FEDERAL MAGISTRATES COURT OF AUSTRALIA

WORKPLACE OMBUDSMAN V B W METCALF PTY LTD & ANOR *[2010] FMCA 332*

INDUSTRIAL LAW – Pecuniary penalties – breaches of award – underpayment of employee – underpayment of penalty rates and overtime – failure to pay entitlement for annual leave on termination of employment – failure to pay annual leave loading on termination of employment.

Industrial Relations Act 1999 (Qld)
Workplace Relations Act 1996 (Cth)

Australian Ophthalmic Supplies v McAlary-Smith [2008] FCAFC8
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Limited [2007] FMCA 7

Applicant:	WORKPLACE OMBUDSMAN
First Respondent:	B W METCALF PTY LTD
Second Respondent:	BRIAN METCALF
File Number:	BRG 429 of 2009
Judgment of:	BURNETT FM
Hearing date:	1 April 2010
Date of Last Submission:	1 April 2010
Delivered at:	Brisbane
Delivered on:	1 April 2010

REPRESENTATION

Counsel for the Applicant:	Ms Dann
Solicitors for the Applicant:	Norton Rose Australia
Counsel for the First Respondent:	Mr Merrell
Solicitors for the First Respondent:	Creevy Russell
Counsel for the Second Respondent:	Mr Merrell
Solicitors for the Second Respondent:	Creevy Russell

ORDERS

(1) That the First Respondent pay the sum of $6,000.

(2) That the Second Respondent pay the sum of $1,200.

(3) That the penalties be paid under s841 of the Act to the Commonwealth of Australia within thirty (30) days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 429 of 2009

WORKPLACE OMBUDSMAN
Applicant

And

B W METCALF PTY LTD AND ANOTHER
Respondent

REASONS FOR JUDGMENT

Ex Tempore

(Revised from Transcript)

Introduction

1. This case instances another example of the complex nature of industrial laws now governing employer relationships between employers and employees and highlights the ever necessary requirement for vigilance on the part of the employers who wish to enter into private arrangements with employees to ensure that those arrangements at law, at least, conform with the minimum employment requirements and standards now provided for under the legislation.

Background

2. The applicant is the Fair Work Ombudsman, formerly the Workplace Ombudsman and has a regulatory role in the scheme provided for

under the Act. The first respondent B W Metcalf Proprietary Limited was the employer. It was, at all material times, an Australian proprietary company limited by shares capable of suing and being sued and a constitutional corporation engaged in trading activity.

3. The company engaged in the business of the provisional of transport services and employed Mr Gary Douglas Thompson to work in its business. The second respondent is a natural person. He is the sole director and secretary of the company and had been so since July 1996. At all times he held the issued shares in the company and was the ultimate decision-maker in relation to the terms and conditions of Mr Thompson's employment. The business conducted by the company was a freight transport business based in Gatton, Queensland, and was principally involved in the activity of grain haulage.

4. On 16 February 2004, Mr Thompson commenced employment with the company. That employment came to an end on 6 September 2007. Mr Thompson was employed by the company as a truck driver and typically his duties involved driving a truck. His duties also included the duties of loading and unloading his truck. They also included long-distance driving throughout northern New South Wales and southern Queensland, with occasional trips to Victoria. He was based at Clifton South, in Queensland.

5. The types of trucks he drove included a B-double and an AB-triple and/or road train being very large transport vehicles. His contract of employment was oral and the relevant terms for these purposes included a term that he would receive 20 per cent of the gross earnings of the truck that he drove and that he would receive a living-away-from-home allowance for the nights he was not at home.

6. During the period of his employment, the *Workplace Relations Act 1996* (Cth) (WR Act) applied. By reason of that Act the notional agreement preserving a state award in relation to Transport Distribution And Courier Industry Awards Southern Division 2003, and parts of the *Industrial Relations Act 1999* (Qld), in respect of preserved entitlements, as defined in clause 34 of schedule 8 of the *WR Act*, that is, the transport NAPSA, applied to Mr Thompson's employment and were binding upon the company in respect of Mr Thompson's employment.

7. Additionally the Australian Pay and Classification Scale derived from the Transport Distribution and Courier Industry Award Southern Division 2003, are the APCS, covered Mr Thompson's employment and, again, likewise was binding on the company in respect of Mr Thompson's employment. The company admits that Mr Thompson had entitlements and that it had obligations under each of the *WR Act*, the transport NAPSA and the APCS and that those obligations pertained to Mr Thompson's employment.

8. The second respondent being the director and alter ego of the company knew of the company's obligations under each of the WR Act, the transport NAPSA and the APCS and also of the terms and conditions of Mr Thompson's employment and his entitlement to the benefit of the terms and conditions of his employment specified by each of the instruments I've referred to above. During that period, Mr Thompson ordinarily drove a B-double truck and he ordinarily worked under a grade 8A classification under the APCS.

9. Included in his entitlements was an annual leave entitlement provided for by clause 7 of the NAPSA and that provided for an entitlement of an equivalent of four weeks annual leave at the end of each year of employment; a payment of one-twelfth of his pay for the period of his employment if his employment terminated prior to the completion of one year of employment; and loading of 17.5 per cent of Mr Thompson's ordinary wage rate for any periods of annual leave based upon his performing work at the grade 8A classification, Mr Thompson was entitled to be paid at least $623.96 per week, which is calculated by reference to the APCS hourly rate times 38 hours a week.

10. Given his entitlements, on termination of his employment, and under the transport NAPSA, Mr Thompson was accordingly entitled to be paid $9,821.41, being the amount in respect of accrued annual leave entitlements for the period of his employment. The calculation of that sum has been set out in the submissions provided and need not be further detailed here as there is no contest between the parties as to its quantification.

11. From 5 September 2005, the company started deducting a sum of $75 per week from amounts due to Mr Thompson's wages and holding on

account for Mr Thompson. The deduction was referred to as a leave accrual on Mr Thompson's pay slips, and it seems that the sum was set aside in the nature of a provision. From time to time, during his employment, while Mr Thompson was absent from work on approved leave, he had access to this sum and was paid amounts deducted from this account which sums, of course, had accumulated from deductions from his wages. Mr Thompson was reimbursed the balance of the amount deducted from his wages and held to his account on the termination of his employment such that now Mr Thompson has received the full benefit of the sums that were set aside by way of provision.

12. Significantly, however, the system that I've just outlined did not discharge the company's obligations to pay Mr Thompson annual leave entitlements under clause 7 of the transport NAPSA. In fact, during the period of Mr Thompson's employment the company only paid to Mr Thompson the amounts deducted from his wages by way of leave entitlements. The company did not pay Mr Thompson any sum representing annual leave entitlements as provided by clause 7 of the transport NAPSA.

13. Likewise, on termination, Mr Thompson was paid only the amounts deducted from his wages and held to his account in the nature I've earlier described. The company did not make any other payment to Mr Thompson for annual leave entitlements. It was on that basis that on his termination, Mr Thompson was entitled to be paid the amount of $9,821.41, which I've earlier referred to.

14. It is agreed between the parties that the conduct of the company which is alleged breached its obligations under clause 7 of the transport NAPSA by failing to pay Mr Thompson the amount of $9,821.41, representing his annual leave entitlements for the period of his employment. The company admits that it breached clause 7 of the transport NAPSA by this matter and that, as a result of that breach, Mr Thompson has suffered loss and damages in that amount in respect of the accrued annual leave entitlements that were payable on his termination.

15. It is further agreed between the parties that that sum of $9,821.41 plus interest has now been paid by the company to Mr Thompson. So far as

the second respondent is concerned, it is agreed that in his capacity as sole director and company secretary, he was the ultimate decision-maker in relation to the terms and conditions of engagement of Mr Thompson and that he knew of the company's obligations and that Mr Thompson was entitled to the benefit of the terms and conditions of his employment specified in each of the instruments I've earlier referred to. It follows that he admits that he was involved in the conduct of the company, which is alleged and that by reason of section 728 of the WR Act he too is to be treated as having contravened clause 7 of the transport NAPSA and he admits that fact.

16. By reason of those matters, the applicant now seeks the imposition of pecuniary penalties upon each of the first and second respondents pursuant to section 719 of the WR Act for one breach for each of those parties of the applicable provisions of the NAPSA having effect under clause 38 of schedule 8 of the WR Act and which are enforceable as a collective agreement under clause 43 of schedule 8 of the WR Act.

17. The orders sought are for the payment against the first respondent of a penalty pursuant to section 719 of the WR Act with respect to the breach which has been alleged and likewise for an order against the second respondent.

18. In particular, the breach is alleged in respect of clause 7.1 of the NAPSA in respect of the Transport Distribution And Courier Industry Awards Southern Division 2003 Queensland; section 11(7) of the Industrial Relations Act 1999 Queensland, as a term of the transport NAPSA; and schedule 8, clause 38 of the WR Act which is an applicable provision for the purposes of section 718 of the WR Act. Likewise, as I earlier indicated, an order is sought against the second respondent for the payment of a penalty for like breaches.

19. Further orders are sought, pursuant to section 841 of the WR Act that any penalties imposed be paid to the Commonwealth. Finally, orders are also sought for the payment of those sums within 30 days. Subject to quantum, I do not think there is any challenge to the nature of the restitutionary orders sought. Also, subject to the quantum of penalty, I do not think there is any challenge to the nature of penalty orders sought.

20. Dealing then with the admitted contraventions. I've earlier outlined the facts which are relevant to these matters. Perhaps the single most important point agitated on behalf of the applicant is whether or not the contraventions alleged constitute an instance of single or a multiple contravention. The applicant submits that the failure by the company in this case should be treated as a single contravention of an applicable provision being the obligation to pay Mr Thompson amounts due for accrued but untaken annual leave on the termination of Mr Thompson's employment.

21. It is submitted that the calculation of the payment due occurs under the transport NAPSA by reference to two components. The first component comprises the ordinary wage rate for the period of annual leave entitlement for the completed years plus the incomplete year at a one-twelfth proportion of the pay the employer received during that part year period of employment. The second component is a further amount calculated at the rate of 17.5 per cent of that amount. Those sums come by reference to clause 7.1 of the NAPSA which deals with annual leave. In broad terms, it provides at 7.1.1:

> *"Every employee shall be entitled to annual leave on full pay as follows:*
>
> *(b) Not less than four weeks."*

22. At 7.1.2:

> *"Such annual leave must be paid for by the employer in advance.*
>
> *(b) **At the ordinary time rate** of pay payable to the employee concerned immediately prior to that leave."*

23. Clause 7.1.5 proceeds to provide for the calculation of annual leave pay and provides in these terms. In respect to annual leave entitlements to which clause 7.1 applies:

> *"Annual leave pay shall be calculated as follows:*
>
> *b) All employees subject to the provisions of clause 7.1.5(c) in no case shall the payment of an employer to an employee be less than the sum of the following amounts:*
>
> *i) **The employee's ordinary wage rate** as prescribed in clause 5.1, and;*

ii) a further amount calculated at the rate of 17 and one half per cent of the amounts referred to in clauses 7.1.5(b)(i)."

24. There is a slight difference in the language apparent in clause 7.1.2 and 7.1.5 in that the reference in 7.1.2 is to what is described as "the ordinary time rate of pay", whereas in clause 7.1.5 in the calculation section, it provides for "the employee's ordinary wage rate". Clause 5.4.3, which deals with the definitions that apply to certain provisions of the NAPSA, but not necessarily clause 7.

25. It does provide another definition which employs the term "ordinary time rate of pay", and that relates to ordinary time earnings. It is perhaps useful to look at that clause for some assistance in the construction of the term "ordinary wage rate of pay".

26. It seems, by my reading of those words, that what the ordinary time rate of pay seeks to do is to set the benchmark, ie, the sum to be paid, without reference to loadings, which is perhaps slightly different to what is sought to be done and made clearer in the calculation provision by reference to the ordinary wage rate, which quite clearly is and intended to be a reference to wages without loadings.

27. It seems, on one view at least, that what is sought to be achieved by clause 7.1.5 is to add two cumulative factors, namely the ordinary wage rate, which is the wage without loadings, together with the 17 and a half per cent loading in order to identify the sum which is then to be the annual leave pay as calculated, and that on that basis it seems that while there can be a contravention of clause 7.1.5 by failing to pay either or of the two requirements that make up the annual leave pay, the fact remains that in the event that there is a non-payment of both matters, they are simply cumulative factors leading to the one contravention rather than two separate contraventions with each failure being a contravention in its own right.

28. I am satisfied, as it is submitted on behalf of the applicant, that I ought read the contravention as relating to simply one contravention rather than two separate contraventions. I should note that the respondent broadly accedes to that approach. So far as the second respondent's liability is concerned, it is worthy of note at this point that by operation of sections 727 and 728 of the WR Act apply to the civil remedy

provisions within the Act itself and deals with the contravention of persons having been concerned with a contravention.

29. So far as penalties are concerned, section 719 of the WR Act is a civil remedy provision. It provides that a court may, on application by a eligible person, make an order imposing a pecuniary penalty on a defendant in respect of a contravention of a civil penalty provision. The maximum penalty in respect of the first respondent under section 719(4) for it being a body corporate is 300 penalty units or a sum of $33,000.

30. In respect of the second respondent being an individual, the Act provides for 60 penalty units maximum penalty, or $6600. In assessing penalty, the court must have regard to a number of matters in particular, including the objects set out in section 3 which, so far as are relevant to this application, include: need to provide for an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the WR Act; second, to ensure the compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigations and enforcement of employee entitlements, and; third, by ensuring that awards provide minimum safety nets entitlements for award-reliant employees.

31. As was submitted by the applicant, the objects emphasise the importance of minimum standards, including annual leave and the enforcement of those standards. That is reflected in the magnitude of penalties which are available. However, as always, punishment must be proportionate. The circumstances of the contravention are always important and the penalty must recognise not only those matters, but also the need for deterrence, both personal and general.

32. In this respect, so far as personal deterrence is concerned, some assessment must be made of the risk of re-offending, and in terms of general deterrence, it is always assumed that an appropriate penalty will act as a deterrent to others who may be likely to offend or reoffend. Accordingly, the penalty should be of a kind that would likely act as a deterrent in preventing similar contraventions by likeminded persons or organisations and should not be such as to crush the person upon whom it is imposed.

33. In an earlier decision of this court of *Mason v Harrington Corporation Limited*[1], a non-exhaustive list of considerations was detailed. I say non-exhaustive because, as was stated by his Honour Buchanan J in *Australian Ophthalmic Supplies v McAlary-Smith*[2], checklists of this kind can be useful, providing they do not become transformed into a rigid catalogue of matters for attention.

34. At the end of the day, the task of the court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.

35. The applicant submitted that the relevant considerations in the context of this application include these: the nature and extent of the conduct which led to the breaches; the circumstances in which the relevant conduct took place; the nature and extent of any loss or damage sustained as a result of the breaches; whether there had been similar previous conduct by the respondent; the size of the business enterprise involved; whether or not the breaches were deliberate; whether senior management was involved in the breaches; whether the party committing the breaches exhibited contrition; whether the party committing the breach had taken corrective action; whether the party committing the breach had cooperated with the enforcement of authorities.

36. Dealing with each of those matters in turn: circumstances, nature and extent of relevant conduct. It is agreed that the total of annual leave entitlements of the first respondent – what the first respondent was required to pay, Mr Thompson, was $9821.41 plus interest. I have outlined the circumstances of the case above and, as is earlier noted, the facts indicate a contravention by omission rather than by commission. By that I mean that there are serious questions about whether or not it could be said that what the respondent sought to do was to, in fact, short change or cheat the employee out of his due entitlements. There are no allegations of any prior contraventions. The

[1] [2007] FMCA 7
[2] [2008] FCAFC8

size of the enterprise involved is relatively small, but, as Tracey J in *Kelly v Fitzpatrick*[3] noted:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees rightly have an expectation that this will occur. When it does not, it will normally be necessary to mark the failure by imposing an appropriate monitory sanction, but such a sanction must be imposed at a meaningful level."*

37. I take into account the fact that this is a small corporation with one shareholder and director at its heart. So far as the deliberateness of the breaches are concerned, as I have earlier noted, the evidence here and the submissions made on behalf of the applicant support the contention that the conduct here is more demonstrative of carelessness or recklessness, but it can quite clearly be seen not necessarily as deliberate. The applicant, in his submission, of course, says it is possible, not discounting the prospect of it being deliberate. But I am inclined to accept the submissions made on behalf of the respondent that the offending conduct was not deliberate in the sense of any intention to deny the employee of his entitlements, but rather deliberate in the sense that a deliberate decision was made, but not with deliberate intent to cause harm.

38. In that regard, I am particularly mindful of the submissions made that in more recent times there has been the negotiation of an enterprise arrangement or an enterprise agreement, albeit one that has not yet been sanctioned in the appropriate way, which serves to give effect to an enterprise agreement which provides for an arrangement which is identical to the very arrangement which has given rise to the respondent's difficulties in this instance.

39. That is to say, an arrangement which involves the employees enjoying an income based or calculated on 20 per cent of the gross value of the load or truck on each occasion and from which there will be express provision made for the deduction of a sum of two per cent on account of leave entitlements.

---

[3] [2007] FCA 1080

40. That was, of course, the arrangement which ensured at the material times, but which clearly was in contravention of the regulation, and, at least to that end, it could be said to be deliberate or, as the respondents say, one made perhaps in ignorance. So far as the involvement of senior management is concerned, it's quite clear that this conduct involved the second respondent, who was the sole director of the company, and he does not oppose orders on the basis of his involvement.

41. So as far as matters of contrition are concerned, the applicant submits that there is limited evidence of contrition, although it is acknowledged that there was cooperation between the applicants and the respondent in terms of the initial investigation. There appears to have been some delay in terms of remedying the contravention; that is the payment of compensatory sums to the employee. But that matter has since been addressed.

42. Having regard to all of these circumstances and, in particular, having regard to the conduct of the employer since the breach, particularly in terms of trying to regularise his arrangements, I think that there has been some demonstrated contrition on the part of the respondents. And in particular, there has been cooperation in the context of these proceedings.

43. That is, of course, a matter that ought be considered as well. It is acknowledged on behalf of the applicant that there has been cooperation between the applicant and the respondents. That is, in part, evidenced by the joint agreed statement of facts, which really are put before me in a fairly comprehensive way. All matters that ought be agreed before me are agreed. In fact, the fact that the debate today revolved around a very small legal point, which was, to a large part, acceded to by the respondent, again, is further evidence of cooperation.

44. There is a need to consider or to ensure compliance with the minimum standards by provision of effective means for investigation and enforcement of employee entitlements. Again, coming back to the observations Tracey J in *Kelly v Fitzpatrick* his Honour noted:

> *"One of the principal objects of the act is the maintenance of a safety net of a minimum of terms and conditions of employment*

and effective enforcement of the obligations imposed by awards and other industrial instruments which at this end the Act makes provision for the investigation of alleged breaches, where it is established that breaches have occurred."

45. As already noted, those penalties were significantly increased by Parliament in 2004. It has already been recognised by this court and others that a failure to pay a per annual leave entitlement is an important obligation, and breach of that obligation warrants sanction. It was contended, as earlier noted on the part of the applicant, that the respondent's conduct demonstrated a disregard for one of the minimum standards, that is, an employee's right to have or to be paid for annual leave accrued, but not taken upon termination of employment. I think that much is accepted or admitted by the respondent.

46. However, the respondent points out, and I think it is noteworthy, that the offence is one of omission rather than commission. That is, that the employer did, I think, set out to do the right thing, but by reason of its failure to properly investigate the effect of the legislation upon legislature the structure of the arrangement it has, in effect, unwittingly committed an offence.

47. So far as deterrence is concerned, it's admitted, I think by all, that generally there is a need in any penalty to reflect both special and general deterrence, and to that end, at least so far as the special deterrence is concerned, the respondent points to the fact that it has now sought to regularise its affairs by reference to the proposed enterprise bargain or arrangement, which is now subject to sanction. But in any event, the matter of deterrence is important and, in particular, the need for general deterrence to other likeminded individuals.

48. I have been presented with a considerable number of comparative penalties, but as always, each penalty must be dictated by the individual circumstances of this case, and while comparative penalties are helpful, and I'm certainly aware of a number of them in particular, I'm not necessarily sure that they are all necessarily apposite in the instant circumstances. I'm certainly very conscious of the matters that have been stated by other courts in relation to these matters.

49. However, in all these circumstances it seems to me that in relation to these particular offences, the following penalties appear to be appropriate. I note that the range which was addressed by each of the applicant and respondent was in the order of five to ten thousand dollars for the first respondent, and one to two thousand dollars for the second respondent. The applicant submitted the penalties ought be mid-range, with the respondent submitting the penalties ought be at the lower end of the range.

50. Having regard to the factors that I identified in the course of my reasons, I am of the view that because of its exceptional circumstances the penalties ought appropriately be awarded at the lower end of the range, and in these circumstances my penalties are as follows. I'll direct that the first respondent pay a penalty fixed in the sum of $6000, and the second respondent pay a penalty fixed in the sum of $1200. I'll direct that the penalties be paid in accordance with section 841 to the Commonwealth of Australia and that they be paid within 30 days.

I certify that the preceding fifty (50) paragraphs are a true copy of the reasons for judgment of Burnett FM

Associate: B Schmidt

Date: 17 May 2010