FEDERAL MAGISTRATES COURT OF AUSTRALIA

WORKPLACE OMBUDSMAN v SECURIT-E HOLDINGS PTY LTD (IN LIQUIDATION) & ORS *[2009] FMCA 700*

WORKPLACE RELATIONS – Penalty hearing for non payment of wages found to be due on rejection of AWA – whether non payment constituted a 'course of conduct' – consideration of penalty against a director where employer company in liquidation.

Workplace Relations Act 1996, ss.178, 346D, 346L, 346R(7)(a), 346ZD(3)(b), 347, 719, 728(1), 841(a)
Conciliation and Arbitration Act 1904, ss.119, 119(1A)
Corporations Act 2001, s.471B

Seymour v Stawell Timber Industries Pty Limited [1985] 9 FCR 241
Rowe v Capital Territory Health Commission (1982) 62 FLR 383
Clothing and Allied Trading Union v Snugglerite Industries Pty Ltd (1990) FCA 346
Cotis v Pow Juice Pty Ltd [2007] FMCA 140
Inspector Trundle v M & K Angelopoulos Pty Ltd [2009] FMCA 37
Blandy v Coverdale NT Pty Ltd (2008) 178 IR 150
Kelly v Fitzpatrick [2007] 166 IR
Cotis v Macpherson [2007] FMCA 2060

Applicant:	WORKPLACE OMBUDSMAN
First Respondent:	SECURIT-E HOLDINGS PTY LTD (IN LIQUIDATION) ACN 077 316 575
Second Respondent:	PAUL RITCHIE
Third Respondent:	SARAH MEREDITH
File Number:	SYG 3345 of 2008
Judgment of:	Raphael FM
Hearing date:	30 June 2009

Date of Last Submission:	30 June 2009
Delivered at:	Sydney
Delivered on:	23 July 2009

REPRESENTATION

Counsel for the Applicant:	Mr A Hatcher
Solicitors for the Applicant:	Clayton Utz
Counsel for the Respondent:	Mr M Easton
Solicitors for the Respondent:	Australian Federation of Employers and Industries

ORDERS

(1) Leave to discontinue proceedings against Third Respondent.

(2) Second Respondent to pay penalty of $5,000.00 for breach of s.346ZD(3)(b) *Workplace Relations Act 1996*, such penalty to be paid to the Commonwealth.

The Court notes that the First Respondent is in liquidation and the applicant accepts that proceedings against it have been stayed pursuant to s.471B *Corporations Act 2001*.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 3345 of 2008

WORKPLACE OMBUDSMAN
Applicant

And

SECURIT-E HOLDINGS PTY LTD (IN LIQUIDATION)
ACN 077 316 575
First Respondent

PAUL RITCHIE
Second Respondent

SARAH MEREDITH
Second Respondent

REASONS FOR JUDGMENT

1. These are proceedings for a penalty for the contravention of s.346ZD(3)(b) of the pre reform *Workplace Relations Act 1996* (the "Act"). The proceedings were commenced against three respondents who were respectively the employer, the responsible director and shareholder of the company and the human resources manager. The employer has now been placed in liquidation. The company was the subject of a creditor's winding up petition. I gave leave to discontinue the proceedings against the third respondent. The proceedings continued against the second respondent pursuant to the provisions of sub-s.728(1) of the Act. A Statement of Agreed Facts was presented which revealed that in 2007, the first respondent was bound by the Security Industry (State) Award, which is preserved as a notional agreement preserving state awards (NAPSA) under Part 3 of Schedule 8 of the Act. The company employed, inter alia, six named

employees, who had duties which complied with the classification of a security officer grade 1 under the NAPSA, save for a Mr David Handley whose duties complied with that of a security officer grade 2.

2. In 2007 the first respondent entered into AWAs with the six named employees and others. In evidence, Mr Ritchie said that the company had entered into those AWAs on advice which appeared to have misconstrued the provisions of the Act. The AWAs provided for remuneration to the employees less than that contained in the relevant award. In accordance with the usual procedures under the Act the AWAs come into force on the day they are lodged (s.347(1)). This gives the employer the benefit of the agreement until certain events occur. The Workplace Authority director then considers the agreements and applies the no disadvantage test, s.346L. If the Workplace Authority director decides under s.346D that the agreement does not pass the no disadvantage test the employer is advised and is entitled to lodge a variation of the agreement within fourteen days after notice has been given to it that the agreement has not passed. Letters were sent in respect of one employee on 12 October, one employee on 20 October, three employees on 24 October and one employee on 14 November. The letters informed Mr Ritchie and the company that the agreement would cease to operate unless they provided information outlined in a form sent with the letter and an appropriate undertaking to vary the agreement. The letters also informed the recipient that if the modified agreement passes the fairness test they must pay any backpay owed to the employee from the date that the workplace authority received the agreement to the date that it received the undertaking to vary so that it passed the test. The company did not take any steps to vary the agreement and so the Workplace Authority advised the employer (in four cases on 17 December and two cases on 18 December) that the relevant AWAs had ceased to operate, in one case on 26 October, in three cases on 7 November and in two cases on 28 November. As a result of this notification the employees became entitled to compensation pursuant to s.346ZD(3). Such payment was to be made within fourteen days pursuant to s.346ZD(3)(b). The compensation which was due to be paid and the dates upon which it was due to be paid are set out at [8].

3. The compensation was not paid as required and the Workplace Ombudsman commenced these proceedings for its recovery. Eventually on 9 January 2009 (five employees) and 12 January (one employee) the required compensation was paid.

4. Mr Ritchie accepts that he is liable to a penalty for the contravention of the Act detailed above as a person involved in the contravention as defined in s.728 of the Act. He gave evidence and told the court that his company was having cash flow difficulties in 2008 and that this is why the backpay was not made up to his employees until 2009. This does not explain why he failed to make up the backpay on receipt of the letters from the Workplace Authority informing him that the AWAs had not passed the fairness test and after he had decided not to seek a variation. This conduct goes to the amount of the penalty but the real issue in the case was whether or not s.719(2) applied.

> **"719 Imposition and recovery of penalties**
>
> (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 subsection (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.
>
> (3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.
>
> (4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:
>
> (a) 60 penalty units for an individual; or
>
> (b) 300 penalty units for a body corporate.

5. Penalties for breaches of an award have a long history as does the "course of conduct" provision. There were provisions in the *Conciliation and Arbitration Act 1904*, s.119, 119(1A) and in the *Workplace Relations Act 1996*, s.178. The breach penalties were extended to statutory breaches in 2006 by the work choices amendments to the Workplace Relations Act. The responsibility for establishing a "course of conduct", which I accept is no different for a breach of a statutory provision than it is for breach of an award, falls squarely upon a respondent unless there is clear and unequivocal evidence in the applicant's case:

> "[t] it is incumbent upon that respondent to lead evidence to support such a submission before the court could be satisfied that such was the case; *AMIEU v Meneling Station Pty Ltd* (1987) 16 IR 245 at [257] per Evatt J."

6. Mr Ritchie gave evidence at the hearing. He had filed an affidavit dated 2 June 2009 in which he made reference to the filing in May, June and July of various AWAs with the Workplace Authority for approval. He referred to the advice of the Workplace Authority that the AWAs had failed the fairness test but he skips over the history and the first letter from the Workplace Authority until he was contacted by a workplace inspector in January 2008. He tells that he established a back payment plan pursuant to which twenty-two of his twenty-nine employees, who had been employed under cancelled AWAs, were repaid some $53,249.94 but no payment was made to the seven employees who were the subject matter of these proceedings. Mr Ritchie said that it was during the latter part of 2008 that the company suffered severe cashflow difficulties and this prevented any payment being made until January 2009. He agreed in cross examination that from early 2008 he ceased to respond to communication from the Workplace Ombudsman about the underpayments and that he did not tell the Workplace Ombudsman that the problem with paying the employees was due to a cashflow difficulty.

7. In *Seymour v Stawell Timber Industries Pty Limited* [1985] 9 FCR 241 Gray J discussed the concept of a single course of conduct at [266 – 267]. His Honour accepted that there could be a single course of

conduct in respect of more than one employee but the decision would have to be the same decision for all. In *Rowe v Capital Territory Health Commission* (1982) 62 FLR 383 at [412]:

> "It was held that a course of conduct did not exist in respect of failure to pay proper wages to two student nurses; the nurses had begun employment in separate years, and were affected by separate decisions of the employer as to the manner in which they would be treated."

Other cases in which the question of single course of conduct have been considered include *Clothing and Allied Trading Union v Snugglerite Industries Pty Ltd* (1990) FCA 346 where the employer breached a union preference clause in relation to the hiring of twelve employees over a period of eighteen months. In that case the court rejected a submission that because of the period of time and the number of employees that were concerned the breaches did not arise out of a course of conduct and determined to treat the matter as such a breach. The reasoning in that case has been applied in the Federal Magistrates Court in *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 where one hundred and six award breaches relating to twenty two employees were divided into six categories in terms of the relative collective agreement and penalties determined by reference to each of these categories. In *Inspector Trundle v M & K Angelopoulos Pty Ltd* [2009] FMCA 37 it was found that there may be a single course of conduct by an employer when the employees commenced and ceased their employment at different times and employees performed their work at different locations.

8. In the instant case the breach of the Act is the breach of s.346ZD and it is that conduct that has to be looked at. Section 346ZD(b) is in the following form:

> **"Employee is entitled to compensation in respect of fairness test period**
>
> (b) if the employee is entitled to compensation because of the operation of section 346R in respect of the workplace agreement – the period of 14 days beginning at the end of the relevant period (within the meaning of section 346R) in relation to the workplace agreement."

The relevant period referred to in that sub-section is defined in s.346R(7)(a):

"**Agreement does not pass fairness test – agreement in operation**

(a) the period of 14 days beginning on the date of issue specified in the notice under section 346P in relation to the workplace agreement; or ..."

In the instant case the Agreed Statement of Facts states as follows:

"[13] As a result of the relevant AWA's failure to pass the fairness test, the First Respondent was required to pay compensation to each of the relevant employees pursuant to section 346ZD(3) of the *Workplace Relations Act 1996* (Cth) as in operation prior to the commencement of the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (No 8, 2008) ('the pre-reform Act').

[14] Pursuant to section 346ZD(3)(b) of the pre-reform Act, the First Respondent was required to pay the required compensation to each of the relevant employees within 14 days of their AWA ceasing to operate.

[15] (a) Mr Lee Campbell - $2,087.68 (gross) payable no later than 21 November 2007;

(b) Mr David Handley - $4,538.50 (gross) payable no later than 21 November 2007;

(c) Mr Gregory Hartland - $4,097.98 (gross) payable no later than 9 November 2007;

(d) Ms Catherine Pickstone - $3,163.48 (gross) payable no later than 12 December 2007;

(e) Mr Steven Varley - $4,078.14 (gross) payable no later than 12 November 2007;

(f) Mr Gordon Wallace - $3,641.92 (gross) payable no later than 12 December 2007."

9. In *Blandy v Coverdale NT Pty Ltd* (2008) 178 IR 150 the Federal Court considered cases of six employees who had been paid under the award wage and not provided with other benefits in an award that the employer claimed to had been superceded by AWAs. It was found that none of the AWAs applied and there was an argument that all twenty-four breaches of the award constituted one course of conduct. The court did not accept this and held that each separate obligation found in an award was to be regarded as a separate term. In that case the court divided the breaches into separate categories of which one was constituted by underpayment. Even though the underpayments were

for separate people and in various different amounts, they were treated as one category. I believe that following this analysis the failure to pay these six employees at the expiration of the relevant period was one course of conduct even though the relevant periods were slightly different and the amounts involved were also different. I accept that there was one decision made not to make these payments at the time they were due. Having come to that conclusion it is now appropriate to assess the penalty.

10. There was discussion of the manner in which penalty should be calculated in *Blandy* at [23]. This articulation which I set out below is one that I would respectfully adopt and which has been adopted in this court on previous occasions:

> "[23] In *Kelly v Fitzpatrick* [2007] FCA 1080 (at [14]), Tracey J. adopted "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". This range of considerations was referred to with approval in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8; 165 FCR 560, at [60] per Graham J; and at [88–89] per Buchanan J. That list of considerations is as follows:
>
> • The nature and extent of the conduct which led to the breaches.
>
> • The circumstances in which that 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.
>
> • Whether the breaches were properly distinct or arose out of the one course of conduct.
>
> • 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 had exhibited contrition.
>
> • Whether the party committing the breaches had taken corrective action.
>
> • Whether the party committing the breaches had cooperated with the enforcement authorities.

- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and

- The need for specific and general deterrence.

While noting that some of these considerations do not specifically apply in these proceedings, I intend to generally follow this list in these reasons. However, where appropriate, I propose to combine some of these considerations under the one heading."

Nature and extent of conduct

11. The non payment of these six employees was the residue of a larger non payment of approximately thirty seven employees. Whilst payment of the outstanding amounts was made it took a considerable period of time before this was done. The amounts involved in respect of each employee was no less than $2,000.00 but no more than $4,538.50. Bearing in mind that these are not highly paid employees the amounts are significant. However, the amounts are less significant when considered in relationship to the total actual wages paid to these employees (*Blandy* at [25]). I would tend to place this conduct within the middle range.

The circumstances in which the conduct took place

12. The respondent's evidence is that he was badly advised to enter into these AWAs and consequently pay under the award wages. We were not given any particulars of the place from whence the advice came. But we do know that the company had an HR department and as it employed a significant number of people it seems to me only reasonable to expect it to have known about the provisions of the "no disadvantage test". If the circumstances are limited to the circumstances in which the non payment was made following notice from the Authority it is quite clear from the papers that the Authority was prepared to be very lenient with the employer, it was only when non payment continued for over a year that these proceedings were commenced. I would regard the circumstances in which the conduct took place as being serious.

The nature and extent of any loss

13. All of the employees have now been paid but were not paid any interest on the unpaid monies as far as I can see. They were out of their wages for a period in excess of a year. I regard the nature and extent of loss as serious.

Similar previous conduct

14. There is no allegation of any previous court determination of prior contraventions.

Whether the breaches arose out of one course of conduct

15. I have found that they did.

Size of the business enterprise

16. I have no substantive evidence about the size of this enterprise which Mr Ritchie directed. However, there seems to have been quite a number of employees. In *Kelly v Fitzpatrick* [2007] 166 IR 14 Justice Tracy opined that:

> "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 monetary sanction. Such a sanction must be imposed at a meaningful level."

The payments which should have been made to these employees should have been made at a time when the company was not experiencing financial difficulties. It later did and that was why the delayed non payment occurred. In *Cotis v Macpherson* [2007] FMCA 2060 at [12] Driver FM said:

> "It is in my view important to make the point that employers should not and cannot regard insolvency, either personal or corporate as a refuge from their responsibilities under the Workplace Relations Act."

I regard the size of the business enterprise in this case mitigates any penalty awarded against the director.

Whether or not the breaches were deliberate

17. Paragraph 18 of the Agreed Statement of Facts is in the following form:

> "[18"] The First Respondent failed to make the required compensation payments to the relevant employees until the following dates, after commencement of these proceedings:
>
> (a) Mr Lee Campbell – 9 January 2009;
>
> (b) Mr David Handley – 9 January 2009;
>
> (c) Mr Gregory Hartland – 9 January 2009;
>
> (d) Ms Catherine Pickstone – 9 January 2009;
>
> (e) Mr Steven Varley – 9 January 2009;
>
> (f) Mr Gordon Wallace – 12 January 2009."

18. The continued non payment of these particular employees was quite deliberate albeit allegedly brought about as a result of the company's cash flow problems. I would regard the breach as serious.

Whether senior management was involved in the breach

19. The claim is against Mr Ritchie who was the principal director and guiding mind of the company.

Whether the party committing the breach has exhibited contrition and has co-operated

20. Mr Ritchie has expressed contrition. There was a certain amount of co-operation with the Workplace Ombudsman although there were long periods when nothing happened. Eventually the majority of payments were made but these were not. Mr Ritchie has suggested that it was he personally who made these payments. I will take these matters into account.

Whether the party committing the breach has taken corrective action

21. This is not applicable.

Ensuring compliance of minimum standards

22. It is suggested by the applicant that one of the principal objects of the Workplace Relations Act was the maintenance of an effective safety net and an effective enforcement mechanism. At the time these offences were committed this was the only protection employees had against an apparently unscrupulous employer. I regard this as an important aspect of my consideration.

The need for specific and general deterrence

23. Whilst the industrial relations climate in Australia has changed considerably since 2007 there is still a need to ensure that employers comply with their obligations whether statutory or under awards. It would be wrong to minimise a penalty in this case just because the statutory provisions under which it is levied have now been overtaken. Mr Ritchie continues to be an employer. He says that he has now taken note of his obligations. I am prepared to accept that, but I believe that the penalty that should be imposed in this case ought to provide him with a salutary reminder.

The totality principle

24. The totality principle is not one that needs to be applied in this case because there is only one penalty to be imposed given my finding in relation to a course of conduct.

25. I have taken all these considerations into account. It has been suggested to me by counsel for the respondents that I should look at this matter in terms of a low to medium range of penalty. I have been asked by the applicant to impose a penalty in the mid range and for an order that the penalty be paid to the Commonwealth under s.841(a). I am sensible of the views expressed in *Blandy* at [79] as to the appropriate approach to be taken in considering the question of penalty. I note that the maximum penalty that I can apply given my findings under s.719 is sixty penalty units or $6,600.00. I am of the view that in the circumstances adumbrated in these reasons a penalty in the lower part of the high range should be imposed. The second respondent shall

pay a penalty of $5,000.00 which sum shall be payable to the Commonwealth.

I certify that the preceding twenty-five (25) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate: S Brant

Date: 23 July 2009