CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION: Civil (Federal)

PARTIES:
Plaintiff: WORKPLACE OMBUDSMAN

Defendant: FRANK HUANG

Case No: 88797/08

Hearing Date: 20 August 2009

Date of Decision: 21 October 2009

Legislation: Workplace Relations Act 1996, Section728
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Magistrate: G J T Hart

Representation: Solicitor for the Plaintiff
Ms R Docking
Holman Webb
Solicitors

There was no appearance by or on behalf of the Defendant

REASONS FOR DECISION

1 On 18 December 2008, the Plaintiff commenced these proceedings by lodging a Summons in the Registry of the Court. The Plaintiff seeks the imposition of civil penalties against the Defendant pursuant to Section 728 of the Workplace Relations Act in circumstances where, it is alleged, the Defendant was the sole director, shareholder and senior manager of two corporate employers, each of which committed multiple breaches of federal industrial instruments and federal industrial legislation.

2 The corporate employers, China Huge International Pty Ltd and Chi Telecom Pty Ltd, are the subject of winding up orders before the Supreme Court of New South Wales, and in those circumstances, as a consequence of the provisions of S471(B) of the Corporations Act 2001, neither of the corporate employers is a party to these proceedings.

3 The Defendant, Mr Frank Huang, was not before the Court when the matter came on for hearing on 20 August 2009, and has not participated in any way in the proceedings before the Court. Prior to the listing of the matter for hearing, 1 had made orders for substituted service and the matter was listed for ex parte hearing in circumstances where I was satisfied that the orders for substituted service had been complied with by the Plaintiff. Having considered the affidavit evidence before the Court concerning substituted service, 1 am satisfied that the Defendant was aware of the proceedings and had elected not to participate in them. On 20 August 2009, the proceedings were conducted on an ex parte basis.

4 The Plaintiff presents the affidavit evidence of seven claimants, three of whom being former employees of the first employer, China Huge International Pty Ltd, with the other four claimants being former employees of the second employer, Chi Telecom Pty Ltd. The evidence before the Court is that the first employer was, until 14 September 2007, engaged in retail activities of a nature which caused the work performed to be covered by the Notional Agreement Preserving the Shop Employees (State) Award. The evidence

presented to the Court by the Plaintiff is that each of the first three claimants was underpaid by the first employer given the provisions of the relevant industrial instrument.

5 In relation to the second employer, the evidence before the Court is that Chi Telecom Pty Ltd, was involved in the business of selling and distributing mobile phone cards and international calling cards. This was not a retail operation but some of the employees, including the fourth claimant and the seventh claimant, were engaged in clerical functions covered by the Notional Agreement Preserving the Clerical and Administrative Employees (State) Award. Evidence presented to the Court by the Plaintiff is that both those former employees were underpaid when the provisions of the Clerical NAPSA are considered. In the case of the fifth and sixth claimants, the case for the Plaintiff is that the fifth claimant, Mr Hu, as computer systems administrator, and the employment of the sixth claimant, Mr He, as information technology and communications engineer, did not involve work which fell within the classification of any award, and in each case the Plaintiff asserts that such former employees were underpaid their entitlements pursuant to the Federal Minimum Wage and other entitlements in accordance with the Workplace Relations Act 1996.

6 Having considered the affidavit evidence provided by the Plaintiff in these proceedings, including the affidavit evidence of Workplace Inspectors Bodkin and Davidson, I am satisfied that the evidence before the Court establishes, on the balance of probabilities, that the alleged contraventions of industrial instruments by the first and second employers has been established by the Plaintiff.

7 Indeed, there is copious evidence of the Defendant, Mr Huang, acknowledging to his former employees and to officers of the Workplace Ombudsman's Office that the moneys were owing and payable, and there is extensive history established in the affidavit material of the Defendant promising to pay such moneys and failing to do so, including occasions where he took the step of forwarding cheques to former employees which *"bounced"* when presented as they were drawn against bank accounts lacking the funds to meet the required payments.

8 In those circumstances, there is very little room for doubt as to the alleged contraventions having occurred or as to the fact that the sole director and shareholder, the Defendant herein, Mr Frank Huang, was fully aware of the nature and extent of the contraventions for which his two companies were responsible. In those circumstances, I propose to make the findings of fact relating to such contraventions by the two corporations, in the terms sought by the Plaintiff in the Draft Findings document handed up at the hearing for the assistance of the Court. Given the above conclusions as to the contraventions committed by the two employer corporations, the next step is to consider whether the Defendant, Mr Frank Huang, was, within the meaning of Section 728 of the Workplace Relations Act *"a person who is involved in a contravention of a civil remedy provision .....".*

9 Given the affidavit evidence tendered by the solicitor for the Plaintiff, Ms Docking, it is clear that the Defendant was the person solely responsible for the payment of staff within both companies. The evidence establishes that he was the sole director and shareholder and was actively engaged in the actual management of both companies. Although he employed persons to perform the role of *"office manager"*, such employees were never authorised to sign staff payment cheques. The evidence establishes that as time went on, the companies experienced financial difficulties in relation to cash flow, and as a consequence, it was frequently the case that staff were paid late, and ultimately were not paid at all. No person other than the Defendant had authority to attend to the payment of staff, and the decision or series of decisions to delay or withhold their salary and other payments, were decisions made exclusively by the Defendant herein.

10 In such circumstances, the Defendant is clearly a person involved in the contraventions within the meaning of Section 728 of the Act.

11 Having found the Defendant liable pursuant to Section 728, I turn now to consider the question of how the appropriate penalties should be determined. It is unfortunate that Mr Huang elected not to participate in the proceedings. In his absence, it is possible that the Court is denied evidence as to subjective factors which may have mitigated in favour of the Defendant if he had chosen to participate and present such material. In the

circumstances, the only subjective matter which I can take into account is the fact that there is no evidence of any prior convictions being recorded against the Defendant, and in such circumstances he is entitled to some leniency on the basis that he is being sentenced as a first offender.

12 It is clear that in the process of sentencing, the Court should focus primarily upon the objective seriousness of the offences themselves. The evidence establishes that the total underpayments for the seven claimants is in the order of $90,000.00. I regard this as a significant sum of money and I note that in the case of two of the claimants they were each underpaid in excess of $20,000.00.

13 The evidence before the Court suggests that the cash flow problems experienced by the Defendant's companies was not due to poor trading conditions as the evidence suggests that at least one of the companies had a trading profit of about $50,000.00 per month or $600,000.00 per year. Hence the employees of the two employer companies were aware that the businesses were sufficiently profitable for their salaries and other payments to be met in full. The evidence before the Court, which I accept, is that the Defendant stated to at least two of the claimants that his cash flow problems related to gambling losses he had sustained at a Melbourne casino. At different times, he claimed to have lost in excess of $2,000,000.00 as a result of his gambling activities in the casino. The picture which emerges is of the Defendant owning two profitable businesses which he used to fund his gambling activities without bothering to leave sufficient funds to cover the day to day living needs of his own employees. It is difficult to imagine a more thoughtless, selfish, greed-driven, or reprehensible attitude to employees than that demonstrated by such conduct. Remarkably, the employees of the two companies appeared to have a strong sense of underlying trust in the Defendant and demonstrated a marked capacity to believe his promises about arrangements he had in place for future payments, including promises concerning the proceeds of sale of various businesses which the Defendant owned in a worldwide corporate structure. In some cases the claimants worked without pay for a period of almost six months on the basis of promises and assurances given by the Defendant about plans he had put in place so that all staff would receive their entitlements. Whilst the Defendant's assurances inevitably proved to be worthless, it

would appear that the Defendant had a quite remarkable capacity to inspire trust and confidence in others, unfortunately to their detriment.

14 There are twelve contraventions before the Court. The first three relate to the first employer and each carries a maximum penalty of $6,600.00. The remaining nine contraventions concern the second employer, seven breaches carrying a maximum penalty of $6,600.00, whilst two carry a maximum penalty of $1,100.00, being breaches of Regulation 2.19.18 and Regulation 2.19.20. Consequently, the total maximum penalty which could be imposed upon the Defendant in this matter is $68,200.00.

15 I regard the offences as being extremely serious given my conclusions as to the manner in which the contraventions occurred. In my view, it is not overstating the position to say that the Defendant had no qualms about deliberately defrauding and cheating his employees over an extended period of time. In such circumstances, there is a need for a strong general deterrence factor to be included in any penalty, as well as a strong specific deterrence factor to be included. Whilst I do not propose to impose penalties at the maximum set by the legislation, this flows essentially from the fact that the Defendant has not previously been convicted of any breaches of the industrial legislation and, as far as the Court is aware, has no convictions for dishonest conduct in other jurisdictions. In relation to the ten contraventions of the Act and of the industrial instruments, I propose to impose a civil penalty on the Defendant of $5,000.00 in each case. In relation to the two contraventions against the Regulations, I propose to impose a civil penalty of $1,000.00 in each case. Consequently, the civil penalties imposed upon the Defendant will total $52,000.00. I have given thought to the question of whether the principle of totality requires some discount to be given on the total sentence. I have decided that in this case the principle of totality does not require any discount. It is clear that the Defendant was involved in a very large number of contraventions, indeed far more than the number of charges which he has faced. He has already had the benefit of Section 719(2) of the Act, and in all of the circumstances it could not be said, in my view, that the total fine is in some way disproportionate to the seriousness of his conduct.

16 The formal findings and final orders of the Court are set out below:-

Findings

In accordance with the evidence presented before this Court via summons, affidavit evidence of Inspector Mark Davidson, Inspector William Bodkin, Mr John Balmer, Mr Karl Hockey, Mr Gary Skinner, Mr Sen He, Mr Wenfeng Hu, Weidong He and Mr David James, and the Outline of Submissions filed in this matter, the Court finds that:-

1 The Defendant was involved in China Huge International Pty Ltd (**"the First Employer"**)'s contravention of subsection 182(1) of the Workplace Relations Act 1996 (**"the Act"**), within the meaning of Section 728 of the Act and is thereby taken to have contravened Section 182(1) of the Act by failing to pay John Balmer, Karl Hockey and Gary Skinner the basic periodic rate of pay set out in the Australian Pay and Classification Scale derived from the terms of the Shop Employees State Award NSW.

2 The Defendant was involved in the First Employer's contravention of subsection 235 of the Act, within the meaning of Section 728 of the Act, and is thereby taken to have contravened Section 235 of the Act by failing to pay Jon Balmer, Karl Hockey and Gary Skinner their accrued amount of annual leave on termination.

3 The Defendant was involved in the Fist Employer's contravention of subclause 23(viii)(a) of the Notional Agreement Preserving the State Award – Shop Employees (State) Award (NSW) (**"the Shop NAPSA"**), within the meaning of Section 728 of the Act and is thereby taken to have contravened subclause 23(viii)(a) of the Shop NAPSA by failing to pay John Balmer, Karl Hockey and Gary Skinner annual leave loading on termination of employment.

4 The Defendant was involved in Chi Telecom Pty Ltd (**"the Second Employer"**)'s contravention of subsection 182(1) of the Workplace Relations Act 1996 (**"the Act"**), within the meaning of Section 728 of the Act and is thereby taken to have contravened Section 182(1) of the Act by failing to pay Sen He and David James the basic periodic rate of pay set out in the Australian Pay and Classification Scale derived from the terms of the Administrative Employees (State) Award NSW.

5 The Defendant was involved in the Second Employer's contravention of subsection 182(3) of the Act, within the meaning of Section 728 of the Act and is

thereby taken to have contravened subsection 182(3) of the Act by failing to pay Wenfeng Hu and Weidong He the Federal Minimum Wage.

6 The Defendant was involved in the Second Employer's contravention of clause 12.1 of the Notional Agreement Preserving the Clerical and Administrative Employees (State) Award NSW (**"the Clerical NAPSA"**), within the meaning of Section 728 of the Act and is thereby taken to have contravened Clause 12.1 of the Clerical NAPSA by failing to pay Sen He and David James the penalty rate of pay.

7 The Defendant was involved in the Second Employer's contravention of subsections 189(1) and 189(3) of the Act, within the meaning of Section 728 of the Act and is thereby taken to have contravened subsections 189(1) and 189(3) of the Act by failing to pay wages to Wenfeng Hu, Weidong He and David James on a fortnightly basis.

8 The Defendant was involved in the Second Employer's contravention of Section 235 of the Act, within the meaning of Section 728 of the Act and is thereby taken to have contravened Section 235 of the Act by failing to pay Wenfeng Hy, Seidong he and David James the accrued amount of annual leave payment on termination.

9 The Defendant was involved in the Second Employer's contravention of subclause 14.2.7 of the Clerical NAPSA, within the meaning of Section 728 of the Act and is thereby taken to have contravened subclause 14.2.7 of the Clerical NAPSA by failing to pay David James annual leave loading on termination of employment.

10 The Defendant was involved in the Second Employer's contravention of Clause 22 of the Clerical NAPSA, within the meaning of Section 728 of the Act and is thereby taken to have contravened Clause 22 of the Clerical NAPSA by failing to pay superannuation contributions in respect of David James.

11 The Defendant was involved in the Second Employer's contravention of Regulation 2.19.18 of the Workplace Relations Regulations 2006 (**"the Regulations"**), within the meaning of Section 728 of the Act and is thereby taken to have contravened Regulation 2.19.18 of the Regulations by failing to provide employee records as requested and required to be produced.

12 The Defendant was involved in the Second Employer's contravention of Regulation 2.19.20 of the Regulations, within the meaning of Section 728 of the Act and is thereby taken to have contravened Regulation 2.19.20 of the Regulations by failing to issue Wenfeng Hu, Weidong He and David James with payslips in respect of all payments of remuneration.

Orders

In accordance with the findings of the Court in this matter, the Court orders that:-

1 In respect of China Huge International Pty Ltd (**"the First Employer"**) the Defendant pay a penalty of:-

(a) $5,000.00 for his involvement in contraventions of Section 182(1) of the Workplace Relations Act 1996 (**"the Act"**) in relation to the employment of Jon Balmer, Karl Hockey and Gary Skinner.

(b) $5,000.00 for his involvement in the First Employer's contravention of Section 235 of the Act in relation to the employment of Jon Balmer, Karl Hockey and Gary Skinner.

(c) $5,000.00 for his involvement in the First Employer's contravention of subclause 23(viii)(a) of the Notional Agreement Preserving the State Award – Shop Employees (State) Award (NSW) in relation to the employment of Jon Balmer, Karl Hockey and Gary Skinner.

2 In respect of Chi Telecom Pty Ltd ((**"the Second Employer"**) the Defendant pay a penalty of:-

(a) $5,000.00 for his involvement in the Second Employer's contravention of Section 182(1) of the Act in relation to the employment of Sen He and David James.

(b) $5,000.00 for his involvement in the Second Employer's contravention of subsection 182(3) of the Act in relation to the employment of Wenfeng Hu and Weidong He.

(c) $5,000.00 for his involvement in the Second Employer's contravention of Clause 12.1 of the Clerical NAPSA in relation to the employment of Sen He and David James.

(d) $5,000.00 for his involvement in the Second Employer's contravention of subsections 189(1) and 189(3) of the Act in relation to the employment of Wenfeng Hu, Weidong He and David James.

(e) $5,000.00 for his involvement in the Second Employer's contravention of Section 235 of the Act in relation to the employment of Wenfeng Hu, Weidong He and David James.

(f) $5,000.00 for his involvement in the Second Employer's contravention of subclause 14.2.7 of the Clerical NAPSA in relation to the employment of David James.

(g) $5,000.00 for his involvement in the Second Employer's contravention of Clause 22 of the Clerical NAPSA in relation to the employment of David James.

(h) $1,000.00 for his involvement in the Second Employer's contravention of Regulation 2.19.18 of the Workplace Relations Regulations 2006 (**"the Regulations"**) by failing to provide employee records as requested and required to be produced.

(i) $1,000.00 for his involvement in the Second Employer's contravention of Regulation 2.19.20 of the Regulations by failing to issue Wenfeng Hu, Weidong He and David James with payslips.

3 The combined penalties payable under Orders 1 – 2 inclusive be paid to the Commonwealth of Australia.

4 Orders 1 – 3 inclusive be paid within 28 days.

17 I publish my reasons for decision.

G J T Hart
Industrial Magistrate

21 October 2009