FEDERAL MAGISTRATES COURT OF AUSTRALIA

WORKPLACE OMBUDSMAN v DRACOOK INTERNATIONAL PTY LTD & ANOR *[2009] FMCA 1318*

INDUSTRIAL LAW – Awards – guaranteed basic rate of pay – accessorial liability – contract of employment and Remuneration entitlements – failure to pay entitlements – penalty – factors that ought be considered when imposing a penalty.

Workplace Relations Act 1996 (Cth)
Crimes Act 1914 (Cth)

Australian Competition and Consumer Commission (ACCC) v Australian Safeway Stores (No.4) [2006] FCA 21
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Proprietary Limited trading as Pangaea Restaurant and Bar [2007] FMCA 7
Workplace Ombudsman v Saya Cleaning Proprietary Limited [2009] FMCA 38

Applicant:	WORKPLACE OMBUDSMAN
First Respondent:	DRACOOK INTERNATIONAL PTY LTD
Second Respondent:	ROBERT COOKE
File Number:	BRG 282 of 2009
Judgment of:	Burnett FM
Hearing date:	5 August 2009
Date of Last Submission:	5 August 2009
Delivered at:	Brisbane
Delivered on:	5 August 2009

REPRESENTATION

Counsel for the Applicant:	N/A
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the First Respondent:	N/A
Solicitors for the First Respondent:	N/A
Counsel for the Second Respondent:	N/A
Solicitors for the Second Respondent:	In Person

ORDERS

(1) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Alexander Stevens the sum of $3,968.11 for unpaid wages.

(2) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Alexander Stevens the sum of $192.30 for accrued but untaken annual leave.

(3) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Alexander Stevens interest upon his outstanding entitlements at the rate of 6.5% per annum from 2 May 2008 to date of these Orders being 5 August 2009 (461 days), such interest totalling $341.55.

(4) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Craig Marshall the sum of $3,968.11 for unpaid wages.

(5) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Craig Marshall the sum of $288.44 for accrued but untaken annual leave.

(6) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Craig Marshall interest upon his outstanding entitlements at the rate of 6.5% per annum from 2 May 2008 to date of these Orders being 5 August 2009 (461 days), such interest totalling $349.45.

(7) Within thirty (30) days of these Orders, the First and/or Second Respondent pay to Mr Ahmet Uretir the sum of $3,968.11 for unpaid wages.

(8) Within thirty (30) days of these Orders, the first and/or Second Respondent pay to Mr Ahmet Uretir the sum of $224.37 for accrued but untaken annual leave.

(9) Within thirty (30) days of these Orders, the first and/or Second Respondent pay to Mr Ahmet Uretir interest upon his outstanding

entitlements at the rate of 6.5% per annum from 2 May 2008 to date of these Orders being 5 August 2009 (461 days), such interest totalling $344.19.

(10) Pursuant to section 719(1) of the WR Act, that a penalty of ten thousand dollars ($10,000.00) be imposed upon the First Respondent for the breach of section 182(3) of the WR Act.

(11) Pursuant to section 719(1) of the WR Act, that a penalty of ten thousand dollars ($10,000.00) be imposed upon the First Respondent for the breach of section 235(2) of the WR Act.

(12) Pursuant to section 719(1) of the WR Act, that a penalty of two thousand dollars ($2,000.00) be imposed upon the Second Respondent for the breach of section 182(3) of the WR Act.

(13) Pursuant to section 719(1) of the WR Act, that a penalty of two thousand dollars ($2,000.00) be imposed upon the Second Respondent for the breach of section 235(2) of the WR Act.

(14) Pursuant to section 841 of the WR Act that the aggregate of the penalties aforesaid be paid to the Commonwealth of Australia.

(15) That the penalties referred to in Orders 15, 16, 17 and 18 be paid within thirty (30) days of the date of these Orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 282 of 2009

WORKPLACE OMBUDSMAN
Applicant

And

DRACOOK INTERNATIONAL PTY LTD
First Respondent

And

ROBERT COOKE
Second Respondent

REASONS FOR JUDGMENT

Ex Tempore

1. To many, the effects of the sub-prime crisis in the United States, which commenced to manifest in mid-2007, have remained largely conceptual, the subject of media attraction, an easing of monetary policy and a recasting of fiscal policy. For many, it has not disturbed their existence and life has proceeded on.

2. This Application, however, concerns a company and its sole director who were not so lucky. They were at the coalface and had just commenced drilling when the apparently safe financial ceiling collapsed upon them, as a by-product of the sub-prime crisis and the global credit crisis that followed. That, of itself, however, is no justification for what followed.

3. The facts so far as this Application are concerned are largely agreed and they are these. The First Respondent is, and was, at all relevant times a body corporate and a person and an employer for the purpose of section 719 of the *Workplace Relations Act* 1996 (Cth) "The Act". It was the operator of a financial services business, being a home loan brokerage business based at Bundall, and it had been recently established for that purpose.

4. The Second Respondent at all material times was the sole director and secretary of the First Respondent and its sole shareholder. The First Respondent was, in effect, his alter-ego. He was a person who had the ultimate responsibility for the management and decision making of the First Respondent and was generally competent to do so. He had a background in small business. He says that his previous experience was in food retailing. He had, in 2004, sold a number of McDonald's franchises he held in Victoria.

5. He had invested those funds, resettled in Queensland, and this appears to have been his first foray into the finance industry. It was, as he saw it, more a franchise operation than a finance operation. In any event, he prepared some elementary financial documents to assist in this enterprise and they are included in exhibit 1, they being profit and loss projections for this business for the calendar year 2008, showing a commencement or start-up in January and proceeding on from there.

6. Consistent with his profit projections, he employed from early March 2008 three employees: they being Alexander Louis Stevens, as a finance consultant level 1, Craig Anthony Marshall as a branch business development manager, and Ahmet Uretir, who was a finance consultant level 2. I might add that it is agreed that these employees were employed between 11 March 2008 and 2 May 2008.

7. During the relevant period, each of the employees were employed by the First Respondent pursuant to individual contracts, those contracts of employment having been dated 28 February 2008. Their employment was not covered by any other industrial instrument. In accordance with section 182(3) of The Act, the employees are entitled to be paid a basic periodic rate of pay for each of their guaranteed hours that is at least equal to the standard federal minimum.

8. Each of the employees' contracts of employment contained a remuneration structure including allowances in excess of the federal minimum wage. Their contracts stated that they would be paid their salary and allowances on a monthly basis. The First Respondent, as employer, failed to pay any wages to the employees during their employment with it or, indeed, since their termination.

9. The Second Respondent has not underwritten the First Respondent's failures in that regard. In broad terms, the wages outstanding total $11,904.33, made up as $3968.11 for Mr Stevens, $3968.11 for Mr Marshall, and $3968.11 for Mr Uretir.

10. The parties all agree that the First Respondent breached section 182(3) of The Act by failing to pay basic periodic rates to each of the employees, giving rise to the total underpayment of $11,904.33. From 12 April 2008 until 2 May 2008, each of the employees did approach the Second Respondent, Mr Cook, on numerous occasions complaining that they had not been paid their salary and allowances.

11. There were multiple complaints, and in response Mr Cook informed them that the salaries and allowances would be paid into their account. It ought to have been apparent to Mr Cook from at least no later than 12 April 2008, that being the time when at a minimum the first wage instalment ought to have been paid, that there were difficulties with his business and with his cash flow, which such difficulties had, as I have already noted, their origin with the global credit crisis and consequent business downturn.

12. No doubt by that time the generally tightening credit environment ought to have alerted him to the difficulties his business was suffering, and from that time he ought to have commenced taking action to mitigate the prospect of any further harm being occasioned to these employees, irrespective of harm occasioned to his business.

13. By operation of section 232(2) of the Act, the employees each accrued annual leave. The leave allowances were set out in annexure B to the amended statement of claim. Broadly, they totalled $705.11, made up as an entitlement of $192.30 for Mr Stevens, $288.44 for Mr Marshall, and $224.37 for Mr Uretir. The parties agree that the First Respondent breached section 235(2) of the Act by failing to pay the employees

their full annual leave entitlements at the termination of their employment, resulting in an underpayment, as I have noted, totalling $705.11 on account of those benefits.

14. On 2 May 2008, each of the employees resigned from their employment with the First Respondent on the basis that they had not been paid their salary for the duration of their employment. Complaint was made to the Workplace Ombudsman and, ultimately, these proceedings commenced because the First Respondent failed to pay the amount of underpayment assessed by the Applicant. The underpayment was significant, particularly given the short duration of the employees' employment.

15. The Respondents knew, or ought to have known, that a failure to pay any wages to the employees was a breach of the Workplace Relations laws, and attempts by the Applicant at voluntary compliance had failed. It is agreed that at all material times the Respondents were obliged to comply with, and the employees were entitled to the benefit of the Act in relation to the employees' entitlements with the First Respondent.

16. It follows, as I have noted, that in total there are approximately $13,000 in wages and benefits which was not paid by the First Respondent to the various employees. In terms of accessorial liability, section 727 and section 728 of The Act are relevant. They deal with accessorial liability and provide for their Application in respect of the civil remedy provisions within the *Workplace Relations Act*.

17. Broadly, section 728 of The Act provides that a person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision. For the purpose of section 728 of The Act, a person is involved in a contravention if, and only if, the person has aided, abetted, counselled or procured the contravention or has induced the contravention or has been in any way, by act or omission, directly or indirectly, been knowingly concerned in or party to the contravention.

18. In this case there is no debate about Mr Cook's involvement in the contravention. Further, in the event there was any debate, section 826(2) of the Act provides that any conduct engaged in or on behalf of a body corporate by a director or officer of the body corporate within

the scope of his actual or apparent authority shall be taken for the purposes of the Act to also have been engaged in by the corporation.

19. Looking, then, to Mr Cook's involvement, as I earlier noted, Mr Cook knew that the employees were not paid their wages, or ought to have known as the sole director, knew or ought to have known that they had not been paid their annual leave entitlements, and knew or ought to have known that they had also not been paid their superannuation entitlements, although I note that no Orders are sought in respect of unpaid superannuation.

20. The source of the Second Respondent's knowledge is agreed to have been his position with the First Respondent, that is, as the sole director and shareholder, by his access or control to the First Respondent's payroll processes, his day-to-day involvement with the running of the business and his interaction with the employees in relation to the underpayments and, in particular, his response to their complaints that they had not been paid.

21. He was closely involved in the employment of each of the employees in that he directly negotiated their employment and their contracts of employment. He outlined to each of those employees the nature and their roles and duties, and he offered a position to each of those employees. He signed a contract of employment for each of the employees and spoke to each of those employees about their remuneration entitlements and the method of the payment of those entitlements. Also, he was advised by each of those employees that their salary and allowances were not paid as at the times the various complaints were made to him. To that end, Mr Cook acknowledges that he was involved in the First Respondent's breaches of the Act within the meaning of section 728(2) of the Act.

22. The parties have agreed that as a consequence of the corporations breaching sections 182(2) and 235(2) of the Act, the court may order the corporation to repay the amounts specified in the amended Application, including an amount for interest. Following debate in the course of the hearing between myself and counsel for the Applicant, further instructions were taken, resulting in a further amendment to the further amended statement of claim, which had the effect of further amending the statement of claim to provide that the Court may also

make orders in respect of the Second Respondent for the repayment of the amounts sought or specified in the amended Application. Mr Cook has not opposed that course.

23. That takes me, then, to the question of penalty and the course of conduct. Pursuant to sections 719(4)(a) and (b) of The Act, the maximum penalty a court may impose for a breach under section 119(1) is:

a) if a person is an individual, 60 penalty units, or $6,600; or

b) if a person is a body corporate, 300 penalty units, or $33,000.

By operation of section 4(1) of the Act and section 4AA of *the Crimes Act* 1914 (Cth), a penalty unit means $110.

24. Section 719(2) of the Act provides that where there are two or more breaches of an applicable provision committed by the same person, and where the breaches arise out of the same course of conduct by that person, the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term. Having regard to that matter, it is then apparent, for reasons that I will address shortly, that there are essentially two breaches to be considered by the court. They are:

a) a failure by the employer to pay the three employees their wages under section 182(3) and;

b) a failure by the employer to pay the employees their annual leave entitlements under section 335(2).

It follows the maximum penalty the court can impose, for the First Respondent, is $66,000, and for the Second Respondent, $13,200.

25. So far as the factors relevant for determination of penalty are concerned, the principal object as set out in section 3 of the Act includes providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by the Act; and ensuring the compliance with a minimum of standards, industrial instruments and bargaining processes, by providing effective means for the investigation and enforcement of employee entitlements;

and, finally, by ensuring that awards provide minimum safety net entitlements for award-reliant employees.

26. These objects emphasise the importance of minimum standards, including wages, and the enforcement of those standards, and this is further reflected in the magnitude of the penalties which the Parliament has prescribed for breaches. In the case of the body corporate, this is set at a maximum of 300 penalty units, or $33,000 for each contravention of an applicable provision, and for an individual, 60 penalty units, or $6,600 for each contravention.

27. The approach to imposing penalties is now well settled and largely agreed. It is the approach identified by Mowbray FM in *Mason v Harrington Corporation Proprietary Limited trading as Pangaea Restaurant and Bar*[1], which has been approved by Tracey J in *Kelly v Fitzpatrick*[2]. The factors that ought be considered broadly are these, without being exhaustive:

- 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 has been similar previous conduct by the Respondents.
- Whether the breaches were properly distinct or arose out of 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 breach had exhibited contrition.

[1] [2007] FMCA 7
[2] [2007] FCA 1080

- Whether the party committing the breach had taken corrective action.

- Whether the party committing the breach had cooperated with the enforcement authorities.

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

- The need for specific and general deterrence.

28. Dealing first with the circumstances, I have addressed those matters in part in the agreed facts. In broad terms, the First Respondent established a home loan brokering business and employed employees from 11 March 2008 until 2 May 2008. They were not paid any of their minimum wage or annual leave entitlements.

29. The nature of the business in respect of which the Respondents had no actual former experience or knowledge; the approach adopted by the business's alter ego, the Second Respondent, Mr Cook, was that this business was in the nature of a franchise, and to that end, he relied significantly upon representations made to him by the head franchisor. Perhaps that is not surprising, given his background as a McDonald's franchisee. However, ultimately, irrespective of those matters, it ought to have been apparent to Mr Cook very early in the piece that irrespective of representations made to him by the head franchisor, the business was not travelling as one ought to have expected it to travel, particularly when one has regard to the approach which was foreshadowed in his draft profit and loss projections, which, although of itself was not a projected cash flow statement, ought to have provided at least some indication of his cash requirements.

30. It seems, for reasons that are obvious, that this business was not afforded sufficient working capital to ever be successful, and the external economic environment extant at the time did not assist. In any event, shortly after the business commenced trading, the difficulties that were apparent by reason of the global credit crisis ought to have been apparent equally quickly to Mr Cook, and ought to have been responded to with equal diligence, but they were not.

31. In that regard, there was, in my view, a significant omission by Mr Cook in his addressing those responsibilities incurred by him as a business operator, and that matter is significant in terms of the loss that was occasioned by those who have now sustained that loss of income.

32. Next is the nature and extent of any loss and damage sustained as a result of the breaches. As I have earlier noted, the loss of benefits totals approximately $13,000, together with interest, which accrues. The underpayment took place over a period of approximately eight weeks. It is, as was submitted, a significant underpayment for three employees over such a short period of time. They had no income, it would seem, for at least those eight weeks, and, of course, that would have come at significant personal cost to those employees, who, no doubt, had their own personal commitments in the nature of the usual day-to-day living expenses people incur.

33. The underpayment remains outstanding, although the effect of that loss of income has now diminished with the passing of time. That matter is significant, particularly given that it is doubtful the obligations will ever be met, certainly by the Second Respondent, and if I accept Mr Cook's statements to me today, it seems unlikely that they will be met by him. So the loss, in my view, is a significant loss and incurred in a real sense.

34. Next is whether there had been any similar previous conduct by the Respondent. None is alleged against either Respondent.

35. Next, whether the breaches were properly distinct or arose out of one course of conduct. Again, for reasons I touched upon earlier, it seems to me that the contraventions can be categorised as two distinct areas. One in relation to payment of wages; one in relation to payment of benefits. But, otherwise, the contraventions have arisen out of the one course of conduct.

36. Next is the size of the business enterprise involved. The evidence with respect to the size of the company is limited. However, prima facie, it appears that the company was a relatively small entity. It was clearly, significantly undercapitalised, having regard to the P&L projections. Indeed, if it was the position that the Respondent simply intended to trade on the premise that cash flow would sustain its working capital

needs, it can only be said that that approach was negligent in the extreme.

37. The Second Respondent, as I have already noted, no longer trades, and the First Respondent seems to have fallen upon hard times. The fact that the business or the enterprise involved was small is, in my view, of marginal relevance only. In that regard, I accept the views expressed by Simpson FM in *Workplace Ombudsman v Saya Cleaning Proprietary Limited*[3], where there his Honour noted, adopting the words of Tracey J in *Kelly v Fitzpatrick* (supra):

> *"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."*

38. Next is the question of whether or not the breaches were deliberate. It is submitted that the first and Second Respondents' contraventions were, at least, reckless, if not deliberate. Mr Cook says they were not deliberate and, to that end, I think that accords a reasonable degree of truth. However, despite the fact that they may not have been deliberate, in my view, they were clearly reckless.

39. As I have earlier noted, there was clearly insufficient working capital to sustain this enterprise. Furthermore, once it was apparent, or ought to have been apparent, to Mr Cook that the volume of business which he anticipated had not materialised, he ought to have acted promptly to terminate those employees whose services were not required in order to minimise not only the financial risk to himself, but also to minimise the harm which was occasioned to his employees.

40. It is this particular feature of the Application, that constituted recklessness, that is the failure to provide adequate working capital as well as his failure to terminate the employees with greater expedition. These factors constitute the most egregious features of this case.

41. The next consideration is whether the party committing the breach had expressed contrition. Although the Applicant submits there is no

[3] [2009] FMCA 38

evidence of contrition displayed in the face of the contraventions, I think the fact that the Respondents have within a timely way determined to accede to the Application and plead to the contraventions is a factor which ought to be taken into consideration in favour of the Respondents.

42. By reason of the Respondents' conduct in this regard, the Applicant has at least been spared the expense of incurring further expense in these otherwise expensive proceedings.

43. Next, whether the party committing the breach has cooperated with the enforcement authorities. As the Applicant says, the outlined agreed statement of facts have shown little cooperation with the Office of Workplace Ombudsman, particularly in failing to respond to formal notices, to a request to participate in a record of interview, or by rectifying the employees' entitlements, that led to the commencement of these proceedings as a last resort. This is a matter that, I think, does weigh against the Respondents.

44. Next is the need to ensure compliance with minimum standards by the provision of an effective means for investigation into enforcement of employee entitlements. As I noted above, the principal objects of the Act and the magnitude of the penalties for the contraventions of the safety net emphasise the importance of compliance with the safety net and the enforcement of it.

45. By not paying the employees their wages or any wages whatsoever, the Respondents' conduct demonstrated a blatant disregard for the most basic of minimum standards and that is that the employees have a right to be paid for work which is performed. That failure, as I have noted, comes at a human cost. I accept the submission that in assessing appropriate penalties, the court should have regard to the gravity of the employer's obligations under the Act and the impact upon the individual employees and the integrity of the scheme provided for by the Act generally when imposing penalty.

46. Next is the need for specific and general deterrence. The first and Second Respondents are not prevented from engaging in the business in the future. Perhaps, at least so far as the Second Respondent is concerned, other matters may intervene, but so far as the First

Respondent is concerned, it is unlikely that that has any realistic significance in the present circumstances.

47. To that end, then, I accept the submission made by the Applicant that there is a need in this case for specific deterrence, having regard to the circumstances in which the contravention occurred, and, to that end, the penalty particularly also factors that matter in its consideration. I note generally the observations for the need for general deterrence. They are, as Tracey J stated in *Kelly v Fitzpatrick (supra)*, no less important.

48. Having regard, then, finally, to the matter of totality, the appropriate approach is that as identified by Goldberg J in *Australian Competition and Consumer Commission (ACCC) v Australian Safeway Stores (No.4)*[4], and that is, broadly, that the sentence or penalty fixed must as an initial step impose a penalty appropriate for each contravention and then, as a check at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved.

49. So far as submissions were concerned for penalty, numerous cases were cited to me. Each case, of course, is assessed on its individual merits and its own particular circumstances. This case, as I have earlier identified, has its own peculiar facts and is assessed on that basis. I have earlier identified the matters that I particularly thought are significant in terms of the imposition of a penalty in this case.

50. In that regard, I am mindful that by reason of the amendments to the Application, there will be the imposition of an obligation upon the Second Respondent to make restitution to those employees by repayment of the sums that remain outstanding, that are presently also the subject of outstanding interest, and to that end there will be, hopefully, a complete indemnity in respect of loss occasioned to those employees.

51. Having regard to that matter, as I indicated, my view in relation to penalty is somewhat mollified and, accordingly, I think, in the circumstances it is appropriate that in respect of each contravention the Second Respondent be subject to an order to pay a sum of $2,000,

[4] [2006] FCA 21

giving a total of $4,000 for the totality of the contraventions which, as a total penalty, appears to be an appropriate penalty, having regard to the contraventions and the circumstances surrounding the occasioning of those contraventions.

52. For the First Respondent, I accept the submissions made by the Applicants concerning the range. Again, for reasons that I have identified, I consider in terms of the range that the sum of $20,000, being $10,000 in respect of each contravention, represents an appropriate penalty, having regard to the matters that I have earlier addressed.

53. I will make an order in terms of the moneys to be paid within 30 days – both payments and underpayments and penalties.

54. Each of the first and Second Respondents will pay the underpayments in respect of which there be joint and several liability. In respect of the First Respondent, the penalty will be $10,000 in respect of each contravention. In respect of the Second Respondent, the penalty will be $2,000 in respect of each contravention.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Burnett FM

Associate: B Schmidt

Date: 27 January 2010