IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE

INDUSTRIAL DIVISION

Case No. X02682613

ROGER YATES (a workplace inspector appointed pursuant to section 167(2) of the *Workplace Relations Act 1996*(Cth) — Plaintiff

v

REIQUIN PTY LTD (ACN 077 464 861) — First Defendant

And

RICHARD TIMOTHY REID — Second Defendant

MAGISTRATE:	K. HAWKINS
WHERE HELD:	MELBOURNE
DATE OF HEARING:	15 MAY 2009
DATE OF DECISION:	17 JULY 2009

REASONS FOR DECISON

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr Follett	Fisher Cartwright Berriman
For the Defendant	Ms Duffy	Mills Oakley

HER HONOUR:

1. This is an application by Mr Roger Yates, a Workplace Inspector, brought against the First Defendant, Reiquin Pty Ltd, the employer of Ryan Deans, Lachlan Thomson, Davide Altobelli, Hui Wang, and Michael Cirkovic, and the Second Defendant Richard Reid, the sole director of the First Defendant.

2. The employees all worked in the Defendants' car wash business. In the case of the first four employees, the Plaintiff alleges that the Defendant failed to pay wages at all.

3. The Plaintiff alleges numerous breaches of provisions of the *Workplace Relations Act 1996* by the First Defendant. The Plaintiff alleges that the Second Defendant was involved in the First Defendant's contraventions within the meaning of s.728 of the Act. The Plaintiff seeks the imposition of penalties against the Defendants.

4. In the Complaint and Statement of Claim dated 16 September 2008, the Plaintiff alleged that the First Defendant breached the following:

   (a) clause 6(f)(ii)(2) of the *Vehicle Industry – Repair, Services and Retail – Victorian Common Rule Declaration 2005*, in that the First Defendant failed to pay Mr Deans and Mr Thomson the minimum rates of pay for hours worked by junior casual employees on the days Monday to Friday between 6am and 6pm, Saturdays and Sundays, before 27 March 2006;

   (b) s.182(1) of the WR Act (a term of the Australian Fair Pay and Conditions Standard (**AFPCS**)), in that the First Defendant failed to pay Messrs Deans, Thomson, Altobelli, Wang and Cirkovic, the minimum rates of pay for hours worked by casual employees on the days Monday to Friday between 6am and 6pm and between 6pm and 6am, Saturdays and Sundays, on and from 27 March 2006; and

   (c) s.185(2) of the WR Act (a term of the AFPCS), in that the First Defendant failed to pay the employees the minimum casual loadings required by the AFPCS, at various times on and from 27 March 2006.

5. In the Statement of Claim, the Plaintiff also alleged that the Second Defendant was involved in each of the contraventions of ss.182(1) and 185(2) of the WR Act alleged

against the First Defendant, and as such was himself treated as having contravened those provisions (s.728 of the WR Act).

6. On 9 January 2009 the Court made Orders and Declarations by consent. The Defendants admitted the alleged contraventions and the First Defendant agreed to repay the underpayments pursuant to a payment plan.

7. The matter was listed for a penalty hearing on 26 February 2009. Whilst the hearing did not proceed on that day the Second Defendant brought cheques with him to Court in payment of the full outstanding amounts owed to each employee.

8. The penalty hearing ultimately proceeded on 15 May 2009. The Plaintiff relied upon an extensive written submission on the question of penalty. The Defendants made brief oral submissions only and did not take issue with much put on behalf of the Plaintiff.

9. Because the Defendants refused to agree a Statement of Facts the Plaintiff was put to the considerable expense of preparing and filing affidavits on behalf of each of the employees concerned and himself. Accordingly the Plaintiff relied upon the following affidavit material:

   (a) **Affidavit of Ryan Thomas Deans, affirmed on 3 March 2009**. Mr Deans was 20 years old when he was employed as a casual motor vehicle washer and detailer from 24 March to 7 April 2006. He was asked to sign a contract when he started, although he was not given a copy of anything he had signed. He was told he would be a "contractor". He used his own vehicle to travel to and from customers and was not reimbursed for this expense. On 4 April 2006 Mr Ryan advised he would be going on holidays on 8 April, and on 7 April told Mr Reid that he was not sure he would be able to keep working when he returned. Mr Reid told him that he would have to give two weeks notice of his intention to leave. This was the first time that Mr Deans had been advised of such a requirement. He did not work again after that day and was not paid for the $781.46 in wages he had accrued for work done to date.

   (b) **Affidavit of Don Deans, sworn 3 March 2009.** Mr Don Deans attempted to assist his son, Ryan to collect his unpaid wages.

(c) **Affidavit of Lachlan Thomson, affirmed on 25 February 2009.** Mr Thompson worked for the Defendants from 25 March to 28 April 2006 as a casual junior motor vehicle washer and detailer. He was 18 years old and provided his own vehicle for work, without reimbursement. In mid April 2006 he advised that he was unable to work, as rostered, on the upcoming weekend. The Second Defendant told him that he needed to provide two weeks notice of any shift change. This was the first time such a requirement had been mentioned. Shortly thereafter, still having not been paid, Mr Thompson told the Second Defendant that he was no longer happy working for the business. The Second Defendant told him that he would need to provide two weeks notice if he wanted to resign. Again such a requirement had not been previously mentioned. Mr Thompson provided his notice in writing and worked out the two week notice period. He had accrued an entitlement to wages of $851.52. Mr Reid refused to pay him for any of the work he did.

(d) **Affidavit of Davide Altobelli, sworn on 25 February 2009**. Mr Altobelli was 62 years old when he worked for the Second Defendant as a casual motor vehicle washer and detailer from 8 to 13 August 2006. He used his own car to get to and from customers. He was not reimbursed for this expense. When he was unable to locate or contact the Second Defendant to get advise about further jobs he ceased work. He was not paid the $642.02 in wages he had accrued for the work done to that date.

(e) **Affidavit of Hui Wang, affirmed on 25 February 2009**. Mr Wang worked as a casual motor vehicle washer and detailer from 28 to 31 October 2006. He was 30 years of age. After three shifts the Second Defendant handed him a "Car Cleaning Agreement", and later told him that he would not be paid for any of the work he had done unless he signed it. When he chased payment he was told the Second Defendant had "taken legal advise on this" and that he would not be paid unless he provided an ABN and signed the contract. Mr Wang was not required to sign a contract before commencing work. Mr Wang was owed outstanding wages of $211.92.

(f) **Affidavit of Michael Cirkovic, affirmed on 3 March 2009**. Mr Cirkovic worked as a casual motor vehicle washer and detailer from 2 to 31 October 2006. He was 40 and signed a "Contractor Information Form" at the

commencement of his employment. He provided and used his own car to travel to and from customer's locations, without any reimbursement of this expense. He performed 25 shifts and received only two payments of $349 and $851.90 for the work done. This did not fully compensate for the work he had performed. When he attempted to cash the second cheque the bank refused payment due to lack of funds in the Defendant's account. Consequently Mr Cirkovic told the Second Defendant he would no longer work for him. Mr Reid told him he would fix it up but told him that he would have to work out two weeks notice if he wanted to resign. Later the same day he was given a second cheque, which again 'bounced'. Mr Cirkovic told him he would not do any further work until the cheques were honoured. Mr Reid replied *"I'm going to stop payment on the cheques."* Later the same day Mr Reid sent an SMS message stating that no payments would be made until Mr Cirkovic worked out two weeks' notice. Mr Cirkovic did not perform any further work and accrued an entitlement to $2,024.43 for the work he had done.

(g) **Affidavit of Roger Yates, sworn on 26 February 2009**; and **further affidavit sworn 14 May 2009**. Mr Yates a Workplace Inspector, is the Plaintiff. He deposes to exhaustive attempts to meet with the Second Defendant from 22 September 2006 to discuss the claims made by the above former employees of the First Defendant. These attempts were evaded by Mr Reid. Formal Notices to Produce were served and ignored. No excuse was given. All attempts to secure voluntary compliance failed. When a further formal complaint of underpayment of wages was received from another former employee, Mr James Harding on 11 February 2009 the Plaintiff conducted an investigation. Again the Second Defendant ignored correspondence sent to him about further alleged breaches.

(h) **Affidavit of Matthew Robinson, affirmed on 26 February 2009**. Mr Robinson, solicitor for the Plaintiff deposed to communications with the Second Defendant prior to and after the issue of legal proceedings. Mr Robinson encouraged Mr Reid to cooperate which his client and urged him to pay the outstanding entitlements to the employees concerned. By agreement ultimately Consent Orders and Declarations were filed with the Court which included a payment schedule. Mr Reid did not meet the first payment due under this schedule. He failed and/or refused to agree to a Statement of Facts

which could be used by the Court in these proceedings.

LEGISLATIVE PROVISIONS RELATING TO PENALTY

10. This prosecution is brought under the pre-reform WR Act and the WR Act, in relation to breaches of the Award and the WR Act.

11. On 27 March 2006, the terms of the Award that dealt with matters for which provision was made in the AFPCS, ceased to be allowable award matters, and as such, ceased to have effect. For present purposes, this included all terms providing for basic rates of pay and casual loadings.

12. Under s. 178(5) of the pre-reform WR Act and s.718(1) of the WR Act, the Plaintiff (as an Inspector appointed under the WR Act) has standing to bring this complaint.

13. Section 178(1) of the pre-reform WR Act enabled a court of competent jurisdiction to impose a penalty in respect of a breach of an award or order of the Commission by a person bound by that award or order.

14. Section 178(2) provided that where two or more breaches of a term of an award or order were committed by the same person, and the breaches arose out of a course of conduct by the person, the breaches shall, for the purposes of s.178, be taken to constitute a single breach of the term.

15. Section 719(1) of the WR Act enables an eligible court to impose a penalty in respect of a breach of an applicable provision by a person bound by the provision. "Applicable provision" is defined in s.717 to include a term of the AFPCS.

16. Section 719(2) provides that where two or more breaches of a term of an applicable provision are committed by the same person, and the breaches arose out of a course of conduct by the person, the breaches shall, for the purposes of s.719, be taken to constitute a single breach of the provision.

17. The maximum penalty that may be imposed by this Court on the First Defendant, applicable to each of the breaches of the Award and the AFPCS during the whole of the relevant period, $33,000.[1] The maximum penalty that may be imposed on the Second Defendant applicable to each of the breaches of the AFPCS, for the whole of

the relevant period on and from 27 March 2006, is $6,600. [2]

THE COURT'S APPROACH TO DETERMINING PENALTY

18. The Court must firstly identify the separate contraventions involved. Each breach of each separate obligation found in the Award and the AFPCS in relation to each claimant, is a separate contravention of a term of an award, order or applicable provision for the purposes of s.178 of the pre-reform WR Act and s.719 of the WR Act.[3]

19. However, s.178(2) and s.719(2) provide for treating multiple offences, involved in a course of conduct, as a single offence.

20. Second, the Court must then consider an appropriate penalty to impose in respect of each contravention (whether a single contravention alone or as a course of conduct), having regard to all of the circumstances of the case.

21. Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Defendants should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Defendant did.[4] This task is distinct from and in addition to, the final application of the "totality principle".[5]

22. Finally, having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.[6] The Court should apply an "instinctive synthesis" in making this assessment.[7]

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1 See s.178(4)(b) of the pre-reform WR Act and s.719(4)(b) of the WR Act.

2 See s.178(4)(b) of the pre-reform WR Act and s.719(4)(a) of the WR Act.

3 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J) (**McIver**).

4 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J) (**Merringtons**).

5 *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] (Stone and Buchanan JJ) (**Mornington Inn**).

6 See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (**Kelly**); *Merringtons*, supra at 567 [23] (Gray J), 576 [71] (Graham J) and 583 [102] (Buchanan J).

7 *Merringtons*, supra at 567-8 [27] (Gray J) and 572 [55] and 577 [78] (Graham J).

THE CASE AT HAND

Identified contraventions

23. The Plaintiff submits that the contraventions of the Defendants[8] are able to be categorised as falling into the following categories:

(a) failure to pay the required hourly rate of pay to junior casual employees for hours of work between 6am and 6pm on the days Monday to Friday, before 27 March 2006 (breach of clause 6(f)(ii)(2) of the Award);

(b) failure to pay the required hourly rate of pay to junior casual employees for hours of work on Saturdays, before 27 March 2006 (breach of clause 6(f)(ii)(2) of the Award);

(c) failure to pay the required hourly rate of pay to junior casual employees for hours of work on Sundays, before 27 March 2006 (breach of clause 6(f)(ii)(2) of the Award);

(d) failure to pay the basic periodic rate of pay to casual employees for hours of work on and from 27 March 2006 (breach of s.182(1) of the WR Act, as a term of the AFPCS);

(e) failure to pay the guaranteed casual loading percentage to casual employees for hours of work between 6am and 6pm on the days Monday to Friday, on and from 27 March 2006 (breach of s.185(2) of the WR Act, as a term of the AFPCS);[9]

(f) failure to pay the guaranteed casual loading percentage to casual employees for hours of work between 6pm and 6am on the days Monday to Friday, on and from 27 March 2006 (breach of s.185(2) of the WR Act, as a term of the AFPCS);

(g) failure to pay the guaranteed casual loading percentage to casual employees for hours of work on Saturdays, on and from 27 March 2006 (breach of s.185(2) of the WR Act, as a term of the AFPCS); and

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8 It should be noted that the first three contraventions (i.e.: those prior to 27 March 2006) are only referable to the First Defendant, whereas those on and from 27 March 2006, are referable to both Defendants.

9 On and from 27 March 2006, the previous single obligation contained in the Award (to pay a minimum hourly rate of pay to casual employees) was separated into separate obligations: one to pay a basic periodic rate of pay for each hour worked (s.182(1) of the WR Act) and one to pay the appropriate minimum casual loading percentage for hours of work (s.185(2) of the WR Act).

(h) failure to pay the guaranteed casual loading percentage to casual employees for hours of work on Sundays, on and from 27 March 2006 (breach of s.185(2) of the WR Act, as a term of the AFPCS).

24. Each term was breached repeatedly by the Defendants in respect of each of the five employees (except for the breaches prior to 27 March 2006, which related only to Mr Deans and Mr Thomson).

25. However, the Defendants have the benefit of s.178(2) of the pre-reform WR Act and s.719(2) of the WR Act, in relation to each of these repeated breaches of the terms of the Award and the AFPCS.[10]

26. Given the different dates, times and circumstances as to how the relevant Award and AFPCS provisions came to be contravened in relation to each of the five employees, the Plaintiff submits that the course of conduct provisions do not apply so as to treat the contraventions in relation to each of the five employees as the one contravention. The Plaintiff submits they remain separate breaches for each employee.[11]

27. True it is that the contraventions occurred at different times, but all occurred within an eight month time span. Whilst the breaches affected multiple employees they are repeated breaches of the same provisions. Technically, on one view, they are separate breaches for each employee, the matter of overlap is a relevant one. I disagree with the submissions of the Plaintiff on this point and on the basis of the facts in this case, the conclusion reached by Federal Magistrate Simpson in *Workplace Ombudsman v. Saya Cleaning &Anor*[12] .

28. The Plaintiff submits by reference to the categories of contraventions identified above, the Court should consider that the maximum penalty it could impose in this matter on the First Defendant is $726,000, constituted as follows:

(a) four breaches of clause 6(f)(ii)(2) of the Award;[13]

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10 Each repeated breach is treated as part of the same course of conduct (see *Quinn v Martin* (1977) 16 ALR 141 at 143-5 (Smithers, Evatt and Keely JJ) and *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-7 (Gray J, Northrop J agreeing)).

11 See *McIver*, supra; *Workplace Ombudsman v Saya Cleaning Pty Ltd and Anor* [2009] FMCA 38 (unreported, Federal Magistrates Court of Australia, 29 January 2009, Simpson FM) at [24] (**Saya**); *Rowe v Capital Territory Health Commission* (1982) 62 FLR 383 at 412 (Keely J) (not discussed on appeal: *Rowe v Capital Territory Health Commission* (1982) 2 IR 27).

12 [2009] FMCA 38

13 One for Mondays to Fridays from 6am to 6pm (Mr Deans), two for Saturdays (Mr Deans and Mr Thomson) and one for Sundays (Mr Thomson).

(b) five breaches of s.182(1) of the WR Act (as a term of the AFPCS); and

(c) 13 breaches of s.185(2) of the WR Act (as a term of the AFPCS).[14]

29. Conversely if the contraventions in relation to the employees are treated as a course of conduct, and therefore as one breach per term, the maximum penalty the Court could impose would be $264,000 constituted by:

(a) Three breaches of clause 6(f)(ii)(2) of the Award;[15]

(b) One breach of s.182(1) of the WR Act (as a term of the AFPCS); and

(c) Four breaches of s.185(2) of the WR Act (as a term of the AFPCS).[16]

30. Further, the Plaintiff submits the Court should consider that the maximum penalty it could impose in this matter on the Second Defendant is $118,800, constituted as follows:

(a) five breaches of s.182(1) of the WR Act (as a term of the AFPCS); and

(b) 13 breaches of s.185(2) of the WR Act (as a term of the AFPCS).

31. However if the contraventions are treated as a course of conduct, the maximum penalty the Court could impose on the Second Defendant would be $33,000 constituted as follows:

(a) One breach of s.182(1) of the WR Act (as a term of the AFPCS); and

(b) Four breaches of s.185(2) of the WR Act (as a term of the AFPCS).

32. For the reasons expressed above I prefer the second approach outlined.

33. Finally the Plaintiff submits it is not inappropriate to consider the maximum penalties that could be imposed on the Defendants, as part of the comparative exercise of assessing where the current contraventions sit.[17]

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14 Five breaches for Mondays to Fridays between 6am and 6pm, one breach for Mondays to Fridays from 6pm to 6am (Mr Altobelli), four breaches for Saturdays (all except Mr Altobelli) and three breaches for Sundays (Messrs Deans, Thomson and Altobelli).

15 One for Mondays to Fridays from 6am to 6pm(concerning Deans), one for Saturdays (concerning Deans and Thomson) and one for Sundays (Thompson).

16 One breach for Mondays to Fridays between 6am and 6pm, one for Mondays to Fridays from 6pm to 6am (Mr Altobelli), one for Saturdays (all except Mr Altobelli) and one for Sundays' (Messrs Deans, Thomson and Altobelli).

17 *Mornington Inn*, supra at [88] (Stone and Buchanan JJ).

Factors relevant to penalty

34. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act has been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*,[18] as follows:

(a) the nature and extent of the conduct which led to the breaches;

(b) the circumstances in which that conduct took place;

(c) the nature and extent of any loss or damage sustained as a result of the breaches;

(d) whether there had been similar previous conduct by the respondent;

(e) whether the breaches were properly distinct or arose out of the one course of conduct;

(f) the size of the business enterprise involved;

(g) whether or not the breaches were deliberate;

(h) whether senior management was involved in the breaches;

(i) whether the party committing the breach had exhibited contrition;

(j) whether the party committing the breach had taken corrective action;

(k) whether the party committing the breach had co-operated with the enforcement authorities;

(l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

(m) the need for specific and general deterrence.

35. This summary was adopted by Tracey J in *Kelly*.[19] While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken

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18 [2007] FMCA 7 at [26]-[59].

19 Supra, at [14].

into account in the exercise of the Court's discretion.[20]

36. The factors relevant to this matter and the question of appropriate penalties are addressed in turn below.

Nature and extent of the conduct

37. The Defendants relied on one affidavit, sworn by Richard Timothy Reid, filed in Court on the day listed for the penalty hearing. Mr Reed acknowledged that he did not have any proper excuses for the failure to provide payments to the employees concerned. He also acknowledged that he had not dealt with the investigation by the plaintiff in the way that he should have. He merely stated that he felt overwhelmed by the pressures of running his business.

38. Whilst giving evidence at the invitation of the court Mr Reid expressed his frustration at the employees concerned leaving their employment with little notice. He felt that the conduct of the employees jeopardised his relationships with clients because he would be required to cancel pre-booked appointments.

39. In neither his affidavits filed with the Court nor in giving evidence did Mr Reed demonstrate any remorse or contrition for his actions. It is clear that he only paid the outstanding entitlement to the employees on the day that be matter was first listed for hearing. This was in default of an order of this Court to make payment, by way of instalments, commencing prior to that date. Mr Reed gives the clear impression to the Court that were it not for these prosecution proceedings and the matter reaching hearing he would not have paid the amounts which these employees were entitled to. In demonstrating no contrition whatsoever the court does not have any comfort that Mr Reed or the first Defendant have learnt their lessons and will not engage in such conduct again in the future. This is a case where a specific deterrence is critical.

40. The behaviour of the Defendants that lead to the conduct only continuing for a short period of time in most instances. Aside from Mr Cirkovic, who had to fight bouncing cheques, the other four employees were not paid at all by the First Defendant. Naturally enough, they did not tolerate this situation for long, and therefore did not accrue particularly large underpayments.

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20 *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11] (unreported, Federal Court of Australia, 3 October 2007, Gyles J); *Merringtons*, supra at 580 [91] (Buchanan J).

41. Mr Cirkovic, unlike the others, decided to "stick it out". He was left with a large underpayment to show for his loyalty. However, for casual employees, the amounts are not insignificant. In two cases, the employees were junior employees under the Award.

42. The First Defendant received a significant benefit from the underpayments - free labour.

Circumstances in which the conduct took place

43. The Defendants attempted to take advantage of the youth and naivity of the employees in at least three cases, by attempting to sign them up as contractors.[21]

44. The Defendants made the employees work for the business, use their own personal vehicles to get around (without reimbursement)[22] and then simply refuse to pay them.

45. Finally, when the employees attempted to resign, the Defendants (in some cases) told them that they were contractually bound to provide two weeks' notice.[23] When in some cases the employee decided to work that period or continue working, the Defendants still did not pay them for that work.[24]

Nature and extent of loss or damage

46. The employees sought employment for the minimum wage. Some were young. It is not apparent that any were particularly well versed in industrial and employment matters, or the exercise of their rights under relevant industrial instruments. Indeed, Mr Deans required the assistance of his father to assert his rights.[25] None were in strong or even equal bargaining positions.

47. The underpayments in each case are not insignificant.

Similar previous conduct

48. The Plaintiff submits this is an important factor in this case.

49. The Plaintiff submits the Defendants have a long and repeated and consistent

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21 Deans Affidavit at para 3; Wang Affidavit at paras 7-10; Cirkovic Affidavit at para 3.
22 Para 5 of the Deans, Thomson, Altobelli and Cirkovic Affidavits.
23 Deans Affidavit at para 9; Thomson Affidavit at paras 8-9; Cirkovic Affidavit at paras 10 and 13.
24 Thomson Affidavit at para 9; Cirkovic Affidavit at paras 10-12.

practice going back to 1998 failing to pay employee wages. The involvement of the Workplace Ombudsman and its predecessors, he submits has not served to curb the Defendants offending behaviour.

50. Apart from one default judgment, there is no conclusive evidence of any finalised, actual breaches of industrial instruments or legislation. In that case one employee instituted proceedings in this Court (X00829616), seeking repayment of his underpayment ($2,012.89). Default judgment was ordered. No repayment has been made.[26]

51. However, what the Plaintiff submits is clear is that the Defendants, trading as the "Royal Melbourne Car Wash", have been pursuing a strategy of underpaying and not paying ernployees for many years.

52. The Workplace Ombudsman (or its predecessors) has received, in addition to the 5 complaints from the Employees, another 23 complaints from employees or former employees of the Defendants, arising from the operation of the "Royal Melbourne Car Wash".[27]

53. The Plaintiff submits that the Court can draw the almost undeniable inference that the Defendants have offended in the past, have offended in the present case, and will continue to offend again, unless significantly penalised.

54. The only evidence of these complaints was in the form of a print out of a data base held by the Plaintiff. Whilst I can be satisfied from this business record that complaints have been made against the First Defendant, I am unable to make any findings as to the voracity of those complaints. It would be improper to therefore accord them great weight when determining penalty.

Whether the breaches arose out of the one course of conduct

55. The Defendants have obtained significant advantage from components of the contravening conduct, and the breaches in respect of mulitple employees, being characterised as part of a course of conduct thereby minimising the number of contraventions penalised.

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25 Deans Affidavit at para 11.
26 Yates Affidavit at para 26-7.
27 Yates Affidavit at para 24.

Size of the business

56. Mr Reed started the First Defendant a car wash business in 1989 as a way of getting through his university course. Initially he was the only employee but between the period 2006 to 2008 the business employed approximately 5 to 10 employees at any given time. It is not a large business part has had a regular workforce since about 1998.

57. The First Defendant does not have many assets. It owns a computer, a vacuum pressure claim worth approximately $1000-$1500 and chemicals worth about $500. It leases premises at the rear of 535 Riversdale Rd. About 80% of the clients of the business account-based rather than paying by cash. The profits are not high. In the 2004 – 05 financial year its revenues were $279,760 and it made a loss of $10,429.08.

58. In the 2005 – 06 financial year the First Defendant's revenues were $284,322 and it made a profit of $7,422 69. In the 2006 – 07 financial year the business had a revenue of $283,350 and it made a loss of $56,467 46. Financial figures for the 2007 -08 year were not available.

59. The First Defendant has some debts including a taxation liability of $22,196.02.

60. The Second Defendant claims to draw a salary of approximately $20,000 per year from the business. His only other income his royalties from a book of approximately $5-$10,000 per year. His wife also received a wage of about $20,000 from the business but is now employed separately. Whilst Mr Reid lives in a home in an exclusive suburb of Melbourne, it is owned by his wife. He claims to have no assets other than a personal motor vehicle. He has substantial personal liabilities.

Deliberateness of the breaches

61. Given the repetitive action in failing and/or refusing to pay wages to the employees, coupled with the past examples of similar proven conduct, I am satisfied on the balance of probabilities that the actions of the Second Defendant were entirely deliberate. Mr Reid is university educated and I infer must have known at all relevant times the actions of the First and Second Defendants were wholly unlawful. It is beyond contemplation that an employer in Australia in the 21st century could think otherwise. The actions of the Defendants were a calculated campaign to derive

personal financial advantage.

Involvement of senior management

62. The Second Defendant was the "directing mind and will" of the First Defendant.

Contrition, corrective action, co-operation with authorities

63. There is no evidence of any contrition shown by the Defendants for their contraventions. The Employees sought to resolve their complaints with the Defendants directly, and each were rebuffed. Mr Deans and his father were given a deliberate run around when they pressed for their wages,[28] and Mr Cirkovic had two cheques "bounce" on him when he applied pressure for his underpayments.[29]

64. Other employees were clearly unable to resolve disputes directly with the Defendants resulting in some 23 claims to the statutory inspectorate demonstrate.

65. In September 2006, the Plaintiff first became involved. During the two year investigation and prelitigation period the Defendants continued to deny liability, and to evade most correspondence and efforts made by the Plaintiff to resolve the matter.

66. The Defendants took no corrective action until they were dragged to the door of the Court. For purposes wholly related to self confessed self interest of the Second Defendant[30] the Defendants admitted the contraventions and obtained (at their own request) a six month repayment plan for the underpayments. Despite this, the Defendants did not repay the first instalment pursuant to that plan,[31] and only repaid the full amount of the underpayments on the first day this matter was listed for hearing by the Court.

67. The Defendants provided no co-operation to the Plaintiff. They also ignored several Notices to Produce served by the Workplace Ombudsman and Inspectors, seeking the production of documents to ascertain compliance.

68. Despite potential criminal sanction, no explanation was provided by the Defendants for this errant behaviour.

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28 Deans Affidavit at paras 11-12; Don Deans Affidavit at paras 2-4.
29 Cirkovic Affidavit at paras 9-13.
30 Exhibit "H" to the Robinson Affidavit.

69. Furthermore the Summones to Produce documents to this Court have not been complied with.

70. The conduct of the Defendants verges on contemptuous. It must attract significant sanction.

71. However as the underpayments have been repaid in full the Defendants will receive a substantial discount in penalty. This is a significant indication of belated but ultimate acceptance of the authority of the Court.

Ensuring compliance with minimum standards

72. One of the principal objects of the WR Act has been the maintenance of an effective safety net, and effective enforcement mechanisms.

73. The substantial penalties set by the legislature for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards.

74. The words of two senior Federal Court judges about the importance of complying with minimum award obligations and the inappropriateness of awarding nominal penalties, are apt:

> "*It is necessary for all parties to awards to be aware that the obligations in them are part of the law of the land and must be obeyed...*"[32]
>
> "*In this connection it is important that the respondent – and other employers bound by the award and by other awards under the Act – understand the importance of complying with an award...They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*"[33]

Specific and general deterrence

75. Both general and specific deterrence are particularly important in this case.

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31 Yates Affidavit at para 28; Thomson Affidavit at para 12; Altobelli Affidavit at para 13; Wang Affidavit at para 13; Cirkovic Affidavit at para 16.

32 *ETU v Sims Products Ltd (t/as Besco Batteries)* (1988) 42 IR 250 at 253 (Gray J).

33 *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508 (Keely J).

76. General deterrence is an important factor, regardless of the size of the First Defendant and its financial position. The law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others.[34]

77. There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements.

78. The business of the First Defendant is still operating. It will continue to engage employees. Given the recalcitrant attitude of the Defendants, and its 'priors', the need for specific deterrence is very high. The Defendants must get the message that they must comply with the law or close the business down.

Grouping of contraventions

79. The Plaintiff accepts that there may be some case for a grouping or other reduction in the amounts assessed as appropriate penalties for each of the contraventions of the Award (for Mr Deans and Mr Thomson) and both ss.182(1) and 185(2) of the WR Act. Despite ss.178(2) and 719(1), they remain separate contraventions, but they may be said to overlap with each other or involve the potential punishment of the Defendants for the same or substantially similar conduct.

80. Even if this is accepted, the Plaintiff submits that it does not necessitate a reduction in the overall assessment of the appropriate penalty for those contraventions as assessed above. This is particularly so given the benefit already obtained from the operation of s.178(2) of the pre-reform WR Act and s.719(1) of the WR Act.

81. As discussed above I disagree with this approach and consider that it is appropriate to treat the breaches concerning multiple employees as a single course of conduct for the purpose of calculating penalty.

82. Each breach is equally grievous. In all the circumstances I consider that a penalty ought be fixed at 70% of the maximum. For the First Defendant, 8 breaches at $23,100 equals $184,800. For the Second Defendant, 5 breaches at $4620 equals $23,100.

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[34] See paragraph [26] of *Kelly*, supra, and the cases cited therein. See also *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 559-60 [93] (Lander J).

Totality principle and "instinctive synthesis" test

83. Having fixed an appropriate penalty for each contravention or course of conduct, the Court must take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.

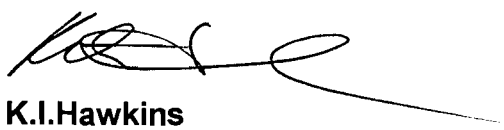
CONCLUSION

84. Whilst the actual quantum of the underpayments are not huge, this case involves a deliberate, underhanded and opportunistic exploitation of casual employees, by an employer and its Director without regard for its' legal obligations, the enforcement bodies established to police those obligations and the Court established to enforce those obligations.

85. The Plaintiff submits, many aspects of this case mirror or exceed in terms of their gravity, the facts considered by Simpson FM in the recent decision of *Saya* (supra), where total penalties against the corporate employer and individual Director were $240,000 and $48,000 respectively (for 12 separate breaches).

86. I accept the submission of the Plaintiff, that in all the circumstances, that penalties towards the maximum for each separate breach are appropriate.

87. Applying the `instinctive synthesis test' to the total penalties considered above I consider that they are an appropriate response to the conduct of the Defendants.



K.I.Hawkins

Magistrate

ORDERS:

1. **That the First Defendant pay an aggregate penalty of $184,800;**

2. **That the Second Defendant pay an aggregate penalty of $23,100;**

3. **That the penalties imposed on the Defendants be paid to the Consolidated Revenue of the Commonwealth within 30 days.**