FEDERAL MAGISTRATES COURT OF AUSTRALIA

WORKPLACE OMBUDSMAN v ELLA ENTERPRISES PTY LIMITED & ANOR [2010] FMCA 54

INDUSTRIAL LAW – Awards – breach of Award – underpayments – recovery of outstanding wages – penalty – Workplace Relations Act – calculation of penalties.

Crimes Act 1914 (Cth)
Corporations Act 2001 (Cth)
Annual Holidays Act 1944 (NSW)
Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulations 1999 (NSW)
Transport Industry (State) Award
Workplace Relations Act 1996 (Cth)

ANZ Bank v Finance Sector Union (2001) 111 IR 227; [2001] FCA 1785
Blandy v Coverdale NT Pty Ltd (2008) FCA 1533
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Johnson v R (2004) 285 ALR 346
Jones v Dunkel (1959) 101 CLR 298
Kelly v Fitzpatrick [2007] FCA 1080
Martin v Fresho Foods Pty Ltd [2009] FMCA 15
Poletti v Ecob No. 2 (1989) 91 ALR 381
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Ray v Radano [1967] AR 471
Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 40

Applicant:	WORKPLACE OMBUDSMAN
First Respondent:	ELLA ENTERPRISES PTY LIMITED
Second Respondent:	LUCAS WALLER
File Number:	BRG 851 of 2008
Judgment of:	Burnett FM
Hearing dates:	11 and 12 May 2009; 10 and 11 June 2009

Date of Last Submission:	2 September 2009
Delivered at:	Brisbane
Delivered on:	3 February 2010

REPRESENTATION

Counsel for the Applicant:	Mr Murdoch
Solicitors for the Applicant:	Minter Ellison
Counsel for the First Respondent:	
Solicitors for the First Respondent:	Plass Lawyers
Counsel for the Second Respondent:	
Solicitors for the Second Respondent:	Plass Lawyers

ORDERS

(1) That the matter be adjourned to a date to be fixed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 851 of 2008

WORKPLACE OMBUDSMAN
Applicant

And

ELLA ENTERPRISES PTY LIMITED
First Respondent

LUCAS WALLER
Second Respondent

REASONS FOR JUDGMENT

1. In this proceeding the applicant on behalf of a worker, Scott Meyers, seeks orders pursuant to section 719(6) of the *Workplace Relations Act 1996* (the Act) for payment to him of a sum of $14,698.89 for underpayment of wages in breach of various awards together with interest and the imposition of a penalty.

Background Facts

2. By an oral agreement entered into between Scott Meyers and Adam Maley in or around July 2006 Meyers agreed to accept employment with Sydney Horse Transport as a truck driver. He was to commence employment immediately. Meyers was informed by Maley that the rate of pay would be $750 per week clear with a gross rate of pay of $806 per week. He was told that he would be required to work 55 hours per week and that any time worked above 55 hours would be taken as overtime. Although not a condition of his contract he was informed that he would have most weekends off although there would be

occasions when he would be required to work on weekends. Meyers accepted those terms and commenced employment with Adam Maley Horse Transport Pty Ltd which traded as Sydney Horse Transport. On 21 July 2006 his employment was transferred to the first respondent, Ella Enterprises Pty Ltd.

3. The second respondent, Lucas Waller was a director of the first respondent and was involved in and responsible for the day to day operations and management of the first respondent. Meyers had in fact spoken to Waller prior to entering into his agreement with Maley. For some time following these events Meyers was unaware that his employment had in fact been transferred from Adam Maley Horse Transport Pty Ltd to Ella Enterprises Pty Ltd as the proprietorship of Sydney Horse Transport had changed hands. Notwithstanding that matter, throughout the term of his employment both Maley and Waller appear to have been involved in that firm's operation.

4. Ella Enterprises was bound by the Transport Industry (State) Award that operates as a notional agreement preserving State awards under the Act (the NAPSA). Pursuant to subclause 34(1) subdivision C of Part 3 of Schedule 8 of the Act the award operated as an "original State award" prior to 27 March 2006. The original State award determined in whole or in part the terms and conditions of employees with Ella Enterprises prior to 27 March 2006. To that extent, from 27 March 2006, certain relevant terms of the original State award became terms of the NAPSA which bound Meyers and Ella Enterprises upon the commencement of Meyers' employment with it. In addition Ella Enterprises was also bound by a preserved Australian Pay Classification Scale derived from the rate provisions in the Award (the APCS). The Award contained rate provisions within the meaning of section 181(1) of the Act which determined the basic periodic rate of pay to be paid to employees covered by the NAPSA. Pursuant to section 208 of the Act and the definition of a pre-reform wage instrument in section 178 of the Act the rate provisions in the NAPSA were an APCS which had effect from 27 March 2006. Additionally Ella Enterprises was also bound by the provisions of the *Annual Holidays Act 1944* (NSW) which was preserved pursuant to clause 34(2) of subdivision C of Part 3 of Schedule 8 of the Act which that prevented the *Holidays Act* determined in whole or in part a "preserved

entitlement" as defined by subclause 34(3) of Meyers' employment with Ella Enterprises and to that extent the relevant terms of the *Holidays Act* were also terms of the NAPSA binding both Ella Enterprises and Meyers.

5. Throughout the course of his employment Meyers performed duties as an employee within the classification of the Transport Worker Grade III in accordance with the NAPSA. In particular he was required to perform duties as a driver of a two axle ridged vehicle with a gross vehicle mass over 4.5 tonnes. For that purpose he held a valid medium rigid truck licence and drove a two axle medium rigid truck registration number 663-IUY with a gross vehicle mass of 10 tonne and an enclosed body for transportation of horses and also a two axle medium rigid truck registration UBL-869 with a gross vehicle maximum of 10 tonne with an enclosed body for the transportation of horses.

6. Meyers continued in that employment until 16 January 2007 when he verbally resigned by informing Adam Maley of his intention to do so.

7. It is agreed between the parties that Meyers made a complaint to the Office of Workplace Services on or about 7 February 2007 regarding underpayment of wages and underpayment of annual leave which were investigated by that office. It is also agreed that in the course of that investigation that office wrote informing Ella Enterprises of its investigation and issued it with a notice to produce documents, in due course a notice of breach and ultimately a final notice, and furthermore permitted Ella Enterprises at least one opportunity for an extension before filing its application on 17 December 2008.

8. It is not a dispute that the basic periodic rate of pay to be paid to Meyers under the APCS was $15.56 per hour for the period 4 August 2006 to 30 November 2006 and $16.28 per hour for the period 1 December 2006 to 16 January 2007. Furthermore it is agreed that the appropriate overtime rates which applied under the NAPSA were $23.34 for the first two hours of overtime per day and $31.12 thereafter for the period 4 August 2006 to 30 November 2006; and $24.42 for the first two hours of overtime per day and $2.56 for each hour thereafter from 1 December 2006 to 16 January 2007. Finally it is also agreed that holiday rates applicable under the NAPSA were at the rate of

$23.34 per hour for the holiday worked on 2 October 2006 and $24.42 per hour for the holiday worked on 1 January 2007.

9. During the relevant period from 4 August 2006 to 16 January 2007 Meyers was paid a base weekly wage of $806 per week for 55 hours work. In addition he was paid an overnight allowance of $120 gross per week with the exception of the weekend ending 29 December 2006 in which weekly overnight allowance paid was $20. Whilst it is not agreed that the overnight allowance was an amount that was paid in addition to wages there is no contest concerning the broad figures.

10. Overall it is agreed that during the period 4 August 2006 to 16 January 2007 Ella Enterprises paid to Meyers a total of $3,918 gross as overtime payments.

Factual Issues in Dispute

11. The following disputed facts remain to be resolved. The respondents do not agree that Ella Enterprises failed to pay Meyers a basic periodic rate of pay in breach of the APCS. They say that is because they disagree on the terms governing the employment agreement. In particular Ella Enterprises contends that the "overnight allowance" formed part of Meyers' wage and accordingly ought be included in the assessment of sums paid pursuant to the award and in respect of any underpayment it is contended there should be a setoff against any sums paid on that basis.

12. The respondents do not agree that Meyers worked the hours of work set out in the documents described in the applicant's material. The case for the respondents is that the documents both incorrectly record the work details and also include allowances which are in all the circumstances unreasonable having regard to the duties that were undertaken. Insofar as there are unreasonable claims the respondents contend the applicant's claims overclaim Meyers' reasonable entitlement to pay.

13. The respondents do not agree that the first respondent failed to pay Meyers' overtime payments in breach of the NAPSA. This in part arises because of the agreed terms of the employment agreement and also the dispute between the parties concerning setoffs claimed against

the "overnight allowance" which has not been permitted in the applicant's calculations. On this matter it is also in contention that Ella Enterprises failed to pay Meyers' penalty rates for the hours worked by Meyers on the Labour Day public holiday on 2 October 2006 and the New Years holiday on 1 January 2007.

14. On the basis of those matters alleged by the applicant the underpayment totals approximately $13,211.22. In addition to this sum is an outstanding sum due under the *Holidays Act.*

15. Insofar as overtime was undertaken they say appropriate allowance has been made.

16. The respondents do not agree that Meyers was requested or required by the first respondent to undertake training for a heavy combination licence. They do not agree with the evidence of Meyers that there was an agreement to this effect.

17. The respondents do not agree that there has been an underpayment of Meyers' annual leave entitlement in breach of the *Holidays Act.* The respondents' position is premised upon the arithmetic calculation flowing from an assessment of Meyers' pay entitlements rather than any disagreement with its strict obligations.

18. The respondents' allege that evidence of over claimed hours is supported by the applicant's obligation to take certain breaks in accordance with the provisions of the *Road Transport (Safety and Traffic Management) (Driver Fatigue) Regulations 1999.* The applicant contends this regulation did not apply to Meyers.

19. The respondents' deny that the second respondent, Lucas Waller was a person who aided, abetted or counselled or procured a breach of the NAPSA, APSC or *Holidays Act* or that he induced a contravention or was by his acts or omission concerned to a party to a contravention of those acts.

Terms of agreement

20. The contract of employment was not governed by any written terms or conditions. The contract was concluded orally following a

conversation between Meyers and Maley in late July 2006. The principle terms contracted by the applicant were:

a) The rate of pay would be $750 per week clear (net) with a gross pay of $806 per week; and

b) Meyers would be required to work 55 hours per week with overtime only payable after working those hours.

21. Although not discussed at the time of engagement Meyers was also paid a weekly "overnight allowance" of $120 per week. This was paid as a bonus payment.

22. For the respondents it was contended, the agreement was that Meyers would be paid $760 per week after tax for up to 55 hours work per week and overtime would be payable for time in excess of 55 hours[1]. It was also contended that the $120 weekly payment was in addition to the "after tax amount" to $760 per week.[2]

23. Maley was not called to give evidence. It was plain that despite the change in identity of employer from Adam Maley Horse Transport Pty Ltd to Ella Enterprises Pty Ltd Maley was still involved in these matters. For instance it was not challenged that following Meyers resignation Maley and not Waller phoned Meyers requesting that Meyers leave the keys to the truck and he (Maley) would arrange for its collection. Further there is no suggestion that this did not occur.

24. No evidence was adduced to establish Maley was not reasonably able to be procured for the trial or that he was not otherwise reasonably available for the trial. Given he was the initial employer and was the only witness associated with Meyers' employment he was an important witness. He was not called by the respondents despite being on notice that the contract was an issue in the case. In the circumstances of this case where the Workplace Ombudsman was seeking to prosecute the proceeding for the benefit of Meyers it was in my view only natural that the respondents produce Maley if he was to be produced to give evidence. It follows the only reasonable inference to be drawn was that

[1] Exhibit 3.
[2] Exhibit 4.

his evidence would have been adverse to the respondents' case; see *Jones v Dunkel* (1959) 101 CLR 298.

25. Meyers impressed me as an honest and accurate witness. He did not embellish his evidence and made concessions when appropriate. This was best demonstrated when he was being cross examined about some minor discrepancies in his timesheets. When on a handful of occasions any discrepancy was identified, if he had no answer to the discrepancy, he would appropriately concede the error. I have no hesitation in accepting his evidence on any matter.

26. Given he was the only witness to attest to the terms of negotiations leading up to and ultimately the conclusion of the contract itself and given that I accept his evidence was provided in accurate and reliable terms I find the contract of employment between Meyers and the first respondent was one negotiated and concluded orally between he and Maley. Its terms were simply, that Meyers would be employed at the rate of pay of $750 per week clear with the gross rate being $806. He was required to work 55 hours per week and would be paid overtime for any time in excess of 55 hours. There was no express agreement concerning the overnight allowance. However the employer paid a sum of $120 weekly in addition to the agreed salary as a bonus payment. It did not otherwise form part of the agreed remuneration.

27. It was agreed between the parties that Meyers performed the duties of an employee within the classification of Transport Worker III in accordance with the NAPSA. Accordingly the first respondent was required to pay Meyers the base periodic rate of pay pursuant to section 182 of the WR Act contained in the APSC. During the period of Meyers' employment with the first respondent that rate was:

    a) For the period 4 August 2006 to 30 November 2006 $15.56 per hour;

    b) For the period 1 December 2006 to 16 January 2007 $16.28 per hour.

28. The appropriate overtime rates that applied under the NAPSA for the first period were $23.34 for the first two overtime hours per day and $31.12 for each subsequent hour thereafter. For the second period (1

December 2006 to 16 January 2007) the comparable rates were $24.42 and $30.56. As public holidays fell through the course of both periods the appropriate holiday rates were $23.34 per hour and $24.42 per hour in addition to the standard hourly rate.

29. As the agreed rate was $14.65[3] it was clear that the agreed rate fell below the basic minimum guaranteed by the WR Act. Section 82(1) of the WR Act relevantly provided that:

> *"If:*
>
> *(a) the employment of an employee is covered by an APCS and*
>
> *(b) the employee is not an APCS piece rate employee;*
>
> *the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro rata for part hours) that is at least equal to the basic periodic rate of pay (the guaranteed basic periodic rate of pay) that is payable to the employee under the APCS."*

30. Section 183 of the WR Act set out employee's guaranteed hours for the purpose of section 182. Relevantly section 183(1) of the WR Act provided:

> *"(1) For the purposes of section 182, if an employee is employed to work a specified number of hours per week, the guaranteed hours for the employee, for each week, are to be worked out as follows:*
>
> *(a) start with that specified number of hours (subject to subsection (4));*
>
> *(b) deduct all the following:*
>
> *(i) any hours in the week when the employee is absent from work on deductible authorised leave (as defined in subsection (6));*
>
> *(ii) any hours in the week in relation to which the employer is prohibited by section 507 from making a payment to the employee;*
>
> *(iii) any other hours of unauthorised absence from work by the employee in the week;*

[3] $806 divided by 55 hours equals $14.65.

> *(iv) any hours in the week when the employee is stood down (but only if the standdown is an authorised standdown);*
>
> *(c) If, during the week, the employee works, and is required or requested to work, additional hours that are, under the terms and conditions of the employee's employment, not count towards the specified number of hours – add on those additional hours.*
>
> *(2) If an employee is employed on a full time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a period that is to constitute employment on a full time basis for the employee, the employee is, for the purposes of subsection (1) is taken to be employed to work 38 hours per week."*

31. It follows that by reason of section 182 and 183 of the WR Act and given that Meyers' periodic rate of $14.65 per hour was less than the basic periodic rate required by APCS the first respondent had an obligation pursuant to section 182(1) to ensure that the rate paid to Meyers for each hour of work was no less than the basic periodic rate under APCS.

32. In calculating the basic periodic rate it is important to note that the "overnight allowance" has not been allowed for. In the sums contended for by the respondent the overnight allowance was incorporated. The effect of the incorporation of the overnight allowance was to raise the hourly rate to $16.83 per hour which was in excess of the basic periodic rate of pay contended for by the applicant. However in order to achieve that outcome the $120 overnight allowance was added to the basic $806 per week pay.[4]

33. Accordingly the respondents' case requires the overnight allowance to be characterised as part of the basic periodic rate of pay. Section 178 of the WR Act relevantly provides:

> *"178 …Basic periodic rate of pay means a rate of pay for a period of work (however the rate is described) that does not include incentive based payments and bonuses, loadings, monetary allowances, penalty rates or any other separately identifiable entitlements."*

[4] (806 + 120) divided by 55 equals $16.83.

34. The evidence was that the overnight allowance was a bonus paid. It did not form part of the original remuneration package and was not part of Meyers' ordinary wages. It follows it did not form part of the "basic periodic rate of pay" as defined in the WR Act and upon that basis the respondents' contention concerning the calculation of the basic periodic rate of pay is in error.

Days and Hours Worked

35. Aside from the question of the terms of the employment contract the other principal source of factual dispute concerned the hours worked by Meyers. Despite the recording of hours worked the respondent contended that:

    a) The hours recorded included statutory rest breaks required under the *Transport Industry (State) Award*; and

    b) The time taken by Meyers to perform the tasks recorded in his tasking sheets were excessive, the inference being that the hours actually recorded were overstated.

36. In broad terms the system of work put in place by the employer depended significantly on the honesty and integrity of Meyers as the employee to do the right thing. That was manifest by Meyers accurately recording start and finish times and by Meyers employing a reasonable application of effort in undertaking the assigned tasks. This system in itself was not subject to internal checks and balances meaning that when disputes arose, as in this case, matters can only be resolved by reference to the credibility of the competing witnesses.

37. In this case the respondents sought to attack the credibility of Meyers. However for reasons that I have earlier addressed I am satisfied his evidence was both honest and reliable. The respondents did not advance any evidence in support of their own case, it being a case prefaced principally upon unfounded suspicions.

38. To appreciate the allegations made by the respondents and of the applicant's response it is necessary to understand the employer's system.

39. The evidence is that the respondent would arrange to fax out each day to Meyers' residence a task sheet entitled "Driver's Sheet". That sheet detailed the duties to be undertaken for that day. At the end of each week Meyers was required to forward to the respondent companies head office a "Drivers Weekly Summary Sheet". This was a form completed by him noting the start and finish times for each day worked together with odometer readings.

40. Finally from this documentation the employer would raise and complete a "Weekly Time Sheet with Breaks". This document appears to incorporate material sourced from the "Drivers Weekly Summary Sheet".

41. To explain the system and to illustrate the case advanced by the respondent in respect of one of the contentious days I will refer to the driver's sheet and documents emanating from Friday 1 September 2006. In general terms the system of work was the same for each and every day that Meyers was employed by the first respondent and other days as are relevant will be addressed in due course.

42. The evidence is that on the day preceding Friday 1 September 2006 staff from the first respondent's office faxed to Meyers at his place of residence the driver's sheet for Friday 1 September 2006. Each row on the driver's sheet constituted an instruction. For Friday 1 September 2006 there were initially four instructions.

43. Looking then at the instructions taking serial 1 by way of illustration and working through the columns across the page, the next column was the time at which the first instruction was to be undertaken. In that case it was 4.40am on Friday 1 September 2006. At that time Meyers was to be at Aberdeen (Brooklyn Lodge) the location identified in the third column. He was to travel from Aberdeen (Brooklyn Lodge) to Jerry's Plains (Coolmore Stud) being the location identified in the fifth column and he was to transport the horse "Silver Success (mare and foal)" that being the livestock identified in the sixth column. The handwritten note in the seventh column "by 5.30am" was a note made by Meyers following the receipt of additional instructions.

Accordingly consistent with that instruction Meyers was to be at the Jerry's Plain (Coolmore Stud) by 5.30am. [5]

44. Continuing with the driver's sheet the second serial then required Meyers to collect Silver Success (mare and foal) from Jerry's Plains (Coolmore Stud) and transport that horse to Aberdeen (Brooklyn Lodge) where he was to disembark that horse and then travel to Widden (Widden Stud) to collect the horse "Looming" for transport to Grafton (at Stropps) Andrew 785 Summerland Way where he would in turn collect "Mor Rene" and "Royal Dawn" for subsequent transport to Scone (Cressfield Stud). In addition along the way there were additional instructions provided to him. The handwritten notes indicate that he was orally instructed to collect from Riverslea – Scone two mares and two yearlings who were to be transported to "Byerley Stud". Handwritten notations along the top of the sheet indicate that his start time was at 4.00am (partly obliterated) – and finish time 2.00pm (partly obliterated) but to which the numerals "10" underneath relate meaning 10 hours. The second notation related to a start time at 11.00pm – with a finish time of 1.30am totalling 2.5 (hours) being the numerals indicated under those hours. A handwritten note on the bottom of the page notes in the same pen 12.5 hours (being 10 hours plus 2.5 hours) and 544 kms.

45. The driver's sheet for Sunday 8 October 2006 would have been forwarded to Meyers by fax on the evening of 7 October 2006. Six serials were noted on that sheet. In broad terms the second column of the driver's sheet identified the hour at which Meyers was required to be at the stud identified in the third column and the stud identified in the fifth column was the destination stud. The seventh column identified the livestock to be collected or delivered and the eighth column was left blank and used for making notes. In addition other handwritten notations occur on the driver's sheet. The evidence of Mr Meyers was that occasionally those notes would be made either while he was driving or at other times throughout the day as aide memoirs in relation to additional instructions including further collection and delivery instructions. For instance on the driver's sheet for Sunday 8 October 2006 two additional instructions are noted they being for a

[5] Affidavit Steven Williams Annexure SW14 page 137

collection from Brooklyn for delivery to Arrowfield of a mare and foal and a further collection from Brooklyn for delivery to Dorley at 5.00pm of a mare. Other relevant notations on the sheet include the start time, in this case of 2.30am and the starting odometer reading being at 103940 together with the finish time being 6.30pm and the finish odometer reading being 184520.

46. At the end of each week Meyers would then prepare a "driver's weekly summary sheet"[6]. Taking the date of 8 October 2006 as an illustration and looking to the relevant driver's weekly summary sheet the relevant details can be seen. For instance for that day it notes that Meyers commenced at 2.30am with a kilometre reading of 183940 and finished at 1630 with a kilometre reading of 184520. It records him as having worked 15 hours and having travelled 580 kilometres. In addition it noted that he had refuelled. Meyers evidence was that one of these sheets was completed quickly and returned to the employer. In turn the employer would prepare the weekly timesheet with breaks.[7]

47. The weekly timesheet with breaks was a document prepared in the office of the first respondent. For instance for Sunday 8 October 2006 it records Meyers having commenced at 2.30am and having concluded at 4.30pm. This is consistent with the information forwarded in the driver's weekly summary sheet. It is to be noted that Meyers was in error in his recording of his times on that date for the driver's sheet shows he concluded work at 6.30pm not 1630 hours and that he had completed 16 hours and not 15 hours as recorded as was noted in the weekly timesheet with breaks. See in particular Meyers handwritten notes in the bottom right hand corner of the driver's sheet which shows his rough workings noting his conclusion that he had worked 16 hours in total. It is clear that there was a transcription error in his weekly driver's summary sheet leading to an error in the total hours worked. In fairness to the employer the employer's calculations were correct in this instance having regard to the primary information provided to it of the commencement and finishing times on that date. This process was adopted for each working day and each working week during which Meyers was employed by the first respondent.

[6] Affidavit of Steven Williams Exhibit SW11 page 46.
[7] Affidavit of Steven Williams Exhibit SW9 page 29.

48. Given the nature of the system of recording the focus of the respondents' attack on the hours worked by Meyers was to closely examine the time taken by Meyers to undertake various of the journeys the subject of the driver's instructions and/or to identify and analyse the transcription errors that occurred in the course of transferring source information from one document to the next such as was illustrated by reference to the documentation for 8 October.

49. The respondents' initially challenged Meyers' records in respect of the following dates: 4, 8 and 30 August; 1, 8, 22, 28 and 30 September; 5, 8 11, 14, 17 20, 23, 24 and 30 October; 1, 8, 13, 14, 15, 17, 27, 28 and 30 November; and 1, 2, 3, 4, 5, 6, 12, 13 and 14 December 2006.

50. Save for complaints in respect of August 4 and 8; September 8 and 30; and December 2, the remaining dates in dispute were particularised in Exhibit 8.

51. Except for the respondents' complaints specifically addressed below the complaint was more simply that the records were not completed in accordance with the records maintained. No case was put except to allege that Meyer did not work the hours as recorded. The matter in each instance ultimately fell to be determined by reference to whether or not I accepted that Meyers was providing an honest and reliable account of his recollection. I accept Meyers as a truthful and reliable witness. I have no reason to doubt the veracity of any matter stated by him and I accept his evidence on these matters.

52. Save for concessions made by Meyers in respect of 1 September and 2 December he was firm in his evidence that the records accurately recorded his commencement and completion times on those days. Cross examination of Meyers in respect of those days claimed fortifies my view that his evidence on those matters was accurate. For instance much of the cross examination was directed to the time it took to undertake the collection and delivery of the various horses. Despite the respondents' assertion that Meyers had been inefficient in the performance of his duties I do not accept that to be the case. Meyers was able to explain the difficulties that were occasioned between collections and deliveries and matters that delayed a standard turnaround. For instance Meyers was required to remain on station when horses were being mated. It was not uncommon for horses to

take some time for this activity. In addition the speed with which horses could be loaded and offloaded depended upon their state of anxiety. Some livestock were docile but others frisky. In addition particular care had to be taken because the livestock in question was valuable. Many of the horses in question had a value in excess of a million dollars. Other factors that impacted upon productivity included the speed with which the truck containing valuable livestock would travel about the roads. Notwithstanding the maximum regulated speed of 100 kilometers per hour Meyers said he often travelled at a speed significantly less than that in order to ensure that the livestock was transported comfortably across the rural roads. I consider Meyers' evidence in relation to these matters appropriate, reasonable and satisfactory and accept his evidence concerning the time taken to undertake each of the tasks which were recorded in the driver's sheets.

53. Generally the respondents sought to criticise Meyers because of his failure to produce a drivers log book which he maintained while driving the truck. Meyers' evidence was the log book was lost and was not able to be produced at the hearing. Despite the criticism I was satisfied his explanation for its loss was reasonable.

54. The log book was also relied upon to support an argument that Meyers' hours should have been reduced to take account of unpaid rest breaks. It was alleged that Meyers' hours claimed would have put him in breach of the *Road Transport (Safety & Traffic Management) (Driver Fatigue) Regulations 1999* (NSW). However these regulations did not apply to the class of vehicle being driven by Meyers so that argument is in my view inconclusive.

55. Concerning the specific dates that are particularised and in dispute:

    a) 1 September 2006: The driver's sheet maintained by Meyers for 1 September 2006 has written upon it in handwritten notations a commencement time of 4.00am through to 2.00pm with the numerals 10 underneath it and then 11.00pm to 1.30pm with the numerals 2.5 underneath it. That gave a total of 12.5 hours which corresponds with the figure 12.5 hours and the numerals 544 kms written elsewhere on the sheet. The driver's sheet also noted the addition of a number of other taskings which were not otherwise provided for on the sheet. It seems likely that those two taskings

related to the 2 ½ hours undertaken late in the night whereas the four taskings identified on the sheet related to the duties undertaken through the day. Following cross examination it was conceded that approximately seven hours driving was involved in the execution of the first four taskings leaving the remaining three hours for waiting around while horses were being covered at the various studs. There were no driver's weekly summary sheets prepared for that period. However the weekly timesheet with breaks prepared by the employer showed a commencement time of 4.30am with a conclusion at 2.00pm followed by a commencement of 8.00pm followed by a conclusion time of 1.30am. All up that came to 15 hours. In the course of cross examination Meyers conceded that he probably did not work 15 hours. He noted that the weekly timesheet with breaks was not a document prepared by him. He was however insistent that he did work the hours noted on the driver's sheet. Those hours would have come from his own driver's sheets and notes he kept before the practice of submitting Driver's Weekly Summary Sheets was introduced. I accept those hours as reflecting the hours worked and find that on 1 September 2006 he worked 12.5 hours.

b) 28 September 2006: The driver's sheet for 28 September 2006 listed three tasks. Handwritten notations on the sheet indicate a starting time of 4.30 and a concluding time of 7.30. In addition there were two further notations being "10.30 – 12.00". However the driver's weekly summary sheet for 28 September 2006 shows a commencement at 4.30am with a finish at 8.00am followed by a commencement at 11.30 am followed by a finish at 2000 hours. A total of 12 hours were claimed. Meyers' evidence was that the various studs referred to in the driver's sheet are all within relative proximity of each other. That matter is significant because the driver's weekly summary sheet shows the kilometers travelled on that day to be 541 which is far in excess of the kilometers which would ordinarily have been covered by the taskings provided for in the driver's sheet. In broad terms Meyers' evidence was that the driver's weekly summary sheet was a document that was largely maintained on a contemporaneous basis or at least one that was completed with the assistance of other documents which had been

contemporaneously prepared. It follows that in view of his reliance upon the contemporaneous recording of times to assist in refreshing his memory on these matters I am satisfied that the hours recorded in the driver's weekly summary sheet reflect the true hours worked by Meyers despite him not being able to adequately particularise each of those matters. It is plain that there were additional taskings given the kilometers involved. In the ordinary course it is to be expected that the employer would have the tasking records that would have enabled Meyers to address the extra driving undertaken on that day. None were produced. In the circumstances I find that Meyers worked 12 hours on 28 September 2006 as claimed.

c) 8 October 2006: The driver's sheet for that date was marked with Meyers' handwriting indicating a 2.30am start working through to 6.30pm. Additional handwritten notes appeared on the driver's sheet indicating further taskings as well as notations relating to arrivals and departures from certain studs. The driver's weekly summary sheet entry for 8 October however showed a start time of 2.30am and a finish time of 1630. In twenty-four hour time 1630 equates with 4.30pm. It is plain from the handwritten notation on the driver's sheet that Meyers in fact completed work at 6.30pm or 1830 hours. Accordingly the driver's weekly summary sheet is in error and should have recorded the hours worked at 16 hours. I am satisfied that Meyers did in fact work between 2.30am and 1830 hours on 8 October 2006 and find accordingly.

d) 2 December 2006: No driver's sheet exists for 2 December 2006 but an entry appears in the driver's weekly summary sheet claiming for 14 hours in respect of work between 0730 and 2130 hours. The applicant does not make a claim for wages on this day but this matter was pursued by the respondents in order to attack Meyers' credibility. When cross examined about that matter Meyers conceded that he had no recollection about what he did on that day. He did state however that he could have been driving a truck but had no specific recollection of that matter. The only observation he could make was that given he had written the hours down it would only be because he had done something on

the day. Given the absence of any driver's sheet or independent recollection by Meyers of the events of 2 December 2006 I consider Meyers' concession in respect of any claim for wages on this date to be appropriate. In my view rather than being a basis on which to attack his credibility his concessions having been made early and appropriately serve to fortify my view that Meyers has sought only to pursue those claims in respect of which he has a just and proper entitlement.

Outstanding Wages

56. To assist the Court the applicant prepared the schedule, exhibit 8 which identified the dates in dispute. As I have earlier indicated many of the disputed occasions were premised upon the first respondent's belief that Meyers had taken an unreasonable length of time to execute the tasks provided for him. I do not accept that to be the case. In respect of the four occasions where discrepancies have been identified within the documentation I confirm my finding that the hours worked were as follows:

a) 1 September 2006 – 12.5 hours;

b) 28 September 2006 – 12 hours;

c) 8 October 2006 – 16 hours; and

d) 2 December 2006 – 0 hours.

The applicant will have to recalculate its outstanding wages schedule exhibit 2 to allow for these findings.

57. Exhibit 2 is a schedule of wage calculations prepared by the applicant for Meyers premised upon the hours claimed and in accordance with his entitlement pursuant to the NAPSA.

58. Exhibit 2 is a precise calculation of Myer's entitlements less sums paid to him through the course of his employment. The sums paid by the employer to Meyers were paid in breach of the NAPSA. The NAPSA made provision for rest breaks and ordinary and overtime payments including a basis for computation of those payments when an entitlement arose. In addition overtime rates were provided for in

respect of Saturday and Sunday work. The flat weekly rate paid by the employer did not take account of the various award conditions. Although the evidence demonstrates that on occasions Meyers worked less than 55 hours in any particular week there were occasions when he worked in excess of that number of hours. Generally however the NAPSA provided that the employer had to pay overtime for all time worked within the spread of ordinary hours in excess of the ordinary hours of work in any week including time worked in excess of daily limitations on working hours and for time worked outside the spread of ordinary hours. In addition weekly ordinary hours and daily ordinary hours were defined together with special rates which applied for Saturday's, Sunday's and public holidays. Exhibit 2 was a calculation prepared of Meyers' wage entitlements pursuant to the NAPSA given the recorded hours contained in the driver's weekly summary sheets.

Holiday entitlements

59. Meyers also had an entitlement to annual leave in accordance with the provisions in the *Holidays Act*. The *Holidays Act* also acts as a NAPSA under the *WR Act* in accordance with Schedule Part 3 of Division 1 of the *WR Act*. The annual leave entitlement under the *Holidays Act* as a "preserved notional term" within the meaning of the *WR Act*. As Meyers ceased employment before completing one year of service he was entitled to be paid out annual leave upon termination: *Holidays Act* section 4(3).

60. Based upon his entitlement of one twelfth of his ordinary pay for his period of employment Meyers was entitled to $1,596.39 by way of holiday leave entitlements. Meyers' final pay slip issued for the period 12 January 2007 to 18 January 2007 indicated that an amount of $1,022.92 was deducted from his final pay for an "employee purchase". He was only paid a net payment of $38.64. The repayment concerned monies paid by the first respondent for Meyers to obtain his HC licence. That matter is dealt with below. Notwithstanding that the net effect is that Meyers did not receive payment for any accrued annual leave upon cessation of his employment as well as not being paid for any hours worked by him during the period 12 January 2007 to 18 January 2007.

61. It follows that the respondents breached the *Holidays Act* by failing to pay to Meyers the sum of $1,596.39 which was his just entitlement at the time of termination.

62. It follows by reason of my findings that there was a total underpayment of wages by the first respondent to Meyers in contravention of the NAPSA in the sum of $13,676.40 less adjustments for the above findings an Order may be made against the first respondent for payment to the employee of the underpayment: S719 of the WR Act.

Provision of heavy combination licence

63. In his evidence Meyers attests that Maley asked if he was interested in obtaining a semitrailer licence. When asked in cross examination about the need for a licence and/or its benefit he stated that there was no need for him to have a semitrailer licence to undertake his work but stated that there was an occasion when he received a phone call from Maley advising him that one of the drivers had resigned and that the respondents did not have anyone to drive a semitrailer truck. Maley asked Meyers if he was willing to get a licence for a semitrailer to which Meyers responded in the affirmative but noting that he could not afford to pay for it. He says Maley informed him that he (Maley) would pay for it. He was quite adamant in his evidence that the payment by Maley was not a loan and that there was no expectation that he would be required to make a repayment. Maley was not called to give evidence nor did he file an affidavit in the proceeding. I have no reason to disbelieve Meyers' evidence on this point. Accordingly I find that Maley approached Meyers and inquired of him about his willingness to obtain a semitrailer licence and informed Meyers that he would fund that licence. There was no suggestion that Meyers would be required to repay any costs associated with the licence. The licence was clearly for the advantage of the employer.

Set-off

64. Given my findings concerning the contract of employment between the parties the payment of the overnight allowance cannot be computed in the calculation of the "basic periodic rate of pay" as provided for by section 178 of the WP Act.

65. The employee cannot contract out of its award obligations. Given my findings as to the hours worked the wages due are capable of ready calculation. In addition the applicant submitted the respondent could not set-off any above award payments in satisfaction of any amount ordered by reason of an entitlement under the NAPSA.

66. It is well settled that a worker's rights to recover outstanding wages are in no way dependant upon the contract of employment between the parties once it is established he was employed. The employee's entitlement to recover payment of any difference between what his employer has paid and the amount which he would be entitled to for wages under the award is a statutory right: *Ray v Radano* [1967] AR 471 at 474.

67. The correct approach to addressing matters of set-off in the industrial context has been explained by various Full Courts and more recently restated by the Full Court in *ANZ Bank v Finance Sector Union*[8] where at [47] the Court noted that to resolve the question it is useful to return to the passage from *Poletti v Ecob No 2*[9] which accurately analyses the relevant judgment of Sheldon J in *Ray v Radano* and annunciates the relevant principles. At [41] the Full Court noted:

> *"It is to be noted that there are two separate situations dealt with in the passage from the judgment of Sheldon J which has been quoted and in the reasoning of the Commission in Pacific Publications. The first situation is that in which the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above or extraneous to award entitlements. In that situation, the contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied on in satisfaction of award entitlements arising outside the agreed purpose of the payments. The second situation is that in which there are outstanding award entitlements, and a sum of money is paid by the employer to the employee. If that sum is designated by the employer as being for a purpose other than the satisfaction of the award entitlements, the employer cannot afterwards claim to have satisfied the award entitlements by means of the payment. The former situation is a question of contract. The latter situation is an application of the common law*

[8] (2001) 111 IR 227; [2001] FCA 1785.
[9] (1989) 91 ALR 381 at 332 - 333.

> *rules governing payments by a debtor to a creditor. In the absence of a contractual obligation to pay and apply moneys to a particular obligation, where a debtor has more than one obligation to a creditor, it is open to the debtor, either before or at the time of making a payment, to appropriate it to a particular obligation. If no such appropriation is made, then the creditor may apply the payment to whichever obligation or obligations he or she wishes: see Halsbury's Laws of England, 4th ed, vol 9, para505 and para506."*

68. Accordingly it is necessary to consider which of the two circumstances is applicable. The first situation noted is one where "the parties to a contract of employment have agreed that a sum or sums of money will be paid and received for specific purposes, over and above all extraneous to award requirements". In that situation the Full Court said, "*a contract between the parties prevents the employer afterwards claiming that payments made pursuant to the contractual obligation can be relied upon in satisfaction of award entitlements arising outside the agreed purpose of the payments*."[10]

69. In this case there was no agreement. The only evidence addressed to the point was the evidence of Meyers. He swore the matter concerning the overnight allowance was never discussed at the time of his employment. He said he noticed that he received a sum of $120 in his pay packet so he queried the respondents' administration which informed him of its nature. He says he challenged his entitlement because he was only occasionally away overnight. He was told it was a payment in the nature of a bonus. Nothing in the evidence suggests it was in the nature of a payment for an award entitlement. In addition nothing in the evidence suggests it was a payment to be made in lieu of an award entitlement and was the subject of that express agreement.

70. It follows that the first circumstance contemplated in the judgment of Sheldon J does not apply.

71. That then leaves the matter to be resolved by reference to the second situation, namely whether the payment "is designated by the employer as being for a purpose other than the satisfaction of award entitlements".

[10] At 238.

72. Clearly in this case that seems apparent.

73. In the respondents' submissions it was contended that the $120 a week was "always agreed to be a part of Meyers' wages rather than an extraneous amount which the first respondent is now trying to set-off."[11] As a matter of fact I do not find this to be the case. For reasons I have earlier explained I do not think there was ever any agreement concerning the payment of this sum.

74. It was further contended that even if I were wrong on my characterisation of the terms of the agreement I should distinguish the principle in *Polletti & Ecob* in any event because that case concerned non cash benefits and this case concerns cash benefits. I see no basis in principle for such a point of distinction. The absence of any basis for such distinction can be inferred from the illustrations provided by Sheldon J in *Ray v Radano* which majority judgment was expressly considered and cited with approval by both the Full Court in *Polletti* and subsequently followed by the Full Court in *ANZ v FSU*.

75. The arguments advanced by the respondents particularly those relying upon the remarks in *James Turner Roofing Pty Ltd v Peters*[12] are unhelpful because they pertain to circumstances where the payments were made pursuant to the employment contract. In this case while the payments were made because of Meyers being the subject of a contract of employment they were not payments agreed to be made as a condition of that contract of employment. The distinction is significant.

76. For completeness the applicant has noted the decision of *Martin v Fresho Foods Pty Ltd* [2009] FMCA 15. In that decision a Court did permit an offset of overpayment against underpayments. However, in fairness to that single judge decision His Honour was not referred to any of the authorities which have been the subject of debate in this Court and accordingly the decision is one made per incuriam.

[11] Respondents' submissions at para 25.
[12] (2003) 132 IR 122.

Accessorial liability

77. The applicant contends that the second respondent was involved in the contraventions in accordance with section 728 of the WR Act. At paragraph 3 of the agreed statement of facts the respondents agreed that the second respondent was the sole director and shareholder of the first respondent and was involved in and responsible for the day to day operation and management of the first respondent. He was also the officer of the first respondent who was involved in the management and employment of Meyers and by reason of those matters responsible in a practical sense for ensuring that the first respondent complied with its legal obligations to Meyers. He was made available for cross examination during the course of the trial. Nothing in his evidence suggested to the contrary.

78. Accordingly I am satisfied he had actual knowledge of the contraventions and should be treated as having committed the contraventions and be liable for penalties.

79. Section 727 sets out the rules that apply for the purposes of Division 3 of Part 14 of the WR Act. Specifically it applies to s719 which deals with both penalties and recovery of underpayments by an employer. Section 728 provides that a person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision. Accordingly the second respondent is also subject to penalty recovery proceedings pursuant to s719.

Summary

80. Overall I am satisfied to the requisite standard, being on the balance of probabilities, of the contraventions alleged by the applicant against each of the respondents as determined above. Those contraventions are particularised in the table provided in Exhibits 2 and 8 subject to the findings I have made and are detailed in paragraphs 55 and 56.

81. Given my findings I direct the matter be adjourned for penalty hearing.

First Respondent

82. Between the date of conclusion of the hearing and judgment the first respondent was the subject of a winding up order and a liquidator appointed. Given the first respondent is now in liquidation the applicant no longer seeks orders against it. However it does maintain its claim for orders and penalties against the second respondent. I accept the Applicant's submission that the winding up Order made against the first respondent does not operate to prevent the delivery of the judgement in the proceedings as it does not amount to continuing with a proceedings in a Court as provided by s471B *Corporations Act 2001* (Cth).

Orders

83. Application adjourned to a date to be fixed.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Burnett FM

Associate: B Schmidt

Date: 3 February 2010