IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE

INDUSTRIAL DIVISION

Case No. X03557374

FAIR WORK OMBUDSMAN — Plaintiff

v

COMPUMARK PTY LTD — Defendant

and

GIUESEPPE DE SIMONE — Second Defendant

and

ALAN EVERS- BUCKLAND — Third Defendant

SUMMARY OF FINDINGS OF BREACH
ORDERS FOR PAYMENT OF ENTITLEMENTS
REASONS FOR DECISION ON PENALTY
ORDERS FOR PAYMENT OF PENALTIES

MAGISTRATE:	K. HAWKINS
WHERE HELD:	MELBOURNE
DATE OF HEARING:	15,16 MARCH, 31 MAY, 1,2,3 JUNE, 27 JULY, 2 SEPTEMBER 2010
DATE OF DECISION:	1 DECEMBER 2010

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms Serpell	Hunt & Hunt
For the First Defendant	No appearance	
For the Second Defendant	In person	
For the Third Defendant	In person	

A. SUMMARY OF FINDINGS OF BREACH

1. On 2 September 2010 the Court determined that the Defendants had contravened the following provisions in respect of Francois Guegan:
    (a) Clause 13.2.2 of the *Liquor and Accommodation Industry – Restaurants – Victoria - Award* 1998 (Award) (until and including 26 March 2006) by failing to pay the minimum casual hourly rates for work performed between the hours of 7.00 am to 7.00 pm, Monday to Friday;
    (b) Section 182(1) of the *Workplace Relations Act 1996* (WR Act) (on and from 27 March 2006) by failing to pay the minimum hourly rates (as contained in the preserved Australian Pay and Classification Scale (APCS) derived from clause 13.2.2 of the Award) for work performed between the hours of 7.00 am to 7.00 pm, Monday to Friday;
    (c) Section 185(2) of the WR Act (on and from 27 March 2006) by failing to pay the casual loading contained in the preserved APCS derived from the Award;
    (d) Clause 26.3.1 of the Award by failing to pay an additional hourly amount for each hour worked between the hours of 7.00 pm and midnight, Monday to Friday;
    (e) Clause 26.3.2 of the Award by failing to pay an additional hourly amount for each hour worked between the hours of midnight and 7.00 am, Monday to Friday;

(f) Clause 26.2.1 of the Award by failing to pay the minimum hourly rates of pay for hours worked on Saturdays; and

(g) Clause 26.2.2 of the Award by failing to pay the minimum hourly rates of pay for hours worked on Sundays.

2. The First Defendant contravened the following provisions in respect of Rachel Ellis:

(a) Section 182(1) of the *Workplace Relations Act 1996* (WR Act) by failing to pay the minimum hourly rates (as contained in the preserved Australian Pay and Classification Scale (APCS) derived from clause 13.2.2 of the Award) for work performed between the hours of 7.00 am to 7.00 pm, Monday to Friday;

(b) Section 185(2) of the WR Act (on and from 27 March 2006) by failing to pay the casual loading contained in the preserved APCS derived from the Award;

(c) Clause 26.3.1 of the Award by failing to pay an additional hourly amount for each hour worked between the hours of 7.00 pm and midnight, Monday to Friday;

(d) Clause 26.2.1 of the Award by failing to pay the minimum hourly rates of pay for hours worked on Saturdays; and

(e) Clause 26.2.2 of the Award by failing to pay the minimum hourly rates of pay for hours worked on Sundays.

3. The Second Defendant contravened the provisions referred to in paragraphs 1 and 2 above by reason of his involvement in the First Defendant's contraventions, pursuant to section 728 of the WR Act.

4. The Third Respondent contravened the provisions referred to in paragraphs 1 and 2 above by reason of his involvement in the First Defendant's contraventions, pursuant to section 728 of the WR Act.

5. The Court ordered a calculation of the wages and superannuation entitlements to be paid to each of the employees, based upon findings of fact made on 2 September 2010. Following receipt of those calculations the Court now orders:

B. ORDERS FOR PAYMENT OF ENTITLEMENTS

(a) The First Defendant pay Francois Guegan $6,258.19 plus interest of $1,105.29;

(b) The First Defendant pay to the Hospitality Industry Portable Liquor Union Superannuation Trust Deed (HOST PLUS) the amount of $802.92 in respect of Francois Guegan's underpaid wages;

(c) The First Defendant pay Rachel Ellis $1,444.94 plus interest of $255.19;

(d) The First Defendant pay to HOST PLUS the amount of $130.04 in respect of Rachel Ellis's underpaid wages.

6. The Court adjourned to allow the parties to make written submissions in regard to the consequential penalties to be imposed.

7. On 27 September 2010 the Plaintiff filed an outline of submission on penalty and a further affidavit of Fiona Pickett dated 27 September 2010.

8. On 25 October 2010 the Third Defendant filed his submission on penalty.

9. No submissions were received from the First or Second Defendants.

10. The Second Defendant sought and was afforded the opportunity to cross examine Ms Pickett on the issues raised in her affidavit on 1 December 2010. Mr De Simone did not attend Court on this day.

C. REASONS FOR DECISION ON PENALTY

Relevant Legislative Provisions

11. This prosecution is brought under the *WorkPlace Relations Act* 1996, in relation to breaches of the *Liquor and Accommodation Industry - Restaurants – Victoria – Award* 1998 and various terms of the *Australian Fair Pay and Conditions Standard* as contained within the *Workplace Relations Act* 1996.

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

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

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

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

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

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

The Court's approach to determining penalty

18. The Court must firstly identify the separate contraventions involved. Each breach of each separate obligation found in the Award and the AFPCS in relation to each claimant, is a separate contravention of a term of an award, order or applicable provision for the purposes of s.178 of the pre-reform WR Act and s.719 of the WR Act.[1]

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

20. Second, the Court must then consider an appropriate penalty to impose in respect of

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

each contravention (whether a single contravention alone or as a course of conduct), having regard to all of the circumstances of the case.

21. Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Defendants should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the Defendant did.[2] This task is distinct from and in addition to, the final application of the "totality principle".[3]

22. Finally, having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.[4] The Court should apply an "instinctive synthesis" in making this assessment.[5]

Factors relevant to penalty

23. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act has been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*,[6] 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;

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

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

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

5 *Merrington's*, supra at 567-8 [27] (Gray J) and 572 [55] and 577 [78] (Graham J).

6 [2007] FMCA 7 at [26]-[59].

(f) the size of the business enterprise involved;

(g) whether or not the breaches were deliberate;

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

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

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

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

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

(m) the need for specific and general deterrence.

24. This summary was adopted by Tracey J in *Kelly*.[7] 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.[8]

Nature and extent of the conduct which led to the breaches

25. The underpayments claimed amount to almost $7,000 in respect of two employees. Mr Guegan and Ms Ellis were employed for five months and four months respectively. These were significant sums over a short period of employment to have been deprived, particularly given they were not highly paid employees. These employees were reliant upon the minimum safety net and have been deprived of the financial benefits that timely payment of correct entitlements would have delivered. Mr Guegan was on a temporary visa and English is not his first language.

26. Whilst superannuation contributions were made by the First Defendant in respect of the wages the employees were paid during their employment, this was not paid until more than one year after their employment ended.

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7 Supra, at [14].

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

Circumstances in which the conduct took place

27. The Defendants alleged that AWA's covered the employee's employment, yet there is no evidence that AWA's were lodged. The Defendant's were on notice that the Workplace Ombudsman that failure to lodge an AWA would mean that the Award or AFPCS would apply to the employment.

28. The attitude of the Second Defendant to this advice was demonstrated by his statement to the Court, that the effect of the provisions of the *WorkPlace Relations Act* was to *"remove the dead hand of centralised wage fixing, and to remove awards."* He argued the agreements in this case were *"freely entered into between equal parties...they were offered shifts at a rate and they accepted them".* He asserted he should therefore be able to rely on the purported AWA's.

29. The actions of the Defendant were an attempt to ride roughshod over established legal entitlements.

30. The contraventions applied throughout the entire period of employment.

31. The Defendants asserted their employees were covered by AWA's. Evidence before the Court is illustrative of the repeated efforts by the Plaintiff to inform the Defendants of the process involved with lodgement and registration of these instruments. The Defendants have deliberately avoided legislative compliance to ensure that AWA's are operative, and thereby pay lesser rates of pay than would otherwise apply for employees covered by the Award.

32. Despite partially acknowledging an underpayment to Ms Ellis, the Defendant has not payed even the outstanding amount admitted.

33. The fact that the Defendants have successfully lodged one AWA for an employee engaged prior to Ms Ellis and Mr Guegan strongly suggests that the Defendants were aware of the correct process but deliberately chose not to do so in respect of these employees.

Similar previous conduct

34. There are no recorded Court outcomes alleged against the Defendants. The Plaintiff submits however that the assertions of the First Defendant were engaged under AWA's indicates that the contraventions are more wide-spread than the two employees the

subject of these proceedings. Whether or not this assertion could be substantiated has not been tested by the Court and accordingly is not a relevant factor in the consideration of penalty.

35. Specific deterrence is however a relevant factor. There has been no conduct on behalf of the First and Second Defendant to give the Court any confidence that they will ensure compliance with their obligations in this regard in the future.

Whether the breaches arose out of the one course of conduct?

36. Each of the breaches identified give rise to a separate and distinct award obligation. There is a connection between the breaches which is relevant to the penalty to be imposed.

Size of the business

37. The business is relatively small, however the employees were engaged by a "labour hire" company, which ought be considered to have expertise in and knowledge of relevant industrial instruments and workplace laws.

Financial Circumstances of the Defendants

38. No evidence of financial capacity was tendered to the Court by the First or Second Defendants.

39. The Third Defendant complied with a summons for production on or about 16 March 2010. He produced what appears to be a complete set of his financial records for recent years. A Notice of Assessment dated 24 February 2010 records a taxable income in the year ending 30 June 2007 of $15,170, and for the year ending 30 June 2009, a taxable income of $19,141. He also documents various debt repayment agreements. He also tendered financial information by way of affidavit. His employment with Cape was terminated by the Second Defendant on 6 June 2010, without notice. He filed documentation to prove that he is currently unemployed and seeking unemployment benefits.

Deliberateness of the breaches

40. I conclude that the Defendants knew that the AWA's were not lodged in a way which would render them operative. The Second Defendant has proved himself in Court to be extremely knowledgeable and capable of understanding complex legal issues. He was

aware of the legislation and sought to use it to his financial advantage. By failing to lodge the AWA in the case of the first employee he avoided scrutiny of the employment relationship in comparison to the "no disadvantage" test in operation at the time. I conclude the breaches by the First Defendant, through the action of the Second Defendant were deliberate.

41. I note that the acknowledged underpayments have not been rectified.

Involvement of Senior Management

42. The Second Defendant, described as the "owner" of the business was involved centrally in the contraventions proved.

43. The Third Defendant, described as the "eyes and ears" of the Second Defendant was also centrally involved in the contraventions, however he was clearly the "gopher" for the Second Defendant, rather than a directing mind. The evidence demonstrates he did:

    (a) Alter employee's timesheets to the employee's detriment; and

    (b) Maintained throughout Ellis's employment that she was only entitled to $14.50 per hour, as opposed to the $15 per hour stipulated in her purported contract, which exacerbated the underpayment she was already suffering by reason of the Defendant's insistence that the purported AWA governed her employment.

Contrition, corrective action & cooperation with the enforcement authorities

44. The Second Defendant has demonstrated broad significant disrespect for government agencies. This is illustrated by his TFN declarations purportedly signed by "Captain Featherstone" and "Luigi Incredible" which actually bear the Second Defendants' signature.

45. The Second Defendant was advised early on in the investigation that no AWA's had been lodged in relation to the employees employment in accordance with the WR Act and that, accordingly the Award/AFPCS applied to their employment. Despite that clear advice the Defendants have maintained their argument that they legally paid the employees pursuant to the AWA and were not required to pay the employees in accordance with the Award/AFPCS and persisted in failing to rectify the identified

underpayments. Those underpayments have still not been rectified.

46. Absolutely no corrective action has been taken by the Defendants. There is no evidence that other employees are being paid correctly.

47. The Defendants' contested these proceedings vigorously, yet called no evidence to prove their defence. The case was listed to accommodate the Second Defendants' other engagements yet he repeatedly sought last minute adjournments. I conclude that the manner in which the Second Defendant conducted his case was designed to obfuscate, frustrate and prolong this litigation.

48. There is a total absence of any demonstrable or meaningful contrition on the part of the First and Second Defendants.

49. The Third Defendant has expressed his remorse for his involvement in the matter, through his submission on penalty. I accept there is no evidence to contradict his assertion that he did not personally profit from his involvement, above the wages received for the position he occupied.

50. The Third Defendant has cooperated with the Plaintiff's investigation and has complied with Court directions.

51. Mr Evers-Buckland submits that his current employment prospects have been diminished through adverse publicity resulting from these proceedings.

Ensuring compliance with minimum standards

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

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

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

"*It is necessary for all parties to awards to be aware that the obligations in them are*

part of the law of the land and must be obeyed..."[9]

"In this connection it is important that the respondent – and other employers bound by the award and by other awards under the Act – understand the importance of complying with an award...They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed."[10]

Specific and general deterrence

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

56. General deterrence is an important factor, regardless of the size of the First Defendant and its financial position. The law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others.[11]

57. 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.

58. Employers need to be reminded that un-lodged AWA's are not valid and cannot therefore override the conditions provided for in the Award/AFPCS and that assertions to the effect that AWA's have been lodged when in fact they have not will not be an excuse for a failure to correctly pay employees.

Maximum Penalties

59. The maximum penalty that may be imposed by this Court on the First Defendant, applicable to each of the breaches of the Award and the AFPCS during the whole of the relevant period, $33,000.[12] The maximum penalty that may be imposed on the Second and Third Defendants applicable to each of the breaches of the AFPCS, for the

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

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

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

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

whole of the relevant period on and from 27 March 2006, is $6,600. [13]

60. The Defendant breached the following provisions of the Award:

(a) Failure to pay the minimum casual hourly rates for work performed between the hours of 7.00 am to 7.00 pm, Monday to Friday (Clause 13.2.2 of the Award);

(b) Failure to pay the minimum hourly rates for work performed between the hours of 7.00 am to 7.00 pm, Monday to Friday (Section 182(1) of the WR Act);

(c) Failure to pay the casual loading (Section 185(2) of the WR Act);

(d) Clause 26.3.1 of the Award by failing to pay an additional hourly amount for each hour worked between the hours of 7.00 pm and midnight, Monday to Friday;

(e) Failure to pay an additional hourly amount for each hour worked between the hours of midnight and 7.00 am, Monday to Friday (Clause 26.3.2 of the Award);

(f) Failure to pay the minimum hourly rates of pay for hours worked on Saturdays (Clause 26.2.1 of the Award); and

(g) Failure to pay the minimum hourly rates of pay for hours worked on Sundays (Clause 26.2.2 of the Award).

61. All provisions of the Award and WR Act were breached repeatedly by the Defendants in respect of the employees. Each occasion is a separate breach; however s. 719(2) of the WR Act and s. 178(2) of the pre-reform WR Act operate so as to limit those breaches to one breach of each provision of the Award or WR Act. Effectively the minimum number of breaches for consideration is seven, albeit they arise out of the same factual course of conduct.

62. Accordingly the maximum penalty that the Court could impose on the First Defendant is $231,000 constituted by one breach of each of the provisions outlined above.

63. Similarly the maximum penalty the Court could impose upon each of the Second and Third Defendants is $46,200.

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

64. It is not inappropriate to consider the maximum penalties that could be imposed on the Defendants, as part of the comparative exercise of assessing where the current contraventions sit.[14]

65. However, some of the breaches have common elements and this should be taken into account in considering an appropriate penalty to ensure that the Defendants are not punished more than once for the same or substantially similar conduct.

Conclusion

66. Whilst the Plaintiff submits that the breaches fall into seven distinct groups, I prefer their alternative submission and conclude that the breaches be considered to fall into the following four distinct groups:

    (a) Failure to pay minimum hourly rates of pay for work performed during ordinary hours on weekdays;

    (b) Failure to pay a casual loading;

    (c) Failure to pay additional amounts for overtime worked during weekdays; and

    (d) Failure to pay minimum hourly rates of pay for work performed on weekends.

67. When grouped this way, the maximum penalty applicable to the First Defendant would be $132,000 and to the Second and Third Defendants, $26,400.

68. Having regard to the penalty considerations outline above I conclude that a penalty which is 75% of the maximum should apply in respect of the First and Second Defendants. That is a penalty of $99,000 for the First Defendant and a penalty of $19,800 for the Second. A penalty of 20%, being $5,200 should apply in respect of the Third Defendant.

69. Having fixed these penalties for the course of conduct the Court must take a final look at this aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches. Given the factors put in mitigation for the Third Defendant, an "instinctive synthesis" of the factors suggest this penalty is too harsh.

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14 *Mornington Inn v Jordan* (2008) 168 FCR 383 at [88] (Stone and Buchanan JJ).

Accordingly I reduce the penalty applicable to him to $2000. The penalties calculated for the First and Second Defendants are appropriate.

70. In addition to the orders above relating to the payment of wages, superannuation and interest I make the following penalty orders.

D. ORDERS FOR PAYMENT OF PENALTIES:

In respect of the contraventions outlined above the Court orders that:

1. The First Defendant pay a penalty of $99,000;

2. The Second Defendant pay a penalty of $19,800;

3. The Third Defendant pay a penalty of $2000;

4. That the payments referred to at paragraphs 1 to 3 herein be paid to the Consolidated Revenue of the Commonwealth within 30 days.

K. I. Hawkins

MAGISTRATE

1 DECEMBER 2010