

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*WORKPLACE OMBUDSMAN v ADELAIDE* [2010] FMCA 95  
*FOAM COMPANY PTY LTD*

INDUSTRIAL LAW – Breach of Award – failure to pay severance pay – failure to give adequate notice of termination of employment – ten employees – penalty hearing.

*Workplace Relations Act 1996* (Cth), ss.4(1), 149, 167(2), 719 & 722  
*Furnishing Industry National Award 2003*, cls.7.1, 19.3.1, 20.1, 21.2 &  
Schedule A  
*Workplace Relations Amendment (Work Choices) Act 2005* (Cth), Schedule 4  
*Crimes Act 1914* (Cth), s.4AA

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847  
*CPSU v Telstra Corporation Limited* (2001) 108 IR 228  
*Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412  
*Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor (No.2)* [2009] FMCA  
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Applicant:	INSPECTOR BRENDA ROLLS (OFFICE OF THE WORKPLACE OMBUDSMAN)
Respondent:	ADELAIDE FOAM COMPANY PTY LTD
File Number:	ADG 355 of 2007
Judgment of:	Simpson FM
Hearing date:	16 June 2009
Date of Last Submission:	13 July 2009 (via written submissions)
Delivered at:	Adelaide
Delivered on:	22 February 2010

## **REPRESENTATION**

Counsel for the Applicant: Mr S. Dowd

Solicitors for the Applicant: Piper Alderman

Counsel for the Respondent: Mr J. Hankin

Solicitors for the Respondent: Gun & Davey

## ORDERS

- (1) Pursuant to section 719(1) of the *Workplace Relations Act 1996* (Cth) (“the Act”), the respondent pay a penalty of \$20,000 for breach of clause 19.3.1 of the *Furnishing Industry National Award 2003* (“the Award”) for failing to pay each of the employees Monica Diaz, Matthew Knight, Damien Lord, Godfrey Lord, Rosie Partridge, Marian Sellar, Christine Thomas, Adam Walker and Craig Willis the required amounts of severance pay.
- (2) Pursuant to section 719(1) of the Act, the respondent pay a penalty of \$20,000 for breach of clause 20.1.1 of the Award for failing to give each of the employees Monica Diaz, Matthew Knight, Damien Lord, Godfrey Lord, Andrew Nock, Rosie Partridge, Marian Sellar, Christine Thomas, Adam Walker and Craig Willis the required periods of notice of termination of their employment.
- (3) The amounts referred to in paragraphs 1 and 2 of this Order are payable to the Commonwealth of Australia.
- (4) Pursuant to section 719(6) of the Act, the respondent pay Monica Diaz the sum of \$5,236.40 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$620.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (5) Pursuant to section 719(6) of the Act, the respondent pay Matthew Knight the sum of \$9,416.85 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$1,381.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (6) Pursuant to section 719(6) of the Act, the respondent pay Damien Lord the sum of \$4,899.96 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$718.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (7) Pursuant to section 719(6) of the Act, the respondent pay Godfrey Lord the sum of \$7,994.59 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$1,172.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.

- (8) Pursuant to section 719(6) of the Act, the respondent pay Andrew Nock the sum of \$8,882.88 for outstanding severance pay plus the sum of \$1,302.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (9) Pursuant to section 719(6) of the Act, the respondent pay Rosie Partridge the sum of \$5,386.06 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$790.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (10) Pursuant to section 719(6) of the Act, the respondent pay Marian Sellar the sum of \$7,749.87 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$1,136.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (11) Pursuant to section 719(6) of the Act, the respondent pay Christine Thomas the sum of \$4,021.54 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$590.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (12) Pursuant to section 719(6) of the Act, the respondent pay Adam Walker the sum of \$4,310.49 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$632.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (13) Pursuant to section 719(6) of the Act, the respondent pay Craig Willis the sum of \$5,013.20 for outstanding pay in lieu of notice and outstanding severance pay plus the sum of \$735.00 being lump sum interest on the sum pursuant to section 722(1) of the Act.
- (14) All applications do otherwise stand dismissed.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
ADELAIDE**

**ADG 355 of 2007**

**INSPECTOR BRENDA ROLLS (OFFICE OF THE WORKPLACE  
OMBUDSMAN)**

Applicant

And

**ADELAIDE FOAM COMPANY PTY LTD**

Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. I before me an Application by a Workplace Inspector for the imposition of penalties pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ("the Act") for numerous breaches of the *Furnishing Industry National Award 2003* ("Award"). The alleged breaches relate to twenty-one employees whose employment was terminated in June 2006. In addition to the imposition of penalties the applicant also seeks Orders pursuant to s.719(6) and s.722 of the Act that the respondent pay each of the former employees their lawful entitlement for a termination payment together with interest on the sum that should have been paid.
2. The matter has proceeded by way of pleadings. The applicant filed an Amended Statement of Claim on 28 March 2008. The respondent filed its Amended Defence on 11 April 2008. The only matters that have been admitted by the respondent are that the respondent is a body corporate under the *Corporations Act 2001* (Cth), that it is a

constitutional corporation within the meaning of s.4(1) of the Act and that at all material times the respondent has carried on the business of being a furniture and foam manufacturer. The respondent has pleaded in relation to all other matters that it has “no knowledge of the matters asserted”. It pleaded in para.10 of its Defence as follows:

*Mr Ron Ingham was one of two directors of the respondent. Mr Ingham was the “hands on” manager of the respondent’s operations. The other director of the respondent was Mr Chris Bobell who lives (and who at all relevant times lived) in Tasmania. Mr Ingham is now dead after a battle with cancer. Mr Bobell, the only remaining director of the respondent has no personal knowledge of the matters alleged in paragraph (10) of the Amended Statement of Claim. Because of the death of Mr Ingham, the respondent is unable to confirm or deny the matters asserted in paragraph (10) of the applicant’s Amended Statement of Claim. (Paragraph 11 of the Defence admits that the respondent employed 15 or more employees as at 14 June 2006).*

### **Evidence relied upon**

3. At the trial of the matter the applicant relied upon the following evidence:
  - a) Affidavit of Brenda Rolls sworn 14 April 2009 and filed 18 May 2009 (Exhibit A1);
  - b) Affidavit of Samuel Condon sworn and filed on 19 May 2009 (Exhibit A2);
  - c) Affidavit of Brenda Rolls sworn 12 June 2009 and filed 15 June 2009 (Exhibit A3);
  - d) Affidavit of Rosie Partridge sworn 8 May 2009 and filed on 1 June 2009 (Exhibit A4);
  - e) Affidavit of Monica Diaz sworn 7 April 2009 (Exhibit A5);
  - f) Affidavit of Matthew Knight sworn 8 December 2008 (Exhibit A6);
  - g) Affidavit of Damien Lord sworn 9 April 2009 (Exhibit A7);

- h) Affidavit of Godfrey Lord sworn 7 April 2009 (Exhibit A8);
  - i) Affidavit of Andrew Nock sworn 7 April 2009 (Exhibit A9);
  - j) Affidavit of Marian Sellar sworn 8 April 2009 (Exhibit A10);
  - k) Affidavit of Christine Thomas sworn 8 April 2009 (Exhibit A11);
  - l) Affidavit of Adam Walker sworn 7 April 2009 (Exhibit A12); and
  - m) Affidavit of Craig Willis sworn 9 April 2009 (Exhibit A13).
4. The respondent has at all times had legal representation. The only evidence put forward on behalf of the respondent was an affidavit of Thomas Hankin, solicitor and counsel for the respondent, sworn and filed on 11 June 2009 (Exhibit R1). After hearing argument from counsel for each of the parties I only admitted paras. 1 to 14 of Mr Hankin's affidavit. What has been admitted relates to events that have taken place since the date of the alleged breaches. No further evidence has been put before the Court by the respondent.

### **The factual and legal background**

5. In Exhibit A1 the applicant, Ms Rolls, says that she is an Inspector employed with the Workplace Ombudsman (formerly the Office of Workplace Services) appointed under s.167(2) of the Act. She annexes what she says is a true copy of her appointment dated 24 October 2006. I accept that the applicant has the correct authority to bring these proceedings.
6. Ms Rolls annexes a copy of the Award as it was on 30 June 2003, together with a table of amendments that have been made to the Award since 30 June 2006. The Award includes as Schedule A a list of respondents to the Award. The respondent is shown as a respondent at page 248 of the Exhibit. It was argued by counsel for the respondent that although the respondent is named in Schedule A to the Award that this does not mean that the respondent is bound by it.

7. It was submitted on behalf of the respondent that s.149 of the pre-Work Choices Act<sup>1</sup> determines who will be bound by an award. Section 149 states:

*Subject to any order of the Commission, an award determining an industrial dispute is binding on:*

- a) *all parties to the industrial dispute who appeared or were represented before the Commission;*
  - b) *all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared);*
  - c) *all parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;*
  - d) *any successor, assignee or transferee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;*
  - e) *all organisations and persons on whom the award is binding as a common rule; and*
  - f) *all members of organisations bound by the award.*
8. It was also submitted that cl.4 of Schedule 4 of the Work Choices Act determined who would be bound by an award post the Work Choices Act. Clause 4 of Schedule 4 provides as follows:

(1) ...

(2) *This item applies to an award (the "original award") in force immediately before the reform commencement.*

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<sup>1</sup> The Act was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (commonly known as the "Work Choices Act"), the relevant parts of which had effect from 27 March 2006.



- (3) *The original award is taken to be replaced by an instrument (the “pre-reform award”) in the same terms as the original award that, on and from the reform commencement, has effect under the Workplace Relations Act 1996 and binds the following:*
- (a) *each employer that was bound immediately before the reform commencement by the original award;*
  - (b) *each organisation that was bound immediately before the reform commencement by the original award;*
  - (c) *each employee of an employer referred to in paragraph (a), in relation to the employee’s employment by the employer, to the extent that the original award regulates worked performed by the employee;*
  - (d) *each eligible entity that was bound immediately before the reform commencement by the original award, but only in relation to outworker terms*
- (4) *To avoid doubt, the pre-reform award binds an employer or eligible entity that was bound by the original award immediately before the reform commencement, whether the employer or eligible entity was bound:*
- (a) *in its own right or as a member of an organisation; or*
  - (b) *because of the operation of paragraph 149(1)(d) or (e) of the Workplace Relations Act 1996, as in force immediately before the reform commencement.*
- (5) *To avoid doubt, if the original award bound an employer, an eligible entity or an organisation as a common rule under paragraph 149(1)(e), the pre-reform award is, to the extent that the pre-reform award binds the employer, eligible entity or organisation, subject to any conditions, exceptions or limitations to which the original award was subject because of the operation of section 141 of the Workplace Relations Act 1996 as in force immediately before the reform commencement.*

9. The effect of cl.4 of Schedule 4 of the Work Choices Act is that if an employer was bound by an award prior to Work Choices it will be bound by the award after Work Choices.

10. I find that the respondent was bound by the Award prior to the Work Choices amendments and was therefore bound by the Award after Work Choices. That the respondent was bound by the Award prior to the Work Choices Act was made clear by cl.7.1 of the Award which states as follows:

*This award shall be binding upon the Construction, Forestry, Mining and Energy Union (Forestry, Furnishing, Building products and Manufacturing Division) and on the members thereof and upon the organisations of employers and the members thereof and the persons, firms and companies whose names are set out in Schedule A to this award in respect of the employment by them in the States of Victoria, New South Wales, South Australia, Tasmania and the Australian Capital Territory of all their employee's, whether members of the said union or not.*

11. The Award is made binding on the respondent by order of the Australian Industrial Relations Commission and therefore is binding on the respondent by reason by s.149 of the pre-Work Choices Act amendments to the Act.
12. In Exhibit A2 Mr Condon deposes to the fact that he is a solicitor employed by the respondent's solicitors. It says that he inspected the Australian Industrial Relations Commission ("the AIRC") file in relation to the Furnishing Industry National Award 2003 and made copies of the Award and all relevant documents containing variations to the Award. He exhibits a copy of the Award as at 30 June 2003. He also says that he obtained from the AIRC a copy of a document titled "Furnishing Industry National Award 2003 - history of variations to the Award". He annexes a copy of that document together with copies of all variations referred to in that document. Mr Condon also annexes to his affidavit a copy of the Award as it was at 30 June 2006 save that Schedule A only includes South Australian respondents to the Award. On the basis of Mr Condon's evidence I accept that Annexure SJC3 to his affidavit accurately reflects the Award in its consolidated form as at 30 June 2006.
13. In Ms Rolls' second affidavit, Exhibit A3, she exhibits copies of the payroll documents for each of the former employees Ms Monica Diaz, Mr Damien Lord, Mr Godfrey Lord, Mr Andrew Nock, Ms Rosie Partridge, Ms Marian Sellar, Ms Christine Thomas, Mr Adam Walker,

Mr Matthew Knight and Mr Craig Willis. She then annexes what she describes as a spreadsheet matrix which she has prepared to estimate the above-mentioned employee's entitlements. In preparing the spreadsheet matrix she has relied not only on the consolidated copy of the Award as at 30 June 2006 and the payroll documents annexed to her affidavit but also the affidavits of each of the former employees being Exhibits A4 to A13 of the applicant's tendered documents.

14. The applicant alleges breaches of cl.19.3.1 and cl.20.1.1 of the Award in relation to each of the ten former employees. Clause 19.3.1 of the Award states:

***Severance Pay - Other than employees of a small employer***

*An employee, other than an employee of a small employer as defined in 19.1 whose employment is terminated by reason of redundancy is entitled to the following amounts of severance pay in respect of a period of continuous service*

<b>Period of Continuous Service</b>	<b>Severance Pay</b>
Less than 1 year	Nil
1 year and less than 2 years	4 weeks pay
2 years and less than 3 years	6 weeks pay
3 years and less than 4 years	7 weeks pay
4 years and less than 5 years	8 weeks pay
5 years and less than 6 years	10 weeks pay
6 years and less than 7 years	11 weeks pay
7 years and less than 8 years	13 weeks pay
8 years and less than 9 years	14 weeks pay
9 years and less than 10 years	16 weeks pay
10 years and over	12 weeks pay

15. Clause 19.1.3 of the Award defines small employer to mean an employer who employs fewer than 15 employees.

16. Clause 20.1 of the Award provides as follows:

*Notice of termination by employer*

*20.1.1 In order to terminate the employment of an employee the employer must give to the employee the period of notice specified in the table below:*

<b>Period of Continuous Service</b>	<b>Period of Notice</b>
1 year or less	1 week
Over 1 year and up to the completion of 3 years	2 weeks
Over 3 years and up to the completion of 5 years	3 weeks
Over 5 years of completed service	4 weeks

*20.1.2 In addition to the notice in 20.1.1 employees over 45 years of age at the time of the giving of the notice with not less than 2 years continuous service, are entitled to an additional weeks notice.*

## **Findings**

17. On the basis of the evidence provided I make the following further findings of fact in relation to the respondent's employment of each of the former employees:

**a) Monica Diaz**

- i) Ms Diaz's date of birth is 30 January 1956;
- ii) Ms Diaz's employment with the respondent was pursuant to the Award;

- iii) Ms Diaz was employed by the respondent as a Sewing Machinist and her classification pursuant to the Award (cl.21.2.4) was Production Employee Level 3;
- iv) Ms Diaz's employment with the respondent was for a continuous period from 23 January 2002 to 21 June 2006;
- v) Ms Diaz's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Ms Diaz was entitled to be paid \$523.60 per week for a 38 hour week and therefore at the rate of \$13.78 per hour;
- vii) the respondent was only paying Ms Diaz at the rate of \$13.33 per hour;
- viii) the respondent terminated Ms Diaz's employment for redundancy on 21 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Ms Diaz upon termination of her employment on 21 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Ms Diaz the required period of notice of termination of employment; and
- xi) the respondent should have paid Ms Diaz the additional sum of \$1,047.28 for outstanding pay in lieu of notice and the further sum of \$4,189.12 for her outstanding redundancy entitlement but failed to do so.

**b) Matthew Knight**

- i) Mr Knight's date of birth is 23 June 1973;
- ii) Mr Knight's employment with the respondent was pursuant to the Award;
- iii) Mr Knight was employed by the respondent as tradesperson and leading hand and his classification pursuant to the

Award (cl.21.2.7) was Furnishing Industry Tradesperson Level 1;

- iv) Mr Knight's employment with the respondent was for a continuous period from 28 October 1998 to 20 June 2006 ;
- v) Mr Knight's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Mr Knight was entitled to be paid \$578.36 per week for a 38 hour week and therefore at the rate of \$15.22 per hour plus a leading hand allowance of \$15.15 per week;
- vii) the respondent was paying Mr Knight \$17.46 per hour;
- viii) the respondent terminated Mr Knight's employment for redundancy on 20 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Knight upon termination of his employment on 20 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Mr Knight the required period of notice of termination of employment; and
- xi) the respondent should have paid Mr Knight the additional sum of \$1,898.17 for outstanding pay in lieu of notice and the further sum of \$7,518.68 for his outstanding redundancy entitlement but failed to do so.

**c) Damien Lord**

- i) Mr Lord's date of birth is 3 January 1979;
- ii) Mr Lord's employment with the respondent was pursuant to the Award;
- iii) Mr Lord was employed by the respondent and his classification pursuant to the Award (cl.21.2.3) was Production Employee Level 2;

- iv) Mr Lord's employment with the respondent was for a continuous period from 3 October 2001 to 21 June 2006;
- v) Mr Lord's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Mr Lord was entitled to be paid \$501.22 per week for a 38 hour week and therefore at the rate of \$13.19 per hour;
- vii) the respondent was paying Mr Lord at the rate of \$14.77 per hour;
- viii) the respondent terminated Mr Lord's employment for redundancy on 21 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Lord upon termination of his employment on 21 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Mr Lord the required period of notice of termination of employment; and
- xi) the respondent should have paid Mr Lord the additional sum of \$890.20 for outstanding pay in lieu of notice and the further sum of \$4,009.76 for his outstanding redundancy entitlement but failed to do so.

**d) Godfrey Lord**

- i) Mr Lord's date of birth is 10 April 1961;
- ii) Mr Lord's employment with the respondent was pursuant to the Award;
- iii) Mr Lord's was employed by the respondent and his classification pursuant to the Award (cl.21.2.6) was Production Employee Level 5;
- iv) Mr Lord's employment with the respondent was for a continuous period from 27 January 2000 to 26 June 2006;

- v) Mr Lord's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Mr Lord was entitled to be paid \$555.18 per week for a 38 hour week and therefore at the rate of \$14.61 per hour;
- vii) The respondent was paying Mr Lord at the rate of \$17.46 per hour;
- viii) the respondent terminated Mr Lord's employment for redundancy on 26 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Lord upon termination of his employment on 26 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Mr Lord the required period of notice of termination of employment; and
- xi) the respondent should have paid Mr Lord the additional sum of \$1,887.61 for outstanding pay in lieu of notice and the further sum of \$6,106.98 for his outstanding redundancy entitlement but failed to do so.

**e) Andrew Nock**

- i) Mr Nock's date of birth is 31 March 1963;
- ii) Mr Nock's employment with the respondent was pursuant to the Award;
- iii) Mr Nock was employed by the respondent and his classification pursuant to the Award (cl.21.2.6) was Production Employee Level 5;
- iv) Mr Nock's employment with the respondent was for a continuous period from 19 August 1996 to 30 June 2006;
- v) Mr Nock's normal hours of work were Monday to Friday from 7am to 4:0pm;



- vi) Mr Nock was entitled to be paid \$555.18 per week for a 38 hour week and therefore at the rate of \$14.61 per hour;
- vii) the respondent was paying Mr Nock at the rate of \$21.05 per hour;
- viii) the respondent terminated Mr Nock's employment for redundancy on 30 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Nock upon termination of his employment on 30 June 2006; and
- x) the respondent should have paid Mr Nock the additional sum of \$8,882.88 for his outstanding redundancy entitlement but failed to do so.

**f) Rosie Partridge**

- i) Ms Partridge date of birth is 11 June 1962;
- ii) Ms Partridge employment with the respondent was pursuant to the Award;
- iii) Ms Partridge was employed part-time by the respondent as a Sewing Machinist and her classification pursuant to the Award (cl.21.2.4) was Production Employee Level 3;
- iv) Ms Partridge's employment with the respondent was for a continuous period from 17 July 2000 to 21 June 2006;
- v) Ms Partridge's normal hours of work were Monday to Thursday with a 30.40 hour working week;
- vi) Ms Partridge was entitled to be paid \$418.91 per week for a 30.40 hour week and therefore at the rate of \$13.78 per hour;
- vii) the respondent was only paying Ms Partridge at the rate of \$13.33 per hour;
- viii) the respondent terminated Ms Partridge employment for redundancy on 21 June 2006;

- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Ms Partridge upon termination of her employment on 21 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Ms Partridge the required period of notice of termination of employment; and
- xi) the respondent should have paid Ms Partridge the additional sum of \$1,196.74 for outstanding pay in lieu of notice and the further sum of \$4,189.12 for her outstanding redundancy entitlement but failed to do so.

**g) Marian Sellar**

- i) Ms Sellar's date of birth is 25 May 1954;
- ii) Ms Sellar's employment with the respondent was pursuant to the Award;
- iii) Ms Sellar was employed by the respondent as a Sewing Machinist and her classification pursuant to the Award (cl.21.2.4) was Production Employee Level 3;
- iv) Ms Sellar's employment with the respondent was for a continuous period from 28 September 1999 to 22 June 2006;
- v) Ms Sellar's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Ms Sellar was entitled to be paid \$523.60 per week for a 38 hour week and therefore at the rate of \$13.78 per hour;
- vii) the respondent was only paying Ms Sellar at the rate of \$13.33 per hour;
- viii) the respondent terminated Ms Sellar's employment for redundancy on 22 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Ms Sellar upon termination of her employment on 22 June 2006;

- x) in breach of cl.20.1.1 of the Award the respondent failed to give Ms Sellar the required period of notice of termination of employment; and
- xi) the respondent should have paid Ms Sellar the additional sum of \$1,989.83 for outstanding pay in lieu of notice and the further sum of \$5,760.04 for her outstanding redundancy entitlement but failed to do so.

**h) Christine Thomas**

- i) Ms Thomas' date of birth is 6 September 1947;
- ii) Ms Thomas' employment with the respondent was pursuant to the Award;
- iii) Ms Thomas was employed by the respondent as a Sewing Machinist and her classification pursuant to the Award (cl.21.2.4) was Production Employee Level 3;
- iv) Ms Thomas' employment with the respondent was for a continuous period from 8 October 2001 to 23 June 2006;
- v) Ms Thomas' normal hours of work were Monday to Friday with a 30.40 hour working week;
- vi) Ms Thomas was entitled to be paid \$418.91 per week for a 38 hour week and therefore at the rate of \$13.78 per hour;
- vii) the respondent was only paying Ms Thomas at the rate of \$12.30 per hour;
- viii) the respondent terminated Ms Thomas' employment for redundancy on 23 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Ms Thomas upon termination of her employment on 23 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Ms Thomas the required period of notice of termination of employment; and

xi) the respondent should have paid Ms Thomas the additional sum of \$670.25 for outstanding pay in lieu of notice and the further sum of \$3,351.29 for her outstanding redundancy entitlement but failed to do so.

**i) Adam Walker**

- i) Mr Walker's date of birth is 25 May 1985;
- ii) Mr Walker's employment with the respondent was pursuant to the Award;
- iii) Mr Walker was employed by the respondent and his classification pursuant to the Award (cl.21.2.3) was Production Employee Level 2;
- iv) Mr Walker's employment with the respondent was for a continuous period from 4 October 2001 to 30 June 2006;
- v) Mr Walker's normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Mr Walker was entitled to be paid \$501.22 per week for a 38 hour week and therefore at the rate of \$13.19 per hour;
- vii) the respondent was paying Mr Walker at the rate of \$13.33 per hour;
- viii) The respondent terminated Mr Walker's employment for redundancy on 30 June 2006;
- ix) The respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Walker upon termination of his employment on 30 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Mr Walker the required period of notice of termination of employment; and
- xi) the respondent should have paid Mr Walker the additional sum of \$300.73 for outstanding pay in lieu of notice and the

further sum of \$4,009.76 for his outstanding redundancy entitlement but failed to do so.

**j) Craig Willis**

- i) Mr Willis' date of birth is 16 June 1975;
- ii) Mr Willis' employment with the respondent was pursuant to the Award;
- iii) Mr Willis was employed by the respondent and his classification pursuant to the Award (cl.21.2.3) was Production Employee Level 2;
- iv) Mr Willis' employment with the respondent was for a continuous period from 26 October 2001 to 21 June 2006;
- v) Mr Willis' normal hours of work were Monday to Friday from 7:30am to 3:30pm;
- vi) Mr Willis was entitled to be paid \$501.22 per week for a 38 hour week and therefore at the rate of \$13.19 per hour;
- vii) the respondent was paying Mr Willis at the rate of \$15.31 per hour;
- viii) the respondent terminated Mr Willis' employment for redundancy on 21 June 2006;
- ix) the respondent breached cl.19.3.1 of the Award by failing to pay severance pay to Mr Willis upon termination of his employment on 21 June 2006;
- x) in breach of cl.20.1.1 of the Award the respondent failed to give Mr Willis the required period of notice of termination of employment; and
- xi) the respondent should have paid Mr Willis the additional sum of \$1,002.44 for outstanding pay in lieu of notice and the further sum of \$4,009.76 for his outstanding redundancy entitlement but failed to do so.

## The penalties

18. Section 719 of the Act includes the following sub-paragraphs;
- (1) *An eligible court may impose a penalty in accordance with this Division on a person if:*
    - (a) *the person is bound by an applicable provision; and*
    - (b) *the person breaches the provision.*
  - (2) *Subject to sub-section (3), where:*
    - (a) *2 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.*
19. An “applicable provision” includes an Award.
20. Section 719(3) provides that s.719(2) will not apply to a breach of an applicable provision that is committed by a person who has already had penalties imposed for earlier breaches of the provision. There is no evidence that the respondent here has ever had a penalty imposed at all let alone in relation to the two provisions that we are here concerned with.
21. The maximum number of penalty units that can be imposed for breach of an applicable provision in relation to a company is three hundred. In this case there are nine breaches of cl.19.3.1 of the Award which by reason of s.719(2) of the Act will be together dealt with as one breach and ten breaches of cl.20.1.1 of the Award which too will be dealt with as one breach.
22. By reason of the definition of “penalty unit” in s.4(1) of the Act penalty unit has the same meaning as given in s.4AA of the *Crimes Act 1914* (Cth) which in turn provides that unless a contrary intention appears, a penalty unit is \$110. The maximum penalty that can therefore be imposed in relation to each of the two breaches by the company is \$33,000.

23. Many of the considerations that need to be addressed when considering penalty in matters such as the present case were helpfully identified in the oft referred to decision of Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7. With some modification and additions I have relied on the list of considerations there referred to. The matters I have considered in deciding whether a penalty should be imposed and if so its quantum are as follows:

- a) the nature and extent of the conduct which led to the breaches;
- b) the circumstances in which the conduct took place;
- c) the nature and extent of any loss or damage sustained as a result of the breaches;
- d) whether there has been similar previous conduct by the party;
- e) whether the breaches were properly distinct or arose out of the one course of conduct;
- f) the size of the business enterprise involved;
- g) whether or not the breaches were deliberate;
- h) whether senior management was involved in the breaches;
- i) whether the party committing the breach had exhibited contrition for the breach firstly, by taking action to make reparation for any loss resulting from the breach whether or not there was a legal obligation to do so and second, in any other manner;
- j) whether the party committing the breach has taken corrective action to ensure further breaches to not occur;
- k) whether the party committing the breach has cooperated with the enforcement authorities;
- l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements;
- m) the need for specific and general deterrence;

- n) if the party has admitted the breaches of the applicable provisions - that fact; and
  - o) if the party is an individual, the character, antecedents, age, means and physical or mental condition of the party.
24. I have previously dealt with the nature and extent of the conduct which led to these breaches and the circumstances in which that conduct took place. I take into account that the breaches arose in the immediate aftermath of the respondent's "hands on" director in Adelaide, Mr Ron Ingham, being diagnosed with terminal cancer. Mr Ingham held a staff meeting on 14 June 2006 at which he informed those present that he was dying from cancer and that as a result, the respondent's business would close in the very near future. All ten of the employees that we are concerned with in this case were terminated before the end of June 2006. Mr Ingham died from cancer in the first half of 2007.
25. It is easy to understand why Mr Ingham was distracted from properly ensuring that the respondent complied with its lawful obligations. The Court would have some sympathy for the respondent if Mr Ingham had sole responsibility for ensuring that the respondent lawfully complied with its legal obligations at the time that these ten employees employment was terminated. What is difficult to understand however is the fact that there is no evidence that has been put before the Court by the respondent explaining what if any action was taken by any other senior person within the respondent's organisation, perhaps a fellow director of Mr Ingham's, to ensure that the respondent ultimately attended to its lawful obligations.
26. Three years elapsed between the termination of these ten employees employment and the hearing of this application. Over these three years the respondent, under its new management, could and should have fully investigated the question of the matters raised by the applicant. Instead these ex-employees continued to be deprived of their lawful entitlements.
27. The respondent's conduct over the last three years remains unexplained. Not only has the respondent not taken appropriate steps to calculate and pay these employees their lawful entitlements but it has not put any evidence before the Court to explain its behaviour since



Mr Ingham was unfortunately unable to continue to properly manage the respondent company.

28. The respondent has not put any evidence before me about the size of the respondent's business and whether, in the absence of Mr Ingham, it continues to operate.
29. There is no evidence before me that would enable me to find that the respondent is contrite. The fact that it has not paid these ex-employees their lawful entitlements suggests to me, in the absence of any evidence, that the respondent is not contrite.
30. There is no evidence from the respondent indicating that they have taken corrective action to ensure that further breaches do not occur.
31. There are numerous cases that make it clear that the penalty imposed should act as a specific deterrent to the respondent before the Court to ensure that in future it treats this type of legislation with the importance that it warrants, and as a general deterrent to the rest of the business community. The penalty should send a clear message to the business community that parliament and courts treat conduct such as we have here as extremely serious.<sup>2</sup>
32. Where a respondent admits to guilt and thereby saves the applicant and the courts (and therefore the public purse) from the time and expense of a full hearing a significant discount is called for. This is not such a case. Not only did the respondent plead not guilty but it failed to reach agreement about many of the facts that needed to be proved as part of the applicant's case. The fact that the respondent adopted the course of action that it did means that the Court is unable to give the significant discount that would otherwise have applied.
33. In light of the above considerations I have to determine the appropriate penalty. I have considered all of the submissions put by Counsel for the applicant and Counsel for the respondent and considered them in light of the evidence that is before me. I have come to the conclusion that there should be a penalty of \$20,000 in relation to each contravention is called for.

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<sup>2</sup> See *Finance Sector Union v Commonwealth Bank of Australia* [2005] FCA 1847 per Merkel J; *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 per Finkelstein J; and *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at 41 per Driver FM.

34. Orders should be made pursuant to s.719(6) of the Act reimbursing each of the employees for the amounts of the underpayments dealt with earlier in these Reasons. The employees are also entitled to interest on those sums.<sup>3</sup>

35. I make the orders to be found at the beginning of these Reasons.

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**I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of Simpson FM**

Associate: Ms N. Julius

Date: 22 February 2010

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<sup>3</sup> *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor (No.2)* [2009] FMCA 154 at paras. 7 to 10.