

**IN THE MAGISTRATES' COURT
OF VICTORIA (INDUSTRIAL DIVISION)
AT MELBOURNE**

Court No: Y03727156

BETWEEN

FAIR WORK OMBUDSMAN (a Fair Work Inspector appointed pursuant to section 701 of the *Fair Work Act 2009* (Cth))
of Level 9, 414 La Trobe Street, Melbourne, VIC 3000

PLAINTIFF

AND

BOSEN PTY LTD (ACN 089 354 174)
of Carrington Consulting Pty Ltd, Unit 7/19 Ellingworth Parade,
Box Hill, Victoria 3142

FIRST DEFENDANT

AND

MR HAO CHEN
of Unit 5, 284 Williams Road, Toorak, Victoria 3142

SECOND DEFENDANT

AND

MS XUE JING
of Unit 5, 284 Williams Road, Toorak, Victoria 3142

THIRD DEFENDANT

DECISION ON PENALTY

HEARING DATES: Submissions made in writing with final oral submissions made 31 March 2011.

INTRODUCTION

1. On 17 February 2011 the Court determined liability in this case and made orders and declarations in respect of contraventions by the First, Second and Third Defendants of the *Retail Trade Industry Sector – Minimum Wage Order – Victoria 1997 (MWO)*, the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim Award 2000 (Award)*, the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim (Roping In No 1) Award 2003 (the Roping In Award)*, the Australian Fair Pay and Conditions Standard (AFPCS), which included a preserved Australian Pay and Classifications Scale (APCS) derived from the Award, and the *Workplace Relations Regulations 2006 (WR Regs)*.
2. This decision concerns the imposition of penalties under the *Workplace Relations Act 1996* in respect of those breaches.

BACKGROUND

3. The Court has concluded that the First Defendant contravened the following terms of the MWO, the Award, the Roping In Award and the AFPCS in respect of the employment of Mr Mohamed Rashid Ullat Thodi (Thodi), Mr Tendai Kudzai Mutepfa (Mutepfa), Mr Kholisile Dhlwayo (Dhlwayo), Mr Anshul Goyal (Goyal), Mr Karl Francis Maxwell (Maxwell), and Mr Kwangu Mashumba (Mashumba) (collectively, the Employees) during their employment with the First Defendant:

- a. the terms of the MWO providing for hourly rates of pay for junior casual employees (clause 5.4.3 of the MWO);
- b. the terms providing for minimum ordinary hourly rates of pay in the Award and payment of basic periodic rates of pay contained in the APCS (clause 14 of the Award, clause 23.2 of the Award, section 182(1) of the WR Act (as a term of the AFPCS));
- c. the terms providing for the payment of casual loadings contained in the APCS and minimum hourly rates for casual employees for hours worked between 7am and 10pm, Monday to Saturday (clause 10.4.2(b) of the Award, clause 6(e)(ii) of the Roping In Award, section 185(2) of the WR Act (as a term of the AFPCS));
- d. the terms providing for minimum hourly rates for casual employees for the first two hours on each shift worked between 10pm and 7am, Monday to Saturday (clauses 10.4.2(d)(i) and 29.4.1 of the Award);
- e. the terms providing for minimum hourly rates for casual employees for all other hours worked between 10pm and 7am, Monday to Saturday (clauses 10.4.2(d)(i) and 29.4.1 of the Award);
- f. the terms providing for minimum hourly rates for casual employees for all hours worked after 6pm on Saturdays (clauses 10.4.2(d)(i) and 29.4.2 of the Award);
- g. the terms providing for minimum hourly rates of pay for all hours worked on Sundays (clause 6(d)(iii) of the Roping In Award);
- h. the terms providing for minimum hourly rates of pay for all hours worked on public holidays (clause 10.4.2(d)(iv) of the Award);

- i. the terms requiring payment of a 1/12th loading in lieu of annual leave (clauses 10.4.2(e) and 32.5 of the Award) or alternatively, payment of unused annual leave on termination of employment (clause 32.4.12 of the Award); and
 - j. the terms providing for the frequency of payment of wages to employees (clause 17.1.3 and clause 17.2 of the Award and section 189 of the WR Act (as a term of the AFPCS)).
4. The Court has also concluded that the First Defendant contravened the following provisions of the WR Regs:
 - a. regulation 19.4(1);
 - b. regulation 19.4(2);
 - c. regulation 19.5(1);
 - d. regulation 19.8(1)(d)(iii);
 - e. regulation 19.8(1)(e);
 - f. regulation 19.11(1);
 - g. regulation 19.11(2);
 - h. regulation 19.11(3); and
 - i. regulation 19.14(1)(a) and (b).
5. The Court concluded that the Second Defendant was a person involved in these contraventions on and from 27 March 2006 above for the purposes of section 728 of the WR Act.
6. The Court concluded that the Third Defendant was a person involved in the contraventions of the Award and the AFPCS insofar as such breaches relate to Thodi and Goyal for the purposes of section 728 of the WR Act.

LEGISLATIVE PROVISIONS RELATING TO PENALTY

7. Whilst the alleged contraventions occurred before the commencement of the *Fair Work Act 2009* (FW Act) and the repeal of the WR Act and WR Regs by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transition Act) on 1 July 2009, the Transition Act provides that an application that could have been made or continued by a workplace inspector may be made or continued on and after 1 July 2009 by a Fair Work Inspector.¹ The Plaintiff is a Fair Work Inspector pursuant to section 701 of the FW Act.
8. The Transition Act also provides that the WR Act continues to apply, on and after the repeal of the WR Act, in relation to conduct that occurred before 1 July 2009.² Unless a contrary intention appears, a reference to the WR Act in the Transition Act generally includes a reference to the regulations made for the purposes of the WR Act.³
9. An eligible court⁴ may impose a penalty in respect of a breach of an applicable provision by a person bound by the provision⁵. "Applicable provision" includes an order of the former Australian Industrial Relations Commission, a term of an award, and a term of the Australian Fair Pay and Conditions Standard⁶.
10. 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 are taken to constitute a single breach of the provision⁷.
11. The Court may order a person who contravenes a civil remedy provision in the WR Regs to pay a pecuniary penalty of up to the maximum penalty permissible under paragraph 846(2)(g) of the WR Act⁸.
12. Where two or more contraventions of a civil remedy provision are committed by a person, and each contravention relates to the same action or course of conduct of the person, the contraventions are taken to be a single contravention of the civil remedy provision⁹.

¹ Clause 13(1), Schedule 18 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transition Act).

² Clause 11(1), Schedule 2, Transition Act.

³ Clause 3(2), Schedule 2, Transition Act.

⁴ Defined to include this Court.

⁵ Section 719(1) of the WR Act

⁶ Section 717 of the WR Act

⁷ Section 719(2) WR Act

⁸ Regulation 14.4 and 14.3(2) of Chapter 2 of the WR Regs

Maximum penalties

13. The maximum penalty that may be imposed by this Court for each contravention of the MWO, the Award and the AFPCS is in the case of an individual, 60 penalty units and in the case of a body corporate, 300 penalty units¹⁰.
14. The maximum penalty that may be imposed by this Court for each contravention of the WR Regs is in the case of an individual, 10 penalty units and in the case of a body corporate, 50 penalty units¹¹.
15. A "penalty unit" is \$110. Therefore, the maximum penalty that may be imposed by the Court for each breach of the MWO, the Award and the AFPCS is:
- a. \$33,000 for each breach of an applicable provision by the First Defendant (as a body corporate); and
 - b. \$6,600 for each breach of an applicable provision by the Second and Third Defendants (as individuals).
16. The maximum penalty that may be imposed on the First and Second Defendants by the Court for each contravention of the WR Regs is:
- a. \$5,500 for each contravention by the First Defendant (as a body corporate); and
 - b. \$1,100 for each contravention by the Second Defendant (as an individual).

THE DETERMINATION OF PENALTY

17. The Court must first identify the separate contraventions involved. Each breach of each separate obligation found in the MWO, the Award, the Roping In Award, the AFPCS and the WR Regs in relation to the employment of Thodi, Mutepfa, Dhliwayo, Goyal, Maxwell and Mashumba are each separate contraventions of a term of an applicable provision for the

⁹ Regulation 14.5

¹⁰ Subsection 719(4)(a) of the WR Act

¹¹ Subsection 846(2)(a) of the WR Act and regulation 14.4 of the WR Regs

purposes of section 719 of the WR Act and regulation 14.4 of the WR Regs.¹² However, section 719(2) of the WR Act and regulation 14.5 of the WR Regs provides for treating multiple contraventions of an applicable provision, involved in a course of conduct, as a single contravention.

Identified contraventions

18. The maximum penalty open to the Court to impose in this matter on the First Defendant is \$379,500 and the maximum penalty for the Second Defendant is \$69,300 constituted as follows:

- a. one contravention of clause 5.4.3 of the MWO;
- b. one contravention of clause 14 of the Award / section 182(1) of the WR Act (as a term of the AFPCS) (ordinary hourly rate of pay / basic periodic rate of pay);
- c. one contravention of clause 10.4.2(b) of the Award / clause 6(e)(ii) of the Roping In Award / section 185(2) of the WR Act (as a term of the AFPCS) (25% casual loading);
- d. one contravention of clauses 10.4.2(d)(i) and 29.4.1 of the Award (time-and-a-half for the first two hours on each shift worked between 10pm and 7am, Monday to Saturday);
- e. a further contravention of clauses 10.4.2(d)(i) and 29.4.1 of the Award (double time for all other hours worked between 10pm and 7am, Monday to Saturday);
- f. one contravention of clauses 10.4.2(d)(i) and 29.4.2 of the Award (minimum hourly rates for casual employees for all hours worked after 6pm on Saturdays);

¹² *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).

- g. one contravention of clause 6(d)(iii) of the Roping In Award (minimum hourly rates of pay for all hours worked on Sundays);
- h. one contravention of clause 10.4.2(d)(iv) of the Award (minimum hourly rates of pay for all hours worked on public holidays);
- i. one contravention of clauses 10.4.2(e) and 32.5 of the Award (1/12th loading in lieu of annual leave) or alternatively clause 32.4.12 (payment of unused annual leave on termination of employment);
- j. one contravention of clauses 17.1.3 and 17.2 of the Award / section 189 of the WR Act (frequency of payment);
- k. one contravention of regulation 19.4(1) of the WR Regs;
- l. one contravention of regulation 19.4(2) of the WR Regs;
- m. one contravention of regulation 19.5(1) of the WR Regs;
- n. one contravention of regulation 19.8(1)(d)(iii) of the WR Regs;
- o. one contravention of regulation 19.8(1)(e) of the WR Regs;
- p. one contravention of regulation 19.11(1) of the WR Regs;
- q. one contravention of regulation 19.11(21) of the WR Regs;
- r. one contravention of regulation 19.11(3) of the WR Regs; and
- s. one contravention of regulation 19.14(1)(a) and (b) of the WR Regs.

19. The maximum penalty the Court can impose on the Third Defendant is \$59,400 constituted as follows:

- a. one contravention of clause 14 of the Award / section 182(1) of the WR Act (as a term of the AFPCS) (ordinary hourly rate of pay / basic periodic rate of pay);
- b. one contravention of clause 10.4.2(b) of the Award / clause 6(e)(ii) of the Roping In Award / section 185(2) of the WR Act (as a term of the AFPCS) (25% casual loading);
- c. one contravention of clauses 10.4.2(d)(i) and 29.4.1 of the Award (time-and-a-half for the first two hours on each shift worked between 10pm and 7am, Monday to Saturday);
- d. a further contravention of clauses 10.4.2(d)(i) and 29.4.1 of the Award (double time for all other hours worked between 10pm and 7am, Monday to Saturday);
- e. one contravention of clauses 10.4.2(d)(i) and 29.4.2 of the Award (minimum hourly rates for casual employees for all hours worked after 6pm on Saturdays);
- f. one contravention of clause 6(d)(iii) of the Roping In Award (minimum hourly rates of pay for all hours worked on Sundays);
- g. one contravention of clause 10.4.2(d)(iv) of the Award (minimum hourly rates of pay for all hours worked on public holidays);
- h. one contravention of clauses 10.4.2(e) and 32.5 of the Award (1/12th loading in lieu of annual leave) or alternatively clause 32.4.12 (payment of unused annual leave on termination of employment);

- i. one contravention of clauses 17.1.3 and 17.2 of the Award / section 189 of the WR Act (frequency of payment).

FACTORS RELEVANT TO PENALTY

20. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act have been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 (Pangaea), [26]-[59], 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 cooperated 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.

21. This summary was adopted by Tracey J in *Kelly v Fitzpatrick*¹³. While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.¹⁴

Nature and extent of the conduct

22. Over a four year period, (and relevantly on and from 27 March 2006 in respect of the Second and Third Defendants), the Defendants engaged the Employees on a casual basis to work a variety of day and night shifts in a 24 hour convenience store and deliberately paid them flat rates of pay well below that which was required. Despite having received some basic IR training and regular updates from Head Office regarding the applicable rates of pay, the Defendants failed to pay the Employees any casual, shift, weekend or public holiday penalties, despite the Employees working a variety of hours that attracted such penalties under the Award. The existence of shift and holiday penalties are a well known feature of the Australian workplace landscape.
23. Further, some of the Employees were not paid at all for a 'training period' before they commenced paid work. This "training period" equated to several weeks of free labour in most instances. The Defendants not only received a significant benefit from the underpayments but also received this free bonus.¹⁵ The conduct was a systematic and significant exploitation of highly vulnerable workers.

¹³ (2007) 146 IR 14; (2007) FCA 1080 at [14]

¹⁴ *Sharpe v Dognia Enterprises Pty Ltd* (2007) FCA 1550, [11]; *Merringtons* at [91] per Buchanan J.

¹⁵ *Bradford v Gippstel Pty Ltd and Anor* (unreported, Magistrates' Court of Victoria, Case No. W03183952, Hawkins M) at paras [46] and [48] (Gippstel).

24. The Defendants took advantage of the Employees' status as international students who had recently arrived in Australia on student visas (which allowed for maximum work of up to 20 hours per week), to study full time and were seeking part-time or casual work to assist them in their studies. The Defendants made out that they were "*doing them a favour*" by only recording half the hours worked which made payslips look like the Employees were receiving double the flat rate they actually received.
25. The conduct in this case is significantly aggravated by the failure of the First Defendant to keep the required time and wage records, and the destruction of any records which were kept. This prevented the Plaintiff from ascertaining the full extent of the underpayments and has prejudiced the ability of the Plaintiff to recover the full amount potentially owed to the Employees.

Circumstances in which the conduct took place

26. The First Defendant carried on the 7Eleven retail businesses in Geelong and South Yarra, Victoria.
27. Mr Chen was responsible for the overall direction, management and supervision of the First Defendant's operations which included setting and adjusting the pay rates and wages for the Employees. Mrs Jing was involved in employing and setting wage rates in respect of two employees, Thodi and Goyal. The evidence shows that the Defendants deliberately failed to pay the Employees their minimum entitlements in accordance with the law and showed a complete disregard of the First Defendant's obligations to make or maintain appropriate time and wage records.
28. The exploitation affected young international students (4 teenagers at the time) who had only recently arrived in Australia who were particularly vulnerable.
29. Prior to the involvement of "Unite" an unregistered "union", The Employees were not particularly well versed in industrial and employment matters or aware of any rights they had under relevant industrial instruments.

Nature and extent of loss or damage

30. The underpayments are vast. The Employees were underpaid throughout the entire duration of their employment with some receiving less than half of what they were entitled to. The amounts of the assessed underpayments of \$25,341.16 for Thodi, \$40,582.76 for Mutepfa, \$4,263.36 for Dhliwayo, \$15,845.36 for Goyal, \$1,341.87 for Maxwell and \$1,882.41 for Mashumba are significant sums of money for employees who rely on the minimum wage.

31. The number of alleged contraventions relating to the employment of the Employees by the First Defendant is also significant.

Similar previous conduct

32. There is no evidence before the Court of any other contraventions by the Defendants.

Whether the breaches arose out of the one course of conduct

33. There is one course of conduct in the determination of paying a flat hourly rate of pay. This determination is one course of conduct, but involves multiple contraventions of penalty rate, annual leave and similar provisions which are 'notorious' in Australian workplace culture.

34. The breaches concerned multiple employees but will be treated as a single course of conduct.

Size of the business

35. The First Defendant was not a large employer. It operated two 7Eleven shops in Geelong and South Yarra, Victoria which were owned and operated by the Second and Third Defendants.

36. However, despite the apparent small size of the businesses and apparent lack of dedicated human resources personnel, the Defendants had the benefit of a franchise

arrangement with a global corporation and were assisted by 7Eleven Head Office to understand their legal obligations.

37. Mrs Jing received training about workplace laws from 7-Eleven head office in 2001 and Mr Chen in 2003 in English. They have limited oral and written English skills and relied up on employee managers for assistance in translation of general and often out of date documentation about wages and conditions received from head office. The breaches may have occurred through ignorance to a degree, however the Defendants are engaged in multiple business operations in an English speaking jurisdiction. They are not vulnerable workers. Ignorance is no excuse for non compliance with legal obligations. There is no evidence they sought clarification of this advice in their native language to ensure they understood and complied with their legal obligations.

38. 7Eleven Head office sent regular wages updates to the business of the Defendants.

Deliberateness of the breaches

39. This was a deliberate and calculated campaign to pay the Employees less than what they were legally entitled to and to obtain free labour and therefore a competitive advantage in the marketplace. They were not breaches brought about by naïve ignorance. The Defendants' ignored training and regular updates and must have been wilfully blind to the well known legal obligations of every small business operator.

Involvement of senior management

40. Mr Chen was involved in the contraventions of the First Defendant. Ms Jing was involved in the contraventions insofar as they relate to Messer's Thodi and Goyal.

Personal circumstances of the defendants

41. As a result of these investigations 7-Eleven threatened the Defendants with a Notice of Termination of their franchise agreement. Apparently the businesses have been sold. The Defendants' chose not to put any material before the Court relating to their financial or personal circumstances.

Contrition, corrective action, co-operation with authorities

42. There is no evidence of any contrition shown by the Defendants for their contraventions. They have maintained a refusal to accept liability/responsibility, have made no concessions and have fully defended their actions which were plainly in breach of the Award/AFPCS and the WR Regs.
43. The Defendants have also taken no corrective action. They have not repaid any of the underpayments despite acknowledging the Employees had been underpaid to some extent.
44. The Defendants have also provided limited cooperation with the Plaintiff. They have admitted no contraventions which has lengthened the litigation process and increased costs to the public purse.

Ensuring compliance with minimum standards

45. One of the principal objects of the WR Act is the maintenance of an effective safety net, and effective enforcement mechanisms. Further, one of the principal objects of the WR Regs is the making and retention by employers of records relating to the employment of employees and the inspection of records by workplace inspectors.
46. The substantial penalties set by the legislature for breaches of such minimum entitlements and record keeping obligations reinforce the importance placed on compliance with minimum standards.

Specific and general deterrence

47. It is well-established that "*the need for specific and general deterrence*" is a factor that is relevant to the imposition of a penalty under the WR Act.

48. The Plaintiff submits the need for specific deterrence is high in this case. The Second and Third Defendants are currently operating a 7-Eleven store in the Melbourne suburb of South Yarra and currently employ persons to work in this store.
49. 7-Eleven management admitted to the Court that non compliance with workplace laws was relatively common amongst 7-Eleven franchises. An education and compliance audit of 7-Eleven stores conducted by the Plaintiff found 30% to be in contravention of relevant workplace laws. The role of general deterrence in this case is large.
50. 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.¹⁶
51. 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 (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them.

Appropriate penalty for each contravention?

52. The Court must consider an appropriate penalty to impose in respect of each contravention, having regard to all of the circumstances of the case.
53. Given the factors outlined above the appropriate starting penalty for each contravention is in the order of 60%.

Common elements in contravention?

54. 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

¹⁶ See paragraph [25] 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).

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 Defendants did.¹⁷ This task is distinct from and in addition to the final application of the "totality principle".¹⁸

55. The Plaintiff submits the contraventions of the MWO, Award and the AFPCS fall into the following 7 distinct groups:

- a. failure to pay the required minimum ordinary hourly rates of pay and basic periodic rates of pay contained in the APCS: (clause 14 of the Award / section 182(1) of the WR Act (as a term of the AFPCS));
- b. failure to pay casual loadings contained in the APCS and the Award: (clause 10.4.2(b) of the Award / clause 6(e)(ii) of the Roping In Award / section 185(2) of the WR Act (as a term of the AFPCS));
- c. failure to pay the required minimum rates of pay for all hours worked after 10pm Monday to Saturday: (clauses 10.4.2(d)(i) and 29.4.1 of the Award);
- d. failure to pay the required minimum rates of pay for all hours worked after 10pm on Saturday night and Sundays: (clauses 10.4.2(d)(i) and 29.4.2 of the Award and clause 6(d)(iii) of the Roping In Award);
- e. failure to pay the required minimum hourly rates of pay for all hours worked on public holidays: (clause 10.4.2(d)(iv) of the Award);
- f. failure to pay 1/12th loading in lieu of annual leave, or alternatively to pay unused annual leave on termination of employment: (clauses 10.4.2(e) and 32.5 of the Award or alternatively clause 32.4.12 of the Award);

¹⁷ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [46] (Graham J) (Merringtons).

¹⁸ *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] (Stone and Buchanan JJ) (Mornington Inn).

- g. failure to pay frequent weekly or fortnightly wages according to the actual hours worked each week or fortnight: (clauses 17.1.3 and 17.2 of the Award / section 189 of the WR Act).

56. The Defendants accept that the first six categories of breach are generally appropriate, but submit that the 7th grouping of offences (at 56 g above) contain no elements which are independent of the first six categories. The issue before the Court was the quantum of payments and not the timing or regularity of wages. As such the payment of the actual hours worked is an essential element of the requirement to pay an employee the appropriate hourly rate, casual and other loadings and amount in lieu of annual leave. To punish for a breach of this seventh category would be duplicitous.

57. I will impose penalty in respect of six categories of breach of the MWO, Award and the AFPCs. The maximum penalty for each Defendant in respect of these categories is therefore:

- a. First Defendant 6 @\$33,000 = \$198,000 (60% = \$118,800)
- b. Mr Chen 6 @\$6,600 = \$39,600 (60% = \$23,760)
- c. Ms Jing 6 @\$6,600 = \$39,600 (60% = \$23,760)

58. The Plaintiff submits contraventions of the WR Regs fall into the following 5 distinct groups ('The Record Keeping contraventions'):

- a. failure to make and keep records: (regulation 19.4(1) & regulation 19.4(2));
- b. failure to keep records in an appropriate condition to enable a workplace inspector to determine entitlements: (regulation 19.5(1));
- c. failure to include the specified contents in the records: (regulation 19.8(1)(d)(iii) and regulation 19.8(1)(e));

- d. failure to include in the records details of the rate of remuneration paid: (regulation 19.11(1), regulation 19.11(2), regulation 19.11(3)); and
- e. failure to include records relating to the termination of an employee's employment: (regulation 19.14(1)(a) and (b)).

59. The Defendant submits the First Defendant has breached only three principal obligations:

- a. To Make or cause to be made a record in accordance with the Regulations, specifically Division 1 of Part 9A to the *WR Regs 2006* (Reg 131A *WR Regs 2006* and Reg 19.4(1) *WR Regs 2006*) (record making obligation);
- b. To keep, or cause to be kept records for a period of seven years (Reg 131A(2) and Reg 131VA *WR Regs 1996* and Reg 19.4(2) *WR Regs 2006*) (record keeping obligation); and
- c. To maintain records in a condition which allows a workplace inspector to determine whether the employee is receiving his or her entitlements (Reg 131B and Reg 131VB *WR Regs 1996* and Reg 19.5 *WR Regs 2006*) (condition of records obligation).

60. The Defendants submit that each of the seven contraventions relate to the record making obligation imposed by Division 1 of Part 9A of the *WR Regs 1996* and Division 3 of Part 19 under the *WR Regs 2006*. As such, they submit each of these contraventions have the same elements as the more general record making obligation at Reg 131A *WR Regs 2006* and Reg 19.4(1) *WR Regs 2006*.

61. The WR Regulations relate to quite distinct obligations. I consider it inappropriate to treat these breaches as substantially the same conduct. I will group these breaches in accordance with the 5 categories outlined at paragraph 56 above.

62. I will impose penalty in respect of 5 categories of breaches of the WR Regulations. The maximum penalty in respect of each Defendant is therefore:

- a. First Defendant 5 @ \$5,500 = \$27,500 (60% = \$16,500)

- b. Second Defendant 5@\\$1,100= \\$5,500 (60%= \\$3,300)
- c. Third Defendant no liability for these breaches.

Totally principle

63. Finally, having fixed an appropriate penalty for each 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 breaches¹⁹ and is not oppressive or crushing.²⁰ The Court should apply an "instinctive synthesis" in making this assessment.²¹

64. I note that the second and third Defendants are a married couple.

65. 60% of the total penalty faced by the First Defendant is therefore \$135,300.

66. 60% of the total penalty faced by the Second Defendant is therefore \$27,060.

67. 60% of the total penalty faced by the Third Defendant is therefore \$23,760

CONCLUSION

68. Giving final consideration to these penalties I consider the appropriate penalty to be applied to the first Defendant is \$120,000.

69. Giving final consideration to these penalties I consider the appropriate penalty to be applied to the second Defendant is \$20,000.

70. Giving final consideration to these penalties I consider the appropriate penalty to be applied to the third Defendant is \$10,000.

¹⁹ See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

²⁰ *Kelly v Fitzpatrick* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

²¹ *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

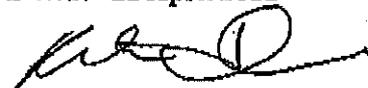
ORDERS

1. **The First Defendant pay an aggregate penalty of \$120,000;**
2. **The Second Defendant pay an aggregate penalty of \$20,000;**
3. **The Third Defendant pay an aggregate penalty of \$10,000;**
4. **The First Defendant pay the penalty referred to in order 1 to the Consolidated Revenue Fund of the Commonwealth;**
5. **The Second and Third Defendants pay the penalties referred to in orders 2 and 3 as follows:**
 - a. **First, to the individuals listed in Schedule A, in the amounts listed therein.**
 - b. **Second, the balance to the Consolidated Revenue Fund of the Commonwealth.**
6. **The payment of the penalties referred to in orders 1 to 3 be stayed for 30 days from the date of this order.**

SCHEDULE A

1. Mr Mohamed Rashid Ullat Thodi - \$28,410.56 (less applicable tax);
2. Mr Tendai Kudzai Mutepe - \$45,498.28 (less applicable tax);
3. Mr Kholisile Dhlwayo - \$4,779.75 (less applicable tax);
4. Mr Anshul Goyal - \$17,764.60 (less applicable tax);
5. Mr Karl Francis Maxwell - \$1,504.40 (less applicable tax); and
6. Mr Kwangu Mashumba - \$2,110.41 (less applicable tax).

Dated: 21 April 2011



K.I. HAWKINS

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MAGISTRATE