FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v AM RETAIL SOLUTIONS PTY LTD & ANOR (NO.5) [2010] FMCA 981

INDUSTRIAL LAW – Contravention of civil remedy provisions of Workplace Relations Act and Regulations – numerous underpayments and other breaches of preserved State award – appropriate penalties to be imposed on sole director of employer company – high levels of culpability – few mitigating circumstances – penalties totalling $82,100 imposed.

Crimes Act 1914 (Cth), s.4AA
Vehicle Industry – Repair Services and Retail (State) Award (NSW), Pt.A, cll.2(e)(i)(5), 2(e)(ii)(7)(iv), 6(4)(a)(ii), 6(4)(c), 14(a)(ii), 15(a)(ii), 16(a)(ii), 17(a)(i)-(vi), 18(a)(i)-(iii),
Workplace Relations Act 1996 (Cth), ss.182, 182(1), 232, 232(2), 234, 234(2), 235, 235(2), 246, 246(2), 246(3), 246(4), 719, 719(1), 719(2), 719(6), 719(7), 722, 728, 841
Workplace Relations Regulations 2006 (Cth), Ch.2 Pt.19, regs.14.4, 14.5, 19.5, 19.8, 19.8(1)(c)–(e), 19.11, 19.11(3)(c)-(d), 19.12, 19.12(1)(a)-(c), 19.14, 19.14(1)(a)-(b), 19.18, 19.18(1)(b), (2), (3)(b), 19.20, 19.20(3), 19.21, 19.21(1)(k)(i)

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39
Fair Work Ombudsman v AM Retail Solutions & Anor (No.4) [2010] FMCA 525
Jarvis v Imposete Pty Ltd (No.2) (2008) 169 IR 458
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Torpia v Empire Printing (Australia) Pty Ltd & Anor [2009] FMCA 853
Workplace Ombudsman v AM Retail Solutions & Anor [2009] FMCA 1046

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	AM RETAIL SOLUTIONS PTY LTD ACN 103 251 038
Second Respondent:	ADIL MAGAR

File Number:	SYG3333 of 2008
Judgment of:	Smith FM
Hearing date:	25 November 2010
Date of Last Submission:	29 October 2010
Delivered at:	Sydney
Delivered on:	23 December 2010

REPRESENTATION

Counsel for the Applicant:	Mr P Newall
Solicitors for the Applicant:	FCB Lawyers
Counsel for the Respondents:	Mr V Dragomirovic
Solicitors for the Respondents:	Law Partners

ORDERS

(1) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the *Workplace Relations Act 1996* (Cth) ('the Act') for contravention of s.182(1) of the Act in relation to the Australian Fair Pay and Conditions Standard ('the AFPCS'), by the failure to pay employees of AM Retail Solutions Pty Ltd the guaranteed basic periodic rates of pay for each hour worked.

(2) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of s.232(2) and s.234(2) of the Act in relation to the AFPCS, by the failure to allow employees of AM Retail Solutions Pty Ltd to accrue annual leave, and the failure to credit annual leave each month.

(3) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of s.235(2) of the Act in relation to the AFPCS, by the failure to pay the full amount due for

accrued annual leave payable upon the termination of the employment of employees of AM Retail Solutions Pty Ltd.

(4) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of s.246(2), s.246(3) and s.246(4) of the Act in relation to the AFPCS, by the failure to allow employees of AM Retail Solutions Pty Ltd to accrue personal/carer's leave, and the failure to credit that leave each month.

(5) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.2(e)(i)(5) of the *Vehicle Industry – Repair Services and Retail (State) Award (NSW)* ('the NAPSA'), by the failure to make a required payment in lieu of the required period of notice of termination of the employment of an employee of AM Retail Solutions Pty Ltd.

(6) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.6(4)(a)(ii) of the NAPSA, by the failure to pay loadings over and above the base rate for ordinary hours to casual employees of AM Retail Solutions Pty Ltd who worked on weekends or public holidays.

(7) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.6(4)(c) of the NAPSA, by the failure to pay overtime loadings to casual employees of AM Retail Solutions Pty Ltd on occasions when an employee worked in excess of 10 hours in a day or over an average of 38 hours per week.

(8) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.14(a)(ii) of the NAPSA, by the failure to pay to weekly employed employees of AM Retail Solutions Pty Ltd the penalty rate prescribed as time and one-half of the ordinary hourly rate for shifts worked on a Saturday.

(9) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.15(a)(ii) of the NAPSA, by the failure to pay the penalty rate of double-time for shifts worked on a Sunday to weekly employed employees of AM Retail Solutions Pty Ltd.

(10) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.16(a)(ii) of the NAPSA, by the failure to pay the penalty rate of double time and one-half of the ordinary hourly rate for shifts worked on a holiday to weekly employed employees of AM Retail Solutions Pty Ltd.

(11) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.17(a)(i)-(vi) of the NAPSA, by the failure to pay casual and weekly employed employees of AM Retail Solutions Pty Ltd who worked an afternoon or evening shift the applicable loading in addition to their ordinary rate of pay.

(12) A penalty of $6,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cll.18(a)(i), 18(a)(ii) and 18(a)(iii) of the NAPSA, by the failure to pay penalty loadings for work falling outside their ordinary hours of work to weekly employed employees of AM Retail Solutions Pty Ltd.

(13) A penalty of $3,000 is imposed on the second respondent, Adil Magar, under ss.719 and 728 of the Act for contravention of Pt.A, cl.2(e)(ii)(7)(iv) of the NAPSA, by the failure to provide, when requested by an employee of AM Retail Solutions Pty Ltd following the termination of his employment, a written statement of his employment specifying the period that he worked and classifying the type of work he performed.

(14) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the *Workplace Relations Regulations 2006* (Cth) ('the Regulations') for contravention of reg.19.5 by the failure to keep the records relating to the employees of AM Retail Solutions Pty Ltd in a condition that allowed a workplace inspector to determine its employees' entitlements and whether the employees were receiving those entitlements.

(15) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.8(1)(c), (d) and (e), by the failure to keep records of the employees of AM Retail Solutions Pty Ltd which contained their status as full-time or part-time, their term of

employment as permanent, temporary or casual, and the dates of their commencement.

(16) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.11(3)(c) and (d) by the failure to keep records of the employees of AM Retail Solutions Pty Ltd which contained details of any loading and penalty rate for which the employee was entitled to be paid.

(17) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.12(1)(a), (b) and (c) by the failure to keep records of the employees of AM Retail Solutions Pty Ltd which contained details of the accrual of their leave, any leave taken by the employee, and the balance of the employee's entitlement to that leave from time to time.

(18) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.14(1)(a) and (b) by the failure to keep records of the employees of AM Retail Solutions Pty Ltd which contained details of whether their termination of employment was (i) by consent; or (ii) by notice; or (iii) summarily; or (iv) some other manner, specifying the manner.

(19) A penalty of $1,100 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.18(1)(b), (2) and (3)(b), by the failure of AM Retail Solutions Pty Ltd to make a copy of a record requested by a workplace inspector available to the inspector in a legible form in the English language within 3 business days at its office, or by post or fax within 14 days after the request.

(20) A penalty of $1,000 is imposed on the second respondent, Adil Magar, under s.728 of the Act and reg.14.4 of the Regulations for contravention of reg.19.20(3) and 19.21(1)(k)(i), for the failure to provide employees of AM Retail Solutions Pty Ltd with payslips which included particulars of the amount of each superannuation contribution

made by the employer for its pay period, and the name of the fund to which it was made.

(21) The penalties payable under the above orders must be paid to the Commonwealth pursuant to s.841 of the Act.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG3333 of 2008

FAIR WORK OMBUDSMAN
Applicant

And

AM RETAIL SOLUTIONS PTY LTD
ACN 103 251 038
First Respondent

ADIL MAGAR
Second Respondent

REASONS FOR JUDGMENT

1. On 7 September 2010 I published my findings on the liability of Mr Adil Magar, the second respondent, for penalties as a person involved in numerous breaches by AM Retail Solutions Pty Ltd ('AM Retail') of the *Workplace Relations Act 1996* (Cth) and of the *Workplace Relations Regulations 2006* (Cth) (see *Fair Work Ombudsman v AM Retail Solutions & Anor (No.4)* [2010] FMCA 525). The findings were not challenged in the subsequent hearing on penalties, and no additional evidence was tendered. This judgment explains my conclusions as to what penalties to impose on Mr Magar in the light of my previous findings. I shall not repeat the legislative and factual background provided by my earlier judgment.

2. In summary, I found Mr Magar to be liable for breaches of the Act and a relevant NAPSA, deriving from non-compliance with the provisions of the *Vehicle Industry – Repair Services and Retail (State) Award*

(NSW) in relation to numerous console operators employed at AM Retail's Volume Plus petrol stations over periods between March 2006 and May 2008. The number of employees affected was significant, and the cumulative value of underpayments to all employees appears to be in the region of $500,000, with some employees being owed substantial amounts. AM Retail commenced a voluntary creditor's liquidation while the proceedings were pending, and there is no evidence as to its current financial position. I made findings which accepted nearly all of the particulars of the breaches which were alleged.

3. In my judgment, I noted the aggregating effect of s.719(2) of the Act, which requires that multiple breaches of the same entitlement provision in relation to one or more employees should be treated as one contravention. In this respect, I explained:

> *19. The separate 'terms' of the State award which constitute the AFPCS and the NAPSA provide the separate 'applicable provisions' which are alleged to have been contravened by AM Retail and Mr Magar. In effect, the Ombudsman seeks findings that one contravention occurred in relation to each type of entitlement conferred by each term of the NAPSA, whether directly or indirectly as part of the AFPCS. He alleges that most of the contraventions were constituted by underpayments to more than one employee in relation to more than one pay period. Some contraventions are particularised by reference to numerous employees and to breaches which were repeated over long periods. This approach to the identification of separate 'contraventions of a civil remedy provision' for which Mr Magar is alleged to be liable in relation to employee entitlements, reflects established jurisprudence on the statutory aggregation of multiple breaches of "an applicable provision" when they "arose out a course of conduct" (see s.719(2) and the cases recently cited by Logan J in* CEEEIPPASUA v QR Ltd (No.2) *[2010] FCA 652 at [27]-[28]). The statutory aggregation of breaches was uncontroversial in the present case, and does not need to be further examined.*
>
> *20. I also do not need to consider in the present judgment, and shall defer until I have received further submissions, whether penalties imposed for each aggregated contravention should be further reduced under sentencing principles recently discussed in* Construction, Forestry,

Mining and Energy Union v Williams *(2009) 262 ALR 417 at [14]-[19] and applied by their Honours at [25]-[26] (see also* Construction, Forestry, Mining and Energy Union v Cahill *[2010] FCAFC 39 at [39]-[42]).*

4. I need to consider in my present judgment whether penalties for the statutory aggregated contraventions should be further reduced under the 'course of conduct' sentencing principle cited in the above authorities, and also the application of the 'totality' principle in relation to the cumulative penalties which I impose on Mr Magar.

The contraventions

5. I found Mr Magar to be liable for separate penalties of up to $6,600 in relation to the following 13 breaches of employee entitlement provisions of the Act and the NAPSA:

   i) Section 182(1) of the Act in relation to the AFPCS, involving the failure to pay 48 identified casual and 'weekly employed' employees, including Charmaine Bradshaw, Caitlyn Izzard, Mourad Gerges, Kamel Morgan, and Najah Hirmiz, the guaranteed basic periodic rates of pay for each hour worked. The breaches occurred over various periods between 27 March 2006 and 3 May 2008 (see [22], [94] and [160] of my judgment);

   ii) Section 232(2) and s.234(2) of the Act in relation to the AFPCS, involving the failure to allow employees to accrue annual leave, and the failure to credit annual leave each month, in respect of 8 identified 'weekly employed' employees, including Nagi Basta, Kamel Morgan and Najah Hirmiz, during the period between 27 March 2006 and 3 May 2008 (see [22], [95] and [165] of my judgment);

   iii) Section 235(2) of the Act in relation to the AFPCS, involving the failure to pay the full amounts due for accrued annual leave, payable upon the termination of the employments of 6 identified 'weekly employed' employees, including Mina Hanna, Nagi Basta and Kamel Morgan, on

various dates in 2007 and 2008 (see [22], [75], [95] and [165] of my judgment);

iv) Section 246(2), s.246(3) and s.246(4) of the Act in relation to the AFPCS, involving the failure to allow employees to accrue personal/carer's leave, and the failure to credit that leave each month, in respect of 8 identified 'weekly employed' employees including Nagi Basta, Kamel Morgan and Najah Hirmiz, during the period between 27 March 2006 and 3 May 2008 (see [22], [95] and [165] of my judgment);

v) Part A, cl.2(e)(i)(5) of the NAPSA, involving the failure to make the required payment in lieu of the required period of notice of termination of the employment of Kamel Morgan, where an underpayment of $2,910.80 occurred (see [22] and [166] of my judgment);

vi) Part A, cl.6(4)(a)(ii) of the NAPSA, involving the failure to pay loadings over and above the base rate for ordinary hours to casual employees who worked on weekends or public holidays. This failure occurred throughout the period between 27 March 2006 and 3 May 2008, and involved the non-payment of the relevant loadings to 33 casual employees who worked on a Saturday, 38 who worked on a Sunday, and 31 who worked on a public holiday. They include Charmaine Bradshaw, Caitlyn Izzard, and Mourad Gerges (see [22] and [160] of my judgment);

vii) Part A, cl.6(4)(c) of the NAPSA, involving the failure to pay overtime loadings to casual employees on occasions when an employee worked in excess of 10 hours in a day or over an average of 38 hours per week. The breaches occurred throughout the period between 27 March 2006 and 3 May 2008, and resulted in the underpayment of at least 23 employees, including Charmaine Bradshaw and Caitlyn Izzard (see [22] and [160] of my judgment).

viii) Part A, cl.14(a)(ii) of the NAPSA, involving the failure to pay the penalty rate prescribed as time and one-half of the

ordinary hourly rate for shifts worked on a Saturday, to 7 'weekly employed' employees including Najah Hirmiz and Kamel Morgan, within the period between 27 March 2006 and 3 May 2008 (see [22], [94] and [160] of my judgment);

ix) Part A, cl.15(a)(ii) of the NAPSA, involving the failure to pay the penalty rate of double-time for shifts worked on a Sunday to 3 identified 'weekly employed' employees including within the period between 27 March 2006 and 3 May 2008 (see [22], [94], [110] and [160] of my judgment);

x) Part A, cl.16(a)(ii) of the NAPSA, involving the failure to pay the penalty rate of double time and one-half of the ordinary hourly rate for shifts worked on a holiday to 6 'weekly employed' employees including Najah Hirmiz and Kamel Morgan, within the period between 27 March 2006 and 3 May 2008 (see [22] and [160] of my judgment);

xi) Part A, cl.17(a)(i)-(vi) of the NAPSA, involving the failure to pay a large number of casual and weekly employees who worked an afternoon or evening shift the applicable loading in addition to their ordinary rate of pay. The breaches occurred throughout the period between 27 March 2006 and 3 May 2008, and the employees who were affected included Charmaine Bradshaw, Caitlyn Izzard, Mourad Gerges, Najah Hirmiz and Kamel Morgan (see [22], [94] and [160] of my judgment);

xii) Part A, cll.18(a)(i), 18(a)(ii) and 18(a)(iii) of the NAPSA, involving the failure to pay penalty loadings for work falling outside their ordinary hours of work to 6 identified 'weekly employed' employees including Najah Hirmiz and Kamel Morgan, within the period between 27 March 2006 and 3 May 2008 (see [22], [94] and [160] of my judgment); and

xiii) Part A, cl.2(e)(ii)(7)(iv) of the NAPSA, involving the failure to provide, when requested by Mourad Gerges a written statement of his employment specifying the period that he

worked and classifying the type of work he performed, following the termination of his employment in 2008 (see [22] and [166]-[168] of my judgment).

6. In addition, I found Mr Magar liable to penalties of $1,100 in relation to the following 7 breaches of the Regulations:

xiv) Reg.19.5, which required AM Retail to keep *"the record relating to the employee ... in a condition that allows a workplace inspector to determine the employee's entitlements and whether the employee is receiving those entitlements"*. This is evidenced by the state of AM Retail's records which were discovered and copied by workplace inspectors when they attended its premises on 8 May 2008 (see [33] and [178] of my judgment);

xv) Reg.19.8(1)(c), which required an employee's records to contain his or her status as full-time or part-time, and (d) his or her term of employment as permanent, temporary or casual, and (e) the date of his or her commencement. These defects are evidenced in the employee records obtained on 8 May 2008 (see [33] and [176] of my judgment);

xvi) Reg.19.11(3)(c) and (d) which required an employee's records to contain details of any loading and penalty rate for which the employee is *"entitled to be paid"*. These defects are evidenced in the employee records obtained on 8 May 2008 (see [33] and [176] of my judgment);

xvii) Reg.19.12(1)(a), (b) and (c), which required the record of an employee who was entitled to leave, to contain details of *"the accrual of that leave"*, *"any leave taken by the employee"*, and *"the balance of the employee's entitlement to that leave from time to time"*. These defects are evidenced in the records of 8 'weekly employees' obtained on 8 May 2008, including those of Nagi Basta, Kamel Morgan and Najah Hirmiz (see [33] and [176] of my judgment);

xviii) Reg.19.14(1)(a) and (b), which required records of the termination of an employee to contain *"whether the termination was terminated (i) by consent; or (ii) by notice; or (iii) summarily; or (iv) some other manner, specifying the manner"*. These defects are evidenced in the employee records of 6 former employees which were obtained on 8 May 2008, including those of Kamel Morgan, Mina Hanna, and Nagi Basta (see [33] and [176] of my judgment);

xix) Reg.19.18(1)(b), (2) and (3)(b), which required AM Retail to make a copy of a record requested by a workplace inspector available to the inspector *"in a legible form in the English language"* within 3 business days at its office, or by post or fax within 14 days after the request. There was a failure to comply with this requirement in relation to a request for records relating to Mina Hanna which was served on 4 March 2008 (see [33] and [179] of my judgment); and

xx) Reg.19.20(3) and reg.19.21(1)(k)(i), which required payslips to include particulars of the amount of each superannuation contribution made by the employer for its pay period, and the name of the fund to which it was made. This occurred in relation to 8 weekly employees (see [33] and [185] of my judgment).

7. Mr Magar's maximum liability for all entitlements contraventions is $85,800, and is $7,700 for all records contraventions.

The circumstances of Mr Magar's involvement

8. I summarised Mr Magar's position in AM Retail in the opening paragraph of my judgment:

> *At all relevant times since 2002, he was AM Retail's company secretary, its sole director, and the sole shareholder of its $100 paid capital. Before it commenced a creditors voluntary winding up on 19 May 2009, AM Retail operated a business of retailing petrol at between 20 and 30 'Volume Plus' service stations in Sydney and regional NSW. Its weekly payrolls for about 11 of its*

sites between 2006 and 2008 usually included about 30 mostly casual employees, with a substantial turn-over of employees at these sites during each year. The background of the business, its relationship with other companies associated with Mr Magar and his family, and the involvement in AM Retail of other members of Mr Magar's family including his father, Azir Magar, and two of his brothers, 'Bill' Magar and Mark Magar, are obscure on the evidence before me. However, the totality of the evidence shows clearly that Mr Magar was at all times, both in law and fact, the controlling mind and manager of the company, exercising full responsibility for AM Retail's general employment policies and practices.

9. Mr Magar has not presented any additional evidence to explain the background circumstances of himself, his family, or AM Retail. In my directions appointing the penalty hearing, I allowed him ample time to give instructions to his solicitor to present evidence or submissions which might explain or mitigate his involvement in the breaches found by me. However, no evidence or submissions were filed, and at the penalty hearing his solicitor said that he had been unable to obtain instructions on Mr Magar's response to my findings and to the Fair Work Ombudsman's submissions on penalty. He applied for an adjournment, but this was unsupported by evidence, even from the bar table, showing any good reason for not proceeding with the appointed penalty hearing. The consequence is that the only mitigating element which his solicitor was able to point to in submissions was that neither Mr Magar nor AM Retail is shown previously to have been convicted for breaches of relevant industrial legislation.

10. The seriousness of my findings as to Mr Magar's involvement arises from his dominant position in the management of AM Retail, his direct responsibility for AM Retail's conscious disregard of its legal obligations as an employer, the long duration of the offending conduct, the large number of employees affected, and the magnitude of the underpaid entitlements.

11. A very high degree of culpability concerns, in particular, the protracted and intentional underpayment of periodic rates of pay to numerous casual and weekly employed employees, i.e. contraventions i, vi, vii, viii, ix, x, xi, and xii in the above list. Mr Magar's personal

involvement in these practices through his supervision of the payroll clerk, Mr Zhou, was explained in my findings, including:

- I can find no evidence which identifies some person, other than Mr Magar, as responsible in fact for directing and supervising the particular wages and other entitlements to be paid by AM Retail to the relevant employees at any time over the period of the underpayments covered by the Ombudsman's case. [49]

- I can therefore confidently conclude that there was direct knowledge and participation by Mr Magar in the underpayments of weekly wage rates which are alleged by the Ombudsman, including non-payment of the award penalty and overtime rates. [51]

- In effect, AM Retail's own records suggest strongly that the relevant managers of the company must have been consciously ignoring the requirements of the preserved award in relation to the particularised employees. Undoubtedly, lower than award rates of basic pay were being consciously paid, loadings and penalties were being consciously disregarded, and leave entitlements were deliberately not being accrued and allowed. The award was simultaneously being observed in relation to some employees but not others. Mr Zhou's evidence explains this appearance of the records. It is that all employee payments implemented policies or practices which had been established by the sole director and manager of the company prior to Mr Zhou's employment as payroll officer. The policies and practices were then periodically confirmed expressly by Mr Magar to Mr Zhou, when he drew attention to changes to award rates or otherwise sought directions as to wage rates and leave entitlements of particular employees or groups of employees. [156]

- I accept Mr Zhou's evidence to this effect without any reservations, and consider that it allows a confident inference on the balance of probabilities that Mr Magar was at all relevant times consciously aware that each payroll approved by him during the relevant period included underpayments of the particularised employees in relation to their award entitlements. Allowing for the possibility that at times there may have been

particular payrolls which he did not personally examine and approve, I am satisfied that his directions given on other occasions must have been implemented on those occasions, and must have been implemented with his knowledge and approval. I can find no evidence of some other officer or manager of AM Retail, including Mr Zhou himself, being delegated with Mr Magar's absolute control over employees' wage rates. I find that he intended, as sole director and statutory officer of the company, that all of the underpayments of wages evidenced by the company's records should be made, and that all of the denials of the award rates of pay established on the evidence before me occurred with his general knowledge of the rates at which they were being paid and in accordance with his directions. [157]

- I would also find that at all relevant times Mr Magar was aware that, on his directions and with his approval, the company was deliberately ignoring its statutory obligations under the award in relation to every underpayment and disregard of the award which is evidenced in its records. [158]

12. As I have noted, the underpayments occurred in relation to both casual and weekly employees employed at numerous petrol stations. Rates of pay for numerous employees were directed in conscious disregard of the Award rates. There is evidence that some casual employees at some sites acquired by AM Retail were able to maintain their rights to be paid the Award rates, but this seems only to have occurred because those employees were aware of their rights. Essentially, Mr Magar appears to have thought that he could adjust wage rates of other employees in his complete discretion. Some long term employees recruited through personal contacts with Mr Magar were paid flat rates under informal agreements in which he exploited a culture of patronage and the weakness of recently arrived migrants. One such employee, Mr Basta, was paid a very low wage, which was supplemented by cash payments taken at the direction of Mr Magar. The uncertainties of that arrangement meant that I was unable to make findings as to the extent of underpayments to Mr Basta, but the uncertainties of the arrangement with Mr Basta provide no mitigation for Mr Magar's disregard of the award generally. The overall impression is that Mr Magar regarded all his employees as persons whom he could exploit for the financial

benefit of his company through an astute appreciation of their vulnerabilities, and in disregard of their legal entitlements.

13. Mr Magar's involvement in AM Retail's failure to accrue and allow annual leave entitlements, and to address accrued entitlements upon termination, also reflected a very high degree of culpability. AM Retail mostly used a workforce of casual console operators who were not entitled to leave. However, the company also recognised a small group of employees as 'weekly employed' or permanent staff, but denied several of them their leave entitlements. In relation to the leave and termination contraventions which were established, which are ii, iii, iv, and v in the above list, I found:

    - In effect, the evidence points strongly to a conclusion that the leave entitlements of weekly employees were generally disregarded by AM Retail, both in relation to the necessary record-keeping, and in the acknowledgement to employees of any rights to paid leave. Paid leave was only given when a specific direction for this was given by Mr Magar to Mr Zhou or some other manager. Mr Magar generally directed that all console operators were to be treated as 'casual' and were not entitled to paid leave, regardless of the length of their continuous full-time work. He treated the giving of paid leave to long-term employees as a matter for his complete discretion. In my opinion, these circumstances allow me to be satisfied on the balance of probabilities that Mr Magar was, if only indirectly, knowingly concerned in, and an intentional 'party to' all of AM Retail's contraventions flowing from its disregard of its award obligations in relation to the accrual and allowing of paid leave and payments on termination. [164]

14. The non-payment of termination entitlements to permanent employees was not disputed in some cases, and in other cases it was disputed by attempts to discredit the employee in relation to the circumstances of their cessation of employment. I did not accept any of these attacks. No mitigating circumstances emerge in the evidence concerning Mr Magar's involvement in the disregard of termination entitlements. The unpaid amounts were relatively substantial, and there is no evidence that the employees will be paid out of the liquidation of

AM Retail. Moreover, the evidence of the surrounding circumstances of the termination of those employees who were witnesses, suggests that Mr Magar employed his brother Mark as an intermediary in peremptory, unfair, and sometimes threatening conduct, with the object of shedding AM Retail of employees with potentially very substantial claims for unpaid entitlements over the period when its affairs were under investigation by Inspectors Bodkin and Smithers and their colleagues (see paragraphs [63]-[64] concerning Mr Gerges, [67]-[69] concerning Mr Hanna, [79], [89]-[90], and [95] concerning Mr Basta, [100]-[101] concerning Mr Hirmiz, and [113]-[114] concerning Mr Morgan). All these factors point to a very high degree of culpability on the part of Mr Magar.

15. The only entitlements contravention which I consider should attract a lower level of penalty is item xiii in the above list, being the refusal to provide Mr Gerges with a written statement of his employment upon termination. Although I was satisfied at [167] that this probably occurred with the knowing involvement of Mr Magar, I was not satisfied at [168] that Mr Magar had personally adopted or approved a general policy or practice to deny employees this important entitlement. The refusal of the written statement in that case, was, however, aggravated by the surrounding circumstances of Mr Gerges' termination. The callous withholding of the statement probably caused Mr Gerges a deal of anxiety and distress, since he needed it to present to Centrelink and prospective new employers.

16. Mr Magar's involvement in the contraventions of the Regulations also reflects a high degree of culpability. At the highest level, is his falsely instructing the company's solicitor to deny the availability of essential employment records, in response to the inspector's notices to produce records (see [129]-[134] and [179] concerning contravention xix in the above list). In my opinion, his considered defiance of important formal investigatory instruments invites the imposition of the maximum penalty, and, indeed, the maximum of $1,100 appears insufficient in the circumstances.

17. Mr Magar's involvement was indirect in the failure of AM Retail to keep and provide the required employee records. These records would have shown the details of their employment and their various

entitlements under the award and in relation to superannuation, and would have provided accessible data to allow inspectors easily to verify compliance. I found at [175] and [178] that the defects were an obvious consequence of his directions to his payroll clerk to ignore entitlements under the Award which would have required the keeping of such records. Mr Magar was the director and manager of AM Retail with responsibility to ensure compliance by the company with these important record-keeping obligations on a employer. No excuse or explanation for the failure of a substantial employer to keep these vital employment records is shown in the evidence. His disregard of legal recording obligations when supervising the work of his payroll clerk reveals a high degree of culpability in relation to each of the contraventions xiv, xv, xvi, xvii, xviii, and xx in the above list.

Sentencing considerations

18. Counsel for the Fair Work Ombudsman framed his submissions on penalty by reference to headings taken from the well-known list of sentencing considerations suggested in this area by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and summarised by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. The list of considerations can guide, but is not a substitute for *"the unrestrained statutory discretion"* (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]). Ultimately, I must arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offence committed and also takes into account other sentencing considerations including deterrence (cf. Graham J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [54]). The matters which become determinative in each case differ with the particular circumstances, and recent judgments of the Full Court have emphasised the discretionary nature of the power to impose civil penalties for breach of industrial legislation, and have supported a mental process of 'instinctive synthesis' (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smit* (supra) at [27]).

19. My above summary of my findings in my previous judgment, has explained the relevant circumstances of the breaches, pointing to their long duration, their substantial effects on numerous casual and weekly

employees, and their derivation from unlawful employment policies consciously adopted and directed by AM Retail's sole director and responsible manager.

20. I have noted that s.719(2) requires the aggregation of an immense number of repeated breaches of the same provisions of the award which took effect as the AFPCS and a NAPSA, and the aggregation of smaller numbers of breaches concerning important leave and termination rights of weekly employees. Regulation 14.5, which I extracted at [28] of my judgment has the same aggregating effect in relation to the pervasive and long established failure of the employer to keep essential employment records concerning all of its employees, as a result of Mr Magar's directions to his payroll clerks to disregard the award and its implicit recording obligations.

21. I have considered whether the resultant 20 breaches should be regarded as *"properly distinct or arose out of the one course of conduct"*, so as to require an additional aggregation or adjustment of the separate penalties which may be imposed under s.719(1) or reg.14.4, when extended by s.728 to a person knowingly concerned. It has been held that it is within the discretion of a sentencing judge *"to engage in the process of determining whether several acts constituting individual offences should be viewed as a course of conduct"* even where this is not expressly required by statute (see *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [2]).

22. However, it is usual in relation to entitlement breaches such as the present not to apply a 'one transaction' principle, since each type of entitlement serves different purposes, and since the statutory aggregation usually results in sufficient aggregation of penalties to produce an appropriate level of sanction.

23. In the present case, the considerations against treating all or any of the breaches for which Mr Magar is liable for separate penalties as deserving adjustment because of a 'single course of conduct' are, in my opinion, overwhelming. It is true that, in one sense, nearly all of the breaches derive from Mr Magar's general policies and directives to ignore award entitlements and the attendant record keeping and production obligations. However, the implementation of his general policies undoubtedly gave rise to innumerable breaches of the

legislation whose extent needs to be recognised in sentencing. In my opinion, the separate and maximum penalties which the Act and Regulations allow the Court to impose do not give rise to any inappropriate or disproportionate duplication or level of penalty, taking into account Mr Magar's overall culpability for the breaches resulting from his directions which defied relevant industrial laws. In particular, I consider that in this case penalties are appropriately imposed in relation to both the non-payment of particular types of entitlements, and for the failure to keep the records required by the regulations relating to that type of entitlement.

24. Turning to other sentencing considerations, on the evidence before me it is impossible to draw conclusions as to the underlying financial position of AM Retail or Mr Magar, which might explain, excuse, or mitigate against the imposition of substantial penalties. The profitability of the company, or its unprofitability, over the period of the contraventions is not shown, nor is the financial or other benefits flowing to Mr Magar and his family from its operations and from the underpayment of its employees. There is no evidence that Mr Magar could not afford to pay the penalties which I am contemplating.

25. Even if I assume that the company's business was conducted on the borderline of financial viability, this could not justify the disregard of industrial law revealed in Mr Magar's conduct. Undoubtedly the company was being operated by Mr Magar through employment practices which deliberately exploited its workforce by systematic underpayment of award entitlements, to the very substantial benefit of its general financial position. Those practices continued throughout the period of the breaches, from March 2006 until May 2008. The evidence suggests that they may have been implemented for several years prior to that period, and perhaps even from the inception of the company's business. It is likely that they were continued until the company was placed into liquidation while the present matter was pending. If I assume that the disregard of award entitlements enabled AM Retail to compete successfully against multinational petrol retailers, then this competitive edge was obtained in a manner which cannot be tolerated nor excused. For all these reasons, I am unable to find any extenuating circumstances in the business background to Mr Magar's conduct.

26. Nor can I find any mitigating circumstances in Mr Magar's responses to the inspectors' investigations and to these proceedings. Rather, his responses point to aggravating circumstances. I accept, as I narrated in my first judgment, that there was some recognition of underpayments to some Holbrook employees when these were investigated in 2006 and 2007. Some arrears were then paid to the employees, but a deficit remained. Moreover, when the investigation broadened to encompass the matters now before me, Mr Magar and his company adopted strategies of delay, avoidance, misrepresentation and cover-up. Mr Magar's brother Mark and other agents were used as intermediaries in attempts to stall the investigations, while employment practices continued the previous disregard for the provisions of the award and of industrial law. In this respect, I have found that Mark Magar's actions were probably generally taken on the instructions, or at least with the knowing approval, of Mr Magar.

27. After the proceedings were commenced in this Court, Mr Magar's responses continued to be uncooperative and to seek to delay and frustrate the progress of the matter. I recounted such conduct in a judgment explaining how the matter had not progressed in its first ten months (see *Workplace Ombudsman v AM Retail Solutions & Anor* [2009] FMCA 1046). In retrospect, I am not satisfied that Mr Magar ever genuinely engaged in the mediation processes which reached the debacle which I explained in that judgment. In retrospect, I consider that his overt conduct in the course of these proceedings suggests that he never gave instructions to his legal representatives which could have spared the taxpayers the very substantial costs of the present proceedings.

28. When making this point, I imply no criticism of the solicitors and counsel who have appeared for Mr Magar, nor of their discharge of their professional obligations to their client and to the Court. I also accept that the complexity and multiplicity of the allegations brought to the Court, and the resultant complexity of the evidence and submissions tendered by the Fair Work Ombudsman, provides an explanation for much of the protraction of the hearing and finalisation of the matter. However, in short, I am not satisfied that any mitigation or reduction of penalty should be contemplated on the ground of 'cooperation' or 'contrition'. I certainly can find no expression of

regret on Mr Magar's part, nor any genuine intention by Mr Magar to rectify the underpayments which were established in these proceedings.

29. Mr Magar's responses to the inspectors' investigations and to these proceedings, in my opinion, point strongly towards giving considerations of special deterrence the highest possible weight. I am not satisfied that he appreciates, or will ever appreciate, the obligations on a sole director and proprietor of a business such as was conducted by AM Retail, to observe Australian laws governing the payment and recording of employees' entitlements.

30. Considerations of general deterrence of other persons who might be tempted to conduct their businesses with the same disregard of industrial laws, are equally important.

31. The only real mitigating circumstance which I have been able to identify in the evidence before me, is that Mr Magar is not shown to have been previously found liable for penalties for contravention of a relevant industrial law. I accept that this consideration should be taken into account in his favour. However, its weight is diminished by the circumstance that his contraventions continued after he conceded in late 2007 that AM Retail had underpaid some Holbrook employees their entitlements under the award. When balancing this mitigating consideration against his overall culpability, and particularly my finding that he had been consciously disregarding the terms of an award which he knew to be operative, I find that I am unable to give his prior record much weight to diminish the maximum penalties available under the legislation. I consider that it should be given no weight, in relation to his defiance of the inspectors' notices to produce records.

32. Taking into account all of the above matters, I have decided that a uniform penalty of $6,000 is appropriately imposed in relation to each of the entitlement contraventions in the above list. As I explained, the one exception where a lower penalty is appropriate concerns contravention xiii, for which a penalty of $3,000 should be imposed.

33. I have concluded that the maximum penalty of $1,100 should be imposed for the breach of regulation xix. A penalty of $1,000 is appropriately imposed for the breaches of the other regulations.

34. The aggregate total of these penalties is $82,100.

35. I have given careful consideration whether this total penalty produces an excessive response to Mr Magar's overall culpability for the conduct constituting his involvement in these breaches (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [27] and [71]). In my opinion, it does not.

36. I accept that in some cases a multiplicity of 'applicable provisions' within s.719(1) can give rise to deemed separate courses of conduct for the purposes of s.719(2) which may result in excessive penalties in the aggregate. A similar disproportionality might arise under the equivalent provisions governing breaches of the regulations.

37. However, there are other cases where the statutory consolidation of breaches under s.719(2) can mask the gravity of a course of conduct involving repeated underpayments to a large body of employees over a long period, and where the quantum of total underpayments vastly exceeds the available maximum penalties. The aggregated total penalties which can be imposed under s.719(1) and (2) might even appear to be inadequate, if there was conscious disregard of the legal entitlements of vulnerable employees in such cases, even where individual penalties are determined at or near to the maximum. In my opinion, this is such a case.

38. I therefore would not reduce any of the individual penalties under the 'totality' principle.

39. I accept the Fair Work Ombudsman's submission that the penalties should be paid to the Commonwealth.

40. Counsel for the Fair Work Ombudsman submitted that I should also direct that the penalties be distributed to the employees who were underpaid their entitlements in proportion to their underpayments. He submitted that if I gave such a direction, *"the Court ... could properly expect the applicant to ... prepare Orders reflecting that apportionment"*. He submitted that the resultant orders could be supported by analogy with a course I adopted in *Jarvis v Imposete Pty Ltd (No.2)* (2008) 169 IR 458 at [55]-[56]. In that case I directed that part of a penalty imposed on an employer should be paid to

compensate an employee for lost interest, in circumstances where the employer belatedly paid arrears of wages before judgment, and where there was uncertainty as to the scope of the 'interest up to judgment' provision in s.722 in that situation.

41. However, I am not persuaded that I should give the direction sought in the present case, even putting aside a doubt whether this would be within the intended scope of the power in s.841 to direct the application of penalties. In the present case, the penalties are being imposed on a director and not on the employer. The power to give relief under ss.719(6) and (7) and 722, by ordering 'an employer' to remedy the underpayments with interest, is not available against Mr Magar, and the Court has no power to order him personally to compensate the employees for any loss of entitlements (see *Torpia v Empire Printing (Australia) Pty Ltd & Anor* [2009] FMCA 853 at [69]). There is no evidence as to the inability of AM Retail to pay outstanding entitlements in the course of its liquidation, and no evidence as to the extent to which the aggrieved employees may already have proven in the insolvency or have sought relief from the Commonwealth under its 'General Employee Entitlements and Redundancy Scheme (GEERS)'. Moreover, I do not consider it appropriate for the Court to give the general direction in the terms sought, in circumstances where the Fair Work Ombudsman has not presented a readily understandable schedule of the amounts outstanding to particular employees which are referable to the particular breaches of entitlement provisions found by me.

42. The most I am prepared to do is to recommend to the Commonwealth that it should consider exercising its *ex gratia* powers to apply penalties received from Mr Magar to the affected employees of AM Retail, whether under the GEERS scheme guidelines, or by a flexible application of those guidelines, or otherwise with the assistance of the Fair Work Ombudsman.

43. For the above reasons, I make the orders set out at the commencement of this judgment.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: 

Date: 23 December 2010