CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION: Civil (Federal)

PARTIES:
Applicant: FAIR WORK OMBUDSMAN
(previously WORKPLACE OMBUDSMAN)

First Respondent: CHIMEARA MEDIA GROUP PTY LTD (in liquidation)

Second Respondent: LESLIE GRAEME BEARD

Case No: 88793/08

Hearing Date: 13 October 2009, written submissions

Date of Decision: 30 August 2010

Legislation: Workplace Relations Act 1996

Magistrate: G J T Hart

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

The First Respondent was not before the Court

The Second Respondent appeared in person

REASONS FOR DECISION

1 The proceedings before the Court concern only the Second Respondent herein. In circumstances where the First Respondent was, at the time of the hearing, a company in liquidation, the Applicant advised the Court that no relief was sought against the incorporated entity. The proceedings continued against the Second Respondent who was, at all material times, a director and owner of the First Respondent.

2 The originating Summons alleges that the corporate First Respondent is guilty of eleven separate contraventions of the Workplace Relations Act and Regulations made thereunder in relation to the employment of three employees who were engaged to work in the First Respondent's restaurant. Further, the Summons alleges that the Second Respondent, as director and the person with managerial responsibility for payroll matters was involved in the contraventions within the meaning of S728 of the Workplace Relations Act.

3 The Second Respondent admits that the First Respondent contravened the legislation as alleged by the Applicant. Further, the Second Respondent admits that he was involved in the contraventions within the meaning of S728 of the Workplace Relations Act, as alleged. In cooperation with the Applicant, the Second Respondent has agreed that the Court be provided with a document headed *"Agreed Statement of Facts and Admissions"*. That document, which became Exhibit 5 in the proceedings, sets out in considerable detail the relevant background facts and circumstances, and details the impact of the specific contraventions on each of the three affected employees, Ms Britten, Ms Hamilton and Ms Tait.

4 The Agreed Statement of Facts and Admissions includes the following:-

"SF1 The First Respondent was from 27 March 2006 a company incorporated under the provisions of the Corporations Act 2001 (Cth).

SF2 On 2 March 2009, a Court ordered the First Respondent to wind up and appointed a liquidator.

SF3 As at 15 September 2009 a search of the ASIC database indicated the status of the First Respondent as in liquidation.

SF4 The Second Respondent was from 27 March 2006 to the date that this Agreed Statement of Facts was entered a Director and Secretary of the First Respondent.

SF5 *The Second Respondent had control of the day to day operations of the business of the First Respondent at all times relevant to these proceedings.*

SF6 *The Second Respondent had control of and processed payments of wages to employees of the First Respondent, including to Ms Britten's, Ms Hamilton's and Ms Tait's (together 'the Complainants').*

SF7 *The Second Respondent had control with respect to negotiations of the Complainants' terms and conditions of employment, including rates of pay, at all times relevant to these proceedings.*

SF8 *Prior to 26 March 2006, the First Respondent was bound by the terms and conditions of the Restaurant &c Employees (State) Award ('Award'), an Award of the Industrial Relations Commission of New South Wales.*

SF9 *On 18 September 2009 the Second Respondent informed the Applicant that he intends to voluntarily pay by 14 October 2009 the following amounts to the Complainants which constitutes the whole of the alleged underpayment of entitlements:*

a) Ms Britten: $1,527.47;
b) Ms Hamilton: $1,819.02; and
c) Ms Tait: $3,072.39

SF15 *On or about 2 May 2007, the Second Respondent terminated Ms Britten's employment with the First Respondent without notice.*

The Employment

Amy Britten

SF16 *During Ms Britten's employment with the First Respondent, the First Respondent failed to pay Ms Britten:*

a) a minimum rate of pay for each of her guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to the employee under a preserved Australian Pay and Classification Scale derived from the Award ('APCS');
b) weekend and public holiday penalty rates for work performed on Saturday, Sunday and public holidays;
c) 1 week's pay in lieu of notice on termination; and
d) her accrued statutory entitlement to personal/carer's leave on 19 February 2007 and 20 February 2007, totalling 11 hours.

Anna Hamilton

SF17 *On 1 February 2006, Ms Hamilton commenced employment with the First Respondent.*

SF22 *By virtue of Ms Hamilton's age and the operation of clause 13 of the Award, Ms Hamilton was a junior employee under the Award throughout her employment with the First Respondent.*

SF24 *On or about 11 December 2006, Ms Hamilton resigned from her employment with the First Respondent.*

SF25 *During Ms Hamilton's employment with the First Respondent, the First Respondent failed to pay Ms Hamilton:*

a) a minimum rate of pay for each of her guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to the employee under the APCS;

b) *rest pauses in accordance with the Award;*
c) *overtime and penalty rates for work performed on Saturdays and Sundays between 27 March 2006 and 6 December 2006; and*
d) *1/12 of her rate of pay as her annual leave entitlement as a casual employee.*

Janiene Tait

SF26 On 15 May 2006, Ms Tait commenced employment with the First Respondent.

SF31 On 19 July 20007, the Second Respondent, on behalf of the First Respondent, terminated Ms Tait's employment with the First Respondent, without notice.

SF32 During her employment with the First Respondent, the First Respondent failed to pay Ms Tait:

a) *a minimum rate of pay for each of her guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to the employee under the APCS between 15 May 2006 and 14 February 2007;*
b) *penalty rates for work performed on Saturdays and Sundays between 27 March 2006 and 6 December 2006;*
c) *1/12 of her ordinary pay as her annual leave entitlement whilst employed as a casual employee;*
d) *for each hour of annual leave taken at a rate no less than the basic periodic rate of pay that was payable to her under the APCS;*
e) *leave loading on annual leave;*
f) *accrued annual leave on termination of employment;*
g) *rest pauses in accordance with the Award; and*
h) *notice of termination of employment.*

Breach of section 182 – failure to pay APCS

SF33 The complainants were entitled to be paid a basic periodic rate of pay for each of their guaranteed hours that was at least equal to the basic periodic rate of pay that was payable to the each of them under the APCS.

SF34 The First Respondent failed to pay the complainants the basic period rate of pay prescribed under the APCS, resulting in underpayments to each of them.

Breach of the Regulations – Failure to make a copy of a record available

SF107 Pursuant to Workplace Relations Regulation 2006 (Regulations) 19.18 of Chapter 2 of the Regulations the First Respondent was required to make a copy of a record available to a workplace inspector on his/her request.

SF108 Inspector Bodkin issued a Request for Records on the First Respondent on 9 July 2008.

SF109 The First Respondent failed to make a copy of the records sought in the Request for Records issued on 9 July 2008 available to Inspector Bodkin as required by the Request for Records.

Breach of the Regulations – Failure to provide payslips

SF110 Pursuant to Regulation 19.20 of Chapter 2 of the Regulations the First Respondent was required to provide Ms Britten with a payslip containing the prescribed particulars within one day of payment being made.

SF111 The First Respondent failed throughout the period of the employment to provide Ms Britten with payslips within one day of payment being made.

SF112 The First Respondent failed throughout the period of the employment to provide Ms Britten with payslips in accordance with Regulation 19.20 of Chapter 2 within one day of payment being made.

Admission of breaches

SF113 The Second Respondent admits he was involved in each of the contraventions pleaded in the Summons filed on 16 December 2008 in these proceedings which include:

a) Breach of subsection 182(1) of the WR Act – APCS in regard to the complainants;

b) Breach of subsection 245(1) of the WR Act – personal/carer's leave in regard to Ms Britten;

c) Breach of subsection 235(1) of the WR Act – annual leave rate at basic periodic rate in regard to Ms Tait;

d) Breach of subsection 235(2) of the WR Act – annual leave on termination in regard to Ms Tait;

e) Breach of subclause 17.1 of the award – annual leave loading in regard to Ms Tait;

f) Breach of subclause 9.3.2 of the award – 1/12 annual leave to casual in regard to Ms Tait and Ms Hamilton;

g) Breach of subclause 11.1 of the award – overtime and penalty rates in regard to the complainants;

h) Breach of subclause 4.4.1 of the award – notice of termination in regard to Ms Tait and Ms Britten;

i) Breach of subclause 7.2 of the award – rest break in regard to the complainants;

j) Breach of Regulation 19.18 of Chapter 2 of the Regulations – make record available to Inspector; and

k) Breach of Regulation 19.20 of Chapter of the Regulations – provision of payslips in regard to Ms Britten."

5 In addition to the Agreed Statement of Facts and Admissions, the Court was provided with the Affidavit evidence of Inspector Bodkin of the Fair Work Ombudsman's Office (Exhibit 1), the Affidavit of Anna Hamilton (Exhibit 2), the Affidavit of Amy Britten (Exhibit 3) and the Affidavit of Janiene Tait (Exhibit 4).

6 Having considered the evidentiary material before the Court, I am able to make the following findings:-

1 The employer has breached:

a) Subsection 182(1) of the Workplace Relations Act 1996 ("the Act");

b) Subsection 245(1) of the Act;

c) Subsection 235(1) of the Act;

d) Subsection 235(2) of the Act;

e) Ch 2 reg 19.18 of the Workplace Relations Regulations 1996 ("the Regulations")

f) Ch 2 reg 19.20 of the Regulations;

g) The following applicable provisions of the Restaurant &c Employees (State) Award ("Award") and Annual Holidays Act 1944 (NSW) a term of the Notional Agreement Preserving a State Award ("NAPSA").

i) Subclause 4.4.1

ii) Subclause 7.2

iii) Subclause 9.3.2

iv) Subclause 17.1

v) Subclause 11.1

2 By reason of section 728(1) of the Act, the Second Respondent was involved in the employer's contraventions listed above.

7 No penalties are sought against the First Respondent, given that the company is in liquidation. The issue before the Court is to determine the appropriate penalties to be imposed upon the Second Respondent in relation to each of the eleven contraventions that have been found to have occurred, and which the Second Respondent has admitted. It is also necessary for the Court to consider the question of what is the appropriate total of penalties to be imposed.

8 Nine of the contraventions carry a maximum penalty of $6,600 each. The remaining two contraventions, being contraventions of Regulation 19.18 and 19.20 carry maximum penalties of $1,100 each. Consequently, the Second Respondent faces a potential maximum total penalty of $61,600 in relation to the eleven contraventions.

9 Ms Andelman, for the Applicant, provided the Court with submissions which draw attention to the helpful summary of relevant issues within the sentencing process provided by Federal Magistrate Mowbray in Mason v Harrington Corporation Pty Ltd

[2007] FMCA 7, as well as the observations of his Honour Mr Justice Tracey in Kelly v Fitzpatrick (2007) 166 IR 14, and his Honour Mr Justice Buchanan in Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8.

10 It is clear that the contraventions extended over a considerable period of time and involved three employees. But for the express provisions of S719(2) of the Workplace Relations Act, the Second Respondent would be faced with sentencing on a much greater number of contraventions. S719(2) provides that where two or more breaches of an applicable provision are committed by the same person, and the breaches arose out of a course of conduct by that person, the breaches shall be taken to constitute a single breach of a term of the relevant industrial instrument.

11 Notwithstanding the number of contraventions, it is clear that in dollar terms the quantum of the underpayments were not substantial when regard is had for the period over which they accumulated. In the case of Ms Britten, the underpayment totalled $1,152.47 gross. In the case of Ms Hamilton, the underpayment totalled $1,419.02 gross, and in the case of Ms Tate, $3,072.39 gross. Whilst these underpayments may well have had real significance for the affected employees at the relevant time, it is appropriate for the Court to take into account, within the sentencing process, the relatively low quantum of the underpayments when compared with the extent of underpayment in other cases brought before the Court for sentencing.

12 It is necessary for the Court to give consideration to the objective seriousness of the contraventions. It is submitted on behalf of the Applicant that at the very least the Court should conclude that the Second Respondent was *"extremely careless"* in relation to the task of researching his obligations to employees. The written submissions provided on behalf of the Applicant include the following:-

> *"5.21 There is no evidence that the breaches were deliberate. Nor is there any evidence that the employer was under a misapprehension of their obligations. It is clear that Mr Beard was extremely careless in failing to properly ascertain his obligations under the law."*

13 The Second Respondent seeks the leniency of the Court and attributes the contraventions to a lack of knowledge and expertise in relation to industrial law generally and, more

specifically, in relation to the obligations upon an employer under the industrial instrument in question and industrial legislation. Further, the Second Respondent asks the Court to take into account his desire, and the desire of his business partner, to assist vulnerable people such as teenagers and members of the Aboriginal community by giving them work and opportunities when he was conducting the business in question. It is not part of the Applicant's case that the Second Respondent went out of his way to engage vulnerable employees. It flows entirely from the Second Respondent's own submissions in mitigation. Superior Courts of record in other proceedings have advanced the proposition that an employer of a vulnerable employee has a special and additional responsibility to protect such employee because of their vulnerability, and that an employer which has failed in its obligations to such an employee, may face higher penalties as a consequence.

14 It is clear that some employers go out of their way to employ persons who, for one reason or another, may find it difficult to obtain employment generally. It may be because they are young and have no qualifications or prior work experience, they may face discrimination on grounds of race due to racial stereotyping, or they may suffer from a physical disability or handicap which requires some special arrangements at the workplace to accommodate. Where an employer goes out of their way to assist such vulnerable employees, such conduct should be acknowledged and applauded.

15 There is, however, unfortunately, another side to the question. Some employers may prefer to employ vulnerable persons because it is their perception that such persons will be easier to exploit because of their vulnerability. Persons who find it difficult to obtain employment at all may well be perceived as being less likely to complain if they receive pay and other benefits that are below the legally permitted minimum rate set by industrial instruments.

16 Unfortunately for the Second Respondent, the material before the Court of an evidentiary nature does not present him as a compassionate, caring employer who set out to assist vulnerable employees because he wished to assist them in some way. On the contrary, the Affidavit evidence before the Court shows emphatically that the Second Respondent

behaved as a bad-tempered bully prone to the use of abusive language including obscene and offensive language in the workplace towards his employees. The Affidavits disclose that the Second Respondent was particularly inclined to behave in this fashion if the employees dared to ask him about underpayments of wages, sick leave entitlements and so on. I am left with the conclusion that the Second Respondent had a low opinion of his own employees and his failure to ensure that they received their minimum lawful entitlements under the industrial instrument flowed from his attitude to his employees and not simply from a lack of knowledge or expertise in the field of industrial law. This conclusion is reinforced by the conduct of the Second Respondent when he was made aware of the underpayments. Decent and conscientious employers do make honest mistakes in payroll matters. They are sometimes quite complex and difficult to apply accurately. Such employers are usually horrified when they discover that they have accidentally underpaid a valued employee. They respond by prompt rectification, accompanied by heartfelt apologies. No such response has been observed in the case of the Second Respondent herein. Indeed, in this case there has been a marked absence of genuine contrition or remorse, and no evidence of any genuine attempt to provide restitution to the three employees who were underpaid.

17 The First and Second Respondents were previously unknown to the Applicant, and there is no evidence that the Respondents have previously breached any law, whether relating to industrial legislation and prescription or otherwise. Consequently, the Second Respondent is entitled to the degree of leniency usually afforded to a first offender. It is appropriate for the Court to take into account the fact that the business in question was a relatively small concern being operated by a partnership comprised of the Second Respondent herein and a Ms Yeates. From the material before the Court, it would appear that Ms Yeates had fulltime employment elsewhere and her involvement in the conduct of the business was very much on a part-time basis. There is no evidence that either the Second Respondent or Ms Yeates, had any prior experience in the conduct of a business in the hospitality industry. From the material before the Court, it would appear that Mr Beard, the Second Respondent, was predominantly interested in the business of property investment and he had purchased the building where the business was conducted with a view to renovating the building and letting it to tenants. However, a failure to secure a

reliable tenant to pay rent for the area suitable for a cafe resulted in the Second Respondent finding it necessary to venture into the cafe business himself rather than leave the space unoccupied and unproductive in terms of rent. The venture was unsuccessful and the cafe closed in circumstances where the Second Respondent was apparently unable to make the business run at a profit. It is clear that the Second Respondent retains considerable bitterness about the failure of the business and, it would appear, is inclined to blame his employees in circumstances where, he is convinced, someone was taking money from the till on a regular basis. The Second Respondent does not identify any particular person whom he suspects in that regard. It may well be the case that the Second Respondent's view as to the reason for the failure of his business, explains to a degree his failure to make any serious attempt to reimburse the employees when the underpayments were clearly established and he recognised that the money was in fact owed. It may also explain the apparent lack of remorse or contrition.

18 It is also appropriate for the Court to take into consideration the fact that the Second Respondent has cooperated with the Applicant to the extent that is evidenced by the joint tender to the Court of the Agreed Statement of Facts and Admissions, and the agreement that the Affidavit evidence be received by the Court without each deponent being subjected to cross-examination. Whilst this cooperation followed a lengthy period of delay and non cooperation, the stance adopted by the Second Respondent in relation to the hearing itself, has real utilitarian value and should be acknowledged.

19 The Applicant contends that any penalties set by the Court should include both a general deterrence factor and a specific deterrence factor. The Applicant submits that a general deterrence factor is required because it is important for all employers to receive a clear message that failure to pay employees their minimum lawful entitlements constitutes a serious breach of the law and will be punished appropriately. Further, the Applicant submits that a specific deterrence factor is required in circumstances where the Second Respondent demonstrates a lack of remorse and may well embark upon the conduct of other businesses in the future when he will again employ staff, and that he should be specifically deterred from again conducting himself with careless disregard for his legal

obligations towards such employees. The Applicant asks the Court to impose penalties in the middle to high range.

20 The Second Respondent informs the Court that he is not engaged in any employment, and that rather than start a new business venture, it is his intention to apply for the pension as he is of pensionable age. The Second Respondent informs the Court that he lacks both income and realisable assets, and that in those circumstances, he is in no position to pay a substantial fine. This Court, being a Local Court in the State of New South Wales, is guided by the provisions of the Fines Act New South Wales. S6 of the Fines Act requires the Court to take into account when sentencing the financial position of a defendant, and to take into account a defendant's capacity or incapacity to pay a fine. Relevant authority further guides the Court in relation to the exercise of the Court's discretion in this regard. Such authority makes clear that the Court should not necessarily accept assertions of impecuniosity from the bar table in the absence of relevant documentation tendered in evidence and available to be tested by a prosecuting authority. I note that in this case the Second Respondent has refrained from placing before the Court any documentation concerning his financial affairs, including the financial affairs of companies of which he is a director. Information provided to the Court by the Second Respondent, but unsupported by documentary evidence, would indicate that a company of which the Second Respondent is a director and owner, is the registered proprietor of the building in which the cafe business previously operated. After a period in which the premises were not used, a new tenant has been found and that company receives rent for the premises. Further, the Second Respondent informs the Court that he is the registered proprietor of a house which he shares for residential purposes with Ms Yeates. The Second Respondent further informs the Court that notwithstanding the income flow being generated by the successful letting of the commercial building, the investment is barely breaking even in circumstances where the property was purchased and renovated utilising a bank loan well in excess of $1,000,000. No material has been received by the Court which would assist the Court in assessing the income controlled by the Second Respondent or his day to day financial needs. In all the circumstances, I am unable to make a finding to the effect that the Second Respondent is impecunious and incapable of paying a substantial fine.

21 It remains for the Court to give consideration to the seriousness of each of the eleven separate offences.

22 Of the eleven offences, there are two which stand out, in the view of the Court, as being more serious than the others. The breach of S182(1) of the Workplace Relations Act, involved the ongoing failure of the First Respondent to pay Ms Britten, Ms Tait and Ms Hamilton, the required minimum rate of pay for hours worked regularly between Monday and Friday of each week. Clause 11.1 of the relevant industrial instrument, namely the Notional Agreement Preserving the Restaurants &c Employees (State) Award, was consistently breached in that the First Respondent failed to pay to its employees any overtime payments when overtime was worked, or penalty rates when the employees were rostered to work on weekends. Again, this was an ongoing breach on the part of the First Respondent. Having considered the objective seriousness of these offences, as well as the subjective matters which mitigate in favour of the Second Respondent, I find that for each of the two offences, the appropriate civil penalty is $4,000.

23 The First Respondent contravened S235(1) of the Act by failing to pay annual leave payments to Ms Tait. Further, the First Respondent breached S235(2) by failing to pay accrued annual leave entitlements to Ms Tait at the time of termination. Clause 9.3.2 of the industrial instrument was contravened when the First Respondent failed to pay the casual rate of 1/12 annual leave increment to both Ms Tait and Ms Hamilton. Clause 4.4.2 of the industrial instrument was contravened when the First Respondent failed to pay wages in lieu of notice at the time of termination of both Ms Tait and Ms Britten. These four breaches are less serious than the first two referred to above in that they had less impact on the employees than the ongoing failure to pay appropriate wages including overtime and penalty rates. In my view, having considered the objective seriousness of these offences as well as the subjective matters which mitigate in favour of the Second Respondent, the appropriate penalty in each case is $2,200.

24 S245(1) of the Workplace Relations Act was contravened by the First Respondent when Ms Britten was unpaid when she took personal/carer's leave. This occurred on more than one occasion but was not a regular occurrence. Clause 17.1 of the industrial instrument was contravened when the First Respondent failed to pay annual leave loading to Ms Tait as required by that clause. Clause 7.2 of the industrial instrument was contravened when the First Respondent failed to pay for rest breaks taken by employees. In my view, these three offences are of a less serious type when the objective seriousness of each offence is considered within the overall context of the employment relationship. In my view, an appropriate penalty in relation to these three offences is $1,200 for each offence.

25 There remain the two contraventions of the Workplace Relations Regulations, namely Regulation 19.18 and 19.20. These breaches concern the failure of the First Respondent to provide payslips to Ms Britten as well as the failure of the First Respondent to make time and wages records available to an authorised inspector of the Fair Work Ombudsman's Office in circumstances where valid notices to produce documents had been served upon the First Respondent and, unfortunately, ignored. As indicated earlier in these Reasons for Decision, some delay was caused in the investigation of this matter by the non-cooperative attitude displayed by the First and Second Respondents, notwithstanding the subsequent and helpful cooperation provided by the Second Respondent after these proceedings were commenced. I regard these as relatively serious offences in that both the provision of payslips to employees in a timely fashion, as well as the provision of time and wages records to an authorised inspector in a timely fashion, are vital to the proper administration of the Workplace Relations Act and the entire system of industrial regulation which is designed to ensure fairness and a lack of disputation in the workplace. Each contravention carries a maximum penalty of $1,100. In my view, the appropriate penalty in each case should be $750.

26 The eleven civil penalties referred to above total $21,900. Having considered the principle of totality, I am not satisfied that there is any sound basis upon which I should reduce the penalties set out above. It is clear that but for the provision found in S719(2) of the Workplace Relations Act, the Second Respondent would be facing a much greater

number of individual breaches, given that more than one employee was involved and some of the offences occurred on numerous occasions, indeed on a weekly basis. Further, for the reasons discussed earlier in these Reasons for Decision, the Second Respondent has failed to provide any evidentiary material that would support a finding that he is incapable of paying a substantial penalty.

27 Consequently, the orders of the Court are as follows:-

1 The Second Respondent is to pay a total penalty in the sum of $21,900 for his involvement in the contraventions.

2 The penalty is to be paid to the employees pursuant to S841(b) of the Workplace Relations Act within 28 days, in the following amounts:-

a)	Ms Britten	$1,152.47
b)	Ms Hamilton	$1,419.02
c)	Ms Tait	$3,072.39)

3 The remaining amount of the penalty is to be paid to the Commonwealth pursuant to S841(a) of the Act, within 28 days.

4 Orders 1, 2 and 3 hereof will be satisfied if the Second Respondent, within 28 days, remits to the Applicant, the Fair Work Ombudsman, the sum of $21,900, to enable the Applicant to make the appropriate payments to the three former employees with the balance of the penalty paid into the Consolidated Revenue Fund of the Commonwealth.

28 I publish my reasons for decision.

G J T Hart
Magistrate

30 August 2010