

CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION: Civil (Federal)

PARTIES:

Applicant: FAIR WORK OMBUDSMAN

First Respondent: ASTERIA JOINERY PTY LTD

Second Respondent: RYAN MARSH

Case No: 78257/09

Hearing Date: 8 June 2010

Date of Decision: 23 July 2010

Legislation: Fair Work Act 2009
Workplace Relations Act 1996, S720, S728

Magistrate: G J T Hart

Representation: Solicitor for the Applicant
Ms L Andelman
Office of the Fair Work Ombudsman

Solicitor for the Second Respondent
Mr P Wayne
Peter M Wayne & Associates

Counsel for the Second Respondent
Mr B Antcliffe

REASONS FOR DECISION

- 1 On 12 April 2010, I made findings and orders as sought by the Applicant herein. The First Respondent, Asteria Joinery Pty Ltd, now in liquidation, had operated a carpentry business and was found to have underpaid eight of its employees. The underpayments gave rise to contraventions of the Australian Pay and Classification Scale in breach of the Workplace Relations Act 1996, as well as contraventions of the Notional Agreement Preserving the Joinery (State) Award. In addition, there was a breach of the Workplace Relations Regulations 2006 whereby the First Respondent failed to issue payslips to its employees.
- 2 In my earlier Decision, findings were made to the effect that the First Respondent had committed seven breaches of the industrial instruments referred to, and, further, that the Second Respondent, being a director and a person involved in the day to day management of the First Respondent, was knowingly concerned in the contraventions within the meaning of S728 of the Workplace Relations Act.
- 3 On 12 April 2010, orders were made against the First Respondent requiring the First Respondent to make payments by way of restitution to the eight employees who were underpaid. The totality of the underpayments is calculated by the Applicant as \$31,389.69.
- 4 When the matter came on for hearing on 8 June 2010, the Court was informed that the First Respondent is in liquidation, and that as a consequence, the restitution orders made on 12 April 2010 are unlikely to ever be complied with. The First Respondent was not represented in Court on that day. Counsel for the Second Respondent conceded that as a matter of practical reality it was most unlikely that the liquidator of the First Respondent would be in a position to make payments to the former employees.
- 5 On 8 June 2010, the matter came before the Court for hearing in relation to the question of what penalties, if any, should be imposed on the Second Respondent given the Court's

earlier finding that he was knowingly concerned in the First Respondent's contraventions within the meaning of S728.

6 It is submitted on behalf of the Applicant that for sentencing purposes there are seven separate contraventions before the Court. Whilst most of the contraventions involve more than one employee and more than one incident of underpayment, the Applicant submits, and I accept, that the scheme of the legislation requires multiple breaches to be treated as a single breach where they arise from the same course of conduct. For example, the Applicant seeks the imposition of a penalty for a breach of S182(1) of the Workplace Relations Act. That contravention relates to a failure on the part of the First Respondent to make any payment at all to eight employees over a period of many weeks. Notwithstanding the fact that there were eight employees involved and more than one pay period, the scheme of the Act requires such conduct to be treated as a single contravention for sentencing purposes.

7 There are three separate contraventions of the Workplace Relations Act, each carrying a maximum penalty of \$6,600.00 for an individual. There are a further three contraventions of the Notional Agreement, again each carrying a maximum penalty under the legislation of \$6,600.00. There is a further breach of the Workplace Relations Regulations which carries a maximum penalty of \$1,100.00. It is submitted on behalf of the Applicant that the Court should impose mid range penalties in relation to each of the seven contraventions in which the Second Respondent was knowingly concerned. The Second Respondent does not have prior contraventions recorded against him. It is submitted that the conduct of the Second Respondent was such that penalties should be imposed and such penalties should be reflective of the Second Respondent's conduct. It is submitted that the First Respondent acted only through the Second Respondent and that he made all decisions as to hiring, firing and the payment of employees. When the First Respondent first fell behind in payments to its employees and they asked for payment, it was the Second Respondent who cajoled them into continuing to work by making promises to the effect that they would get their money "*next week*", but that over time it was found that his promises in that regard were empty and the employees in question worked for some weeks without any payment whatsoever. Later, when the

employees resigned for the purpose of seeking other employment, there were underpayments of annual leave entitlements and annual leave loading. Upon investigation, it was found that even during the period that the employees were being paid, they were not receiving their entitlements to overtime, and in some cases other allowances.

- 8 It is submitted that whilst the Second Respondent was cooperative to a degree during the investigation period, there has been a marked lack of contrition and remorse on his part, and his decision not to contest the findings sought by the Applicant herein as to the contraventions was made at a very late stage and shortly before the matter was due to go to full contested hearing in April 2010.
- 9 The Applicant submits that there is a need for a strong general deterrence factor as well as a specific deterrence factor to be included in any civil penalties imposed by the Court.
- 10 Mr Antcliffe of Counsel for the Second Respondent, asked the Court to refrain from imposing penalties which would crush the Second Respondent and his family. The Second Respondent is married and has a young child. Both the Second Respondent and his wife, Mrs Savannah Marsh, provided witness statements and gave oral evidence at the hearing and were available for cross-examination by the solicitor for the Applicant.
- 11 The Second Respondent's work history is placed before the Court. It reveals that the Second Respondent obtained qualifications as a carpenter, and that within a relatively short number of years he had set up his own business without first obtaining any extensive experience either in his trade or in the conduct of business operations. It would appear that he made the decision to establish his own business in part as a response to some urging by a Mr Williams who then became a "*silent partner*" in the business. The precise nature of the partnership arrangement is entirely unclear. The Second Respondent asserts that at material times prior to late 2008, all of the accounts of the business were managed by Mr Williams' wife and there is some suggestion that Mrs Williams improperly channelled funds from the business into the purchase of personal

items for herself. It is unclear whether action has been taken under either the civil law or the criminal law to recover such assets.

- 12 In any event, after some initial success which caused the business to expand and engage a workforce of eight or ten employees, the First Respondent got into financial difficulties. The Court is informed that the core difficulty was the failure of customers of the First Respondent to pay for the work done, and the failure of the First Respondent to take successful recovery action against such customers. On behalf of the Second Respondent it is submitted that he had never set out to underpay his employees or to deliberately exploit them in any way, but because of the failure of the customers to pay their accounts he simply lacked the funds to pay his employees, but he operated for some time in the hope, now with hindsight seen as a "*forlorn hope*", that such delinquent customers might soon pay up, and in those circumstances, he held out hopes to his employees and indicated that he would be able to pay them in the near future when in fact this would only be possible if the debts to the business were paid.
- 13 Mrs Marsh was an impressive witness. She was candid with the Court and explained the difficulties experienced by her family as a consequence of the failure of her husband's business. Mrs Marsh had taken maternity leave to have her first child and had looked forward to spending time as a fulltime mother, especially in the child's first year. However, because the Second Respondent was unable to pay himself a salary, it had been necessary for her to return to the workforce early and on a fulltime basis, and place her young child into five day per week child care. In due course, the cost of such child care on a five day a week basis proved too great a financial burden, and the child's two grandmothers had been enlisted to assist one day per week each. The parents of Mrs Marsh as well as the parents of the Second Respondent have assisted the family by making substantial loans. It would appear that Mr and Mrs Marsh have substantial commitments by way of mortgage, car loan and credit card debts. While such information was provided to the Court in summary form by way of witness statements, the Court was not provided with supporting documentation of a financial nature, and in those circumstances, such claims could not be appropriately tested in cross-examination.

- 14 Nevertheless, the picture emerges of a young family in serious difficulty as a consequence of financial hardship. This appears to have impacted particularly on Mrs Marsh who has been forced to become the main breadwinner as well as the main child carer, and also taking over from Mrs Williams as the person required to look after the accounts of the business up until the time that it went into liquidation.
- 15 The Court does not have before it the same detailed evidence concerning the financial hardship experienced by the employees of the First Respondent during the period that they were unpaid or underpaid. There is some suggestion that one of the employees found it necessary to leave Sydney and move in with a relative in Kiama due to his financial difficulties. Apart from that, it is unknown how the other employees were affected in terms of their rent or their mortgage payments or their capacity to feed their families, or the strains imposed on their marriages as a consequence of such underpayments. I am prepared to assume, however, that at least in some cases, the impact would have been severe. Many working people live essentially on a week to week basis, and do not have financial reserves or savings to fall back on if they suddenly find themselves unemployed or employed but unpaid. Whilst the Court has considerable sympathy for Mrs Marsh in particular because of the share of the burden that appears to have fallen upon her, the Court cannot lose sight of the underlying purpose of industrial legislation and the creation of industrial instruments which is to regulate the relationship between employers and employees so that employees do not suffer the financial hardship for themselves and their families which would flow from an unregulated environment or one in which an employer could essentially please themselves as to the questions of if, and if so, when, employees are to be paid their wages.
- 16 Whilst I have no doubt that the Second Respondent deeply regrets the position he now finds himself in, encumbered by debt, and forced to look for work as an employed carpenter having become used to being an employer conducting his own business, I am not convinced that such understandable regret flows from any genuine acceptance on the part of the Second Respondent that he should take personal responsibility for the underpayment of his employees. He appears inclined to place the blame on his former customers as though he was a mere conduit. There is no indication of acceptance that

management decisions taken by the Second Respondent may have had some bearing on the failure of the business. It is not unusual for businesses to fail when they grow too fast. A rapidly expanding business which has failed to consolidate its asset backing and credit facilities, can find itself in immediate difficulty because of general economic downturn or some other short term factor.

- 17 The witness statement provided by the Second Respondent suggests that whilst the Second Respondent was well aware of the existence of the Notional Agreement Preserving the Joinery (State) Award, he, nonetheless, proceeded on the basis that at the point of engagement he could make his own arrangements with each employee, and, as such employees were told at the point of engagement what their hourly rate of pay would be, Award obligations would somehow be set aside. Whilst this approach may have been convenient for the Second Respondent, it clearly placed the First Respondent and himself in contravention. In relation to that conduct, it is clear that the employees themselves reject any suggestion that they agreed to waive their entitlement to overtime pay, and, in any event, any such purported agreement to that effect would be a nullity to the extent that the parties to the agreement purported to contract out of the provisions of the relevant industrial instrument.
- 18 Having considered the objective seriousness of each offence, I am of the view that both general and special deterrence factors should be included in any penalties imposed by the Court. The seven offences are clearly not of equal seriousness, and as a consequence, there is some variation in the penalties which will be imposed. The penalties take into account subjective matters including the fact that the Second Respondent has no prior contraventions recorded against him, and the fact that the First Respondent was neither a large nor a long established business operation. The material before the Court suggests that the Second Respondent took on the responsibilities of running his own business prior to the accumulation of the skills, experience and asset backing to carry out that function successfully.
- 19 In relation to any civil penalties imposed by the Court, application is made by the Applicant, that pursuant to S841(b) of the Workplace Relations Act, such moneys be

paid to the eight former employees of the First Respondent, rather than into the Consolidated Revenue Fund of the Commonwealth. In my view, this is an appropriate order to make in circumstances where it is common ground that the eight former employees are unlikely to receive any payments in restitution as a result of the liquidation of the First Respondent. The Applicant has undertaken the mathematical exercise of calculating the percentage of such civil penalties that should be paid to each of the eight former employees, so as to ensure that each employee receives payment in proportion to the quantum of moneys they are owed by the First Respondent. I accept Ms Andelman's calculations in this regard.

20 For the reasons set out above, the Court makes the following orders:-

- 1 Pursuant to S719(1) of the Workplace Relations Act 1996 (Cth) (**WR Act**) a penalty of \$4,400.00 be imposed on the Second Respondent in respect of his contravention of subsection 182(1) of the WR Act in relation to the employment of Craig Potoki, Brett Potoki, Anastasi Constantinou, Amedeo Modellino, Yunus Baykurt, Anthony Holden, Phillip Manton and Eugene Scanlon (**employees**).
- 2 Pursuant to S719(1) of the WR Act a penalty of \$4,400.00 be imposed on the Second Respondent in respect of his contravention of subsection 235(2) of the WR Act in relation to the employment of the employees.
- 3 Pursuant to S719(1) of the WR Act a penalty of \$500.00 be imposed on the Second Respondent in respect of his contravention of subsection 245(1) of the WR Act in relation to the employment of Yunus Baykurt.
- 4 Pursuant to S719(1) of the WR Act a penalty of \$500.00 be imposed on the Second Respondent in respect of his contravention of reg 19.20 of the Workplace Relations Regulations 1996 (Cth) in relation to the employment of the employees.
- 5 Pursuant to S719(1) of the WR Act a penalty of \$500.00 be imposed on the Second Respondent in respect of his contravention of subclause 9.4 of the Notional Agreement Preserving the Joinery (State) Award (**NAPSA**) in relation to the employment of Anastasi Constantinou.
- 6 Pursuant to S719(1) of the WR Act a penalty of \$3,300.00 be imposed on the Second Respondent in respect of his contravention of subclause 23.1 of the NAPSA in relation to the employment of the employees.

- 7 Pursuant to S719(1) of the WR Act a penalty of \$3,300.00 be imposed on the
Second Respondent in respect of his contravention of subclause 29.7 of the
NAPSA in relation to the employment of the employees.
- 8 That 12.71% of the penalties be paid to Craig Potoki.
- 9 That 12.85% of the penalties be paid to Brett Potoki.
- 10 That 18.79% of the penalties be paid to Anastasi Constantinou.
- 11 That 15.33% of the penalties be paid to Amedeo Modellino.
- 12 That 17.00% of the penalties be paid to Yunus Baykurt.
- 13 That 18.43% of the penalties be paid to Anthony Holden.
- 14 That 4.89% of the penalties be paid to Eugene Scanlon.
- 15 That the penalties listed in paragraphs 1-7 be paid within 28 days at the Level 4
Registry of the Court, Downing Centre, 143-147 Liverpool Street Sydney, and
thereafter be remitted by the Registry of the Court to the Office of the Fair Work
Ombudsman for appropriate distribution to the abovenamed eight former
employees.

21 I publish my reasons for decision.

G J T Hart
Industrial Magistrate

23 July 2010