Relations Act 1996*, in addition to the orders made by the Court on 15 April 2009, that Mr Shaun Bowen be paid all outstanding underpayments owed by the First and Second Defendants totalling $10,555.81.

5. Pursuant to section 179A(1) of the pre-reform *Workplace Relations Act 1996* and section 722(1) of the *Workplace Relations Act 1996* that Mr Shaun Bowen be paid interest on the outstanding underpayments by the First and Second Defendants totalling $ 751.34

6. The First and Second Defendants pay the amounts specified in orders 4 and 5 within 30 days of the date of this order.

7. That the First and Second Defendants pay into the Consolidated Revenue Fund of the Commonwealth a penalty of $29,700.

8. That the Third Defendant pay into the Consolidated Revenue Fund of the Commonwealth a penalty of $5,940.

9. That the payment of the pecuniary penalties referred to in orders 7 and 8 be made within 60 days of the date of this order.

DATED: 26 August 2009