IN THE MAGISTRATES' COURT
OF VICTORIA
INDUSTRIAL DIVISION
AT MELBOURNE

No. Y03663145

BETWEEN

FAIR WORK OMBUDSMAN

Plaintiff

and

DMB INVESTMENTS PTY LTD

First Defendant

and

DAVID McPHERSON BLACK

Second Defendant

DECLARATIONS AND ORDERS

1. The First Defendant contravened the following provisions of the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000* (**the Award**), the *Shop Distributive and Allied Employees Association – Victorian Shops Interim (Roping- in No. 1) Award 2003* (**the Roping-in Award**) and the Australian Fair Pay and Conditions Standard (**AFPCS**), which included a preserved Australian Pay and Classifications Scale (**APCS**) derived from the Award:

   (a) clause 10.4.2(b) of the Award and clause 6(e)(ii) of the Roping-in Award as preserved by the APCS;
   (b) clause 6(d)(iii) of the Roping-in Award; and
   (c) clause 10.4.2(e) and clause 32.5 of the Award.

2. The Second Defendant was involved in the contraventions specified in declaration 1 within the meaning of subsection 728(1) of the *Workplace Relations Act (Cth) 2006* (**the WRAct**).

3. By reason of declaration 1, the Second Defendant contravened the following provisions of the Award, the Roping-in Award and the APCS:

   (a) clause 10.4.2(b) of the Award and clause 6(e)(ii) of the Roping-in Award as preserved by the APCS;
   (b) clause 6(d)(iii) of the Roping-in Award; and
   (c) clause 10.4.2(e) and clause 32.5 of the Award.

THE COURT ORDERS THAT:

4. The First Defendant pay to Ms Rowe the amount of $4,697.12 (less tax);

5. The First Defendant pay to Ms Rowe interest owed pursuant to Statute;

6. Pursuant to subsection 841(a) of the WR Act, the First Defendant pay into the Consolidated Revenue Fund of the Commonwealth, an aggregate penalty of $22,000.00.

7. Pursuant to subsection 841(a) of the WR Act, the Second Defendant pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of $4,620.00.

8. The payment of the pecuniary penalties referred to in Orders 6 and 7 above be made within 30 days of the date of this Order.

Dated: 12 August, 2010.

REASONS FOR DECISION

Introduction

1. DMB Investments Pty Ltd (**DMB**) operates a newsagency and lotto business in Elsternwick, Victoria. From 29 April, 2007 to 8 January, 2009 DMB employed Ms Gayle Rowe as a retail assistant providing customer service. Ms Rowe was classified as a casual employee working various hours Monday to Saturday and every third Sunday. For each hour worked, Ms Rowe was paid a flat hourly rate of $18.00.

2. The plaintiff is a workplace inspector pursuant to s701 of the WR Act. On 14 December, 2009 the plaintiff filed a Complaint and Summons in this Court alleging DMB had underpaid Ms Rowe. The plaintiff also alleged the second defendant, Mr David Black, the sole director and shareholder of DMB, was involved in the contraventions contrary to s 728 of the WR Act.

3. A Statement of Agreement Facts was filed with the Court on 30 April, 2009. By that document, DMB admits contravening the following terms of the *Shop, Distributive and Allied Employees Association – Victoria Shops Interim Award 2000* (**the Award**), the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim (Roping In No. 1) Award 2001* (**the Roping-In Award**) and the Australian Fair Pay and Conditions Standard (**the AFPCS**) which included a preserved Australian Pay and Classifications Scale (**APCS**) derived from the Award, in respect of Ms Rowe:

   (a) the terms providing for a minimum hourly rate of pay for casual employees for hours worked between 7am and 10pm Monday to Saturday – clause 10.4.2(b) of the Award and clause 6(e)(ii) of the Roping-In Award;
   (b) the terms providing for minimum hourly rates of pay for all hours worked on Sundays – clause 6(d)(iii) of the Roping-In Award; and

(c) the terms providing for additional payment of annual leave to casual employees – clause 10.4.2(e) and clause 32.5 of the Award.

4. DMB admits that contraventions referred to above resulted in underpayment of wages and entitlements to Ms Rowe totalling $4,697.12. This amount remains unpaid. Mr Black further admits to his involvement, within the meaning of s728 of the WR Act, in the contraventions.

Maximum Penalties

5. The plaintiff seeks the imposition of a penalty on the first and second defendant pursuant to s 719 of the WR Act. The plaintiff concedes that the defendants have the benefit of s719(2), which treats multiple breaches arising out of a course of conduct as a single breach, in relation to the repeated breaches of the Award, Roping-In Award and the AFPCS.

6. It follows therefore, that the maximum penalty that may be imposed in this case is $99,000 in respect of DMB and $19,800 in respect of Mr Black, constituted as follows:

(a) one breach of clause 10.4.2(b) of the Award and clause 6(e)(iii) of the Roping-In Award;
(b) one breach of clause 6(d)(iii) of the Roping-In Award; and
(c) one breach of clause 10.4.2(e) and clause 32.5 of the Award.

Factors relevant to Penalty

7. Factors relevant to penalty have been considered in a number of decisions to which I have been referred: see for instance, *Mason v Harrington Corporation Pty Ltd t/a Pangaea Restaurant & Bar* [2007] FMCA 7 and *Kelly v Fitzpatrick* (2007) 166 IR 14. These cases set out a non-exhaustive list of factors which, in light of the objects of the WR Act, may be considered in determining an appropriate penalty. I analyse the circumstances of this case in light of these considerations below.

Nature and Extent of the Conduct

8. The breaches admitted by the defendants occur over the entire two-year period of Ms Rowe's employment with DMB. The underpayment totalling $4697.12 is not an insignificant amount for an employee, in her 50's, reliant upon a minimum wage. Moreover, I accept that the defendants have received a benefit from the underpayment, which to date, remains outstanding.

9. Submissions made on behalf of the defendants contend that the failure to pay the appropriate rate of pay on Mondays-Saturdays and on Sundays, whilst two distinct contraventions have a common element, that is, a failure to pay the applicable award minimum hourly rate of pay. Accordingly, the defendants argue they should not be penalised twice for what is essentially the same conduct.

10. Guidance on this issue is provided by the authority of *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992)37 FCR 216 in which Gray J observed:

> *The object of s178(2) (the equivalent of s719(2))appears to be that a party bound by an award ands pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of action which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of one obligation, merely because it has acted in breach of another. ...each separate obligation imposed by an award is tob e regarded as a "term", for the purposes of s178 of the Act. If the different terms impose cumulative obligations or obligations which substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty in respect of breaches of some terms, but a substantial penalty in respect of others"* (emphasis added).

11. Accordingly, whilst there is some force in the submission that the same conduct gave rise to the respective breaches, it is equally clear that there are two distinct obligations imposed by the award provisions, with a significantly higher hourly rate imposed by clause 6(d(iii) of the Roping-In Award for Sunday work[1]. To the extent that the obligation to pay a penalty to casual employees for work performed Monday to Saturday and on Sundays, overlaps, I have taken that into account in determining penalty.

Circumstances in which the conduct took place

12. The evidence of Mr Black[2], which was not challenged by the plaintiff, is that DMB purchased the newsagency and lotto business in April, 2007 and that, as owner, he essentially continued the employment practices of the previous owner of the business in paying employees a flat hourly rate of between $16.00 and $18.00 depending on their age and experience. Mr Black's evidence is that he first became aware of the underpayment when contacted by the Fair Work Ombudsman following the termination of Ms Rowe's employment.

13. However, in my view it is clearly incumbent upon all employers, large or small, to exercise due diligence to ascertain the extent of their obligations to their employees at law. This is critical to ensure employees receive the full benefit of the award safety net of minimum wages and conditions. In this particular case, I note that DMB employs three full-time employees and up to 12 part-time staff[3]. It was insufficient for DMB, and Mr Black as the "directing mind and will" of the employer, to simply rely upon the advice of the previous owner in coming to a private arrangement with Ms Rowe as to an hourly rate of pay where that rate falls below the minimum wage.

14. I accept however, that the evidence falls short of establishing that the defendants' conduct was either deliberate or wilful. I find the defendants were

[1] See paragraph 19 of the Statement of Agreed Facts
[2] Affidavit of David McPherson Black dated 11 June, 2010.
[3] Affidavit of David McPherson Black sworn 11 June, 2010 paragraph 6.

reckless in the disregard demonstrated towards compliance with award obligations in respect of Ms Rowe.

Nature and Extent of Loss or Damage

15. As previously stated, the underpayment totalling $4,697.12 is a significant amount for an employee entitled to the benefit of a minimum wage. The defendants submit that regard should be given to the lack of any suggestion the underpayment caused any financial hardship to Ms Rowe. However, in my view this is not a factor to which much weight can attach. The critical concern is that the underpayments spanned over a period of two years, during which time the employer had the benefit of the underpayment. Moreover, despite an offer by DMB to rectify the amount in full in March, 2010, the full amount remains outstanding and owed to Ms Rowe.

Similar previous conduct

16. The defendants have not been charged with or convicted of any contravention of award or other industrial obligations in the past, and this is a matter I have taken into account in determining penalty.

Size of the Business

17. DMB is not a large employer. It currently employs three full-time employees in the newsagency/lotto business, one of whom is Mr Black. It also employs up to 12 part-time employees presently. DMB had no dedicated human resources: the business is largely conducted by Mr Black. The plaintiff submits the fact this is a small employer is not a particularly relevant matter on the question of penalty and that no reduction should be afforded to the defendants because of it. However, it is clearly one of the factors identified by the authorities as being relevant to the question of penalty. Certainly, it would be an aggravating feature of the breach if such resources were available to the employer and it recklessly disregarded its award obligations in those circumstances. Such aggravating features are absent here.

18. More relevant to penalty however, is the financial state of DMB, which is set out in the Affidavit of Mr Black. The Statement of Agreed Facts indicates that the profit and loss position over the past three years has been as follows:

- $71,302.67 in 2007;
- $127,166.00 profit in 2008;
- $231,990.00 loss in 2009.

19. It is notable that Ms Rowe was employed from April, 2007 through to January, 2009 during a period in which DMB made a profit, and indeed a sizable one in 2008. It is clear on the evidence however, that the financial position of DMB deteriorated significantly in 2009 financial year. Mr Black's evidence is that DMB owes the National Australia Bank and his former wife in excess of $1 million and that in the current financial year, DMB suffered a loss of $11,397.53 yet posted a profit of $11,057.97 as at 31 March, 2010.

Involvement of Senior Management

20. As previously indicated, the second defendant was the sole director of DMB and has admitted his involvement in the breaches. DMB did not act, other than through Mr Black.

Contrition, corrective action and co-operation with the authorities

21. Between March, 2009 when the plaintiff first contacted Mr Black in relation to Ms Rowe's underpayment claim, and December, 2009 when proceedings were instituted, DMB sought to negotiate a settled outcome to the claim.

22. On 15 June, 2009 the Office of the Workplace Ombudsman (the legal predecessor to the plaintiff) sent DMB a Breach Notice requiring payment of the underpayment (then totalling $5,351.89) by 30 June, 2009. DMB did not respond to that notice.

23. On 6 July, 2009 the FWO contacted Mr Black regarding the notice and Mr Black said he wanted to discuss the matter but he couldn't at that time. On 13 July, 2009 when Mr Black was again contacted by the FWO he said he was only prepared to pay superannuation owing to the Australian Taxation Office and nothing else. After a final notice was sent on 14 July, 2009 solicitors for the defendants contacted the plaintiff and ultimately sought to negotiate a resolution of the claim, with an offer to pay $1500 over six months commencing in October, 2009. At this point, the solicitors for the defendants advised the FWO that DMB was having cash flow problems. An agreement was reached that a one-off payment in this amount would be paid in October, 2009. This amount was not paid, with the solicitors for the defendants advising that, "he was broke"[4] at that time.

24. After the proceedings were issued, and legal advice received, the defendants acknowledged liability and made full admissions in respect of the breaches. The defendants have cooperated in the production of a Statement of Agreed Facts. There is utility attended upon the early resolution of proceedings by the co-operation of the defendants at this point.

25. However, the failure of the defendants to make any payment/s towards rectifying the underpayment over the past 16 months demonstrates a lack of genuine contrition particularly during periods, such as March, 2010 where a profit was recorded by DMB but repayment of Ms Rowe was not afforded the appropriate priority by the business.

Specific and General Deterrence

26. Clearly, the need for specific and general deterrence is relevant to the imposition of a penalty under the WR Act. On the question of deterrence personal to the defendants, I was referred to the observation of Gray J in

[4] Statement of Agreed Facts paragraph 34

Plancor Pty Ltd v Liquor Hospitality & Miscellaneous Workers Union (2008) 171 FCR 357 at [37]:

"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur".

27. In my view, there remains a need for specific deterrence, noting particularly that DMB and Mr Black continue to operate the business and employ a number of full and part-time employees. The lack of any corrective action by the defendants, particularly where DMB continues to trade, leads me to conclude the need for specific deterrence remains relevant to penalty in this case.

28. General deterrence is also an important factor regardless of the size and financial circumstances of the defendants. The Court is required to impose a penalty that serves as a clear deterrent to other employers that non-compliance with minimum employment standards is a serious matter and that compliance with award obligations is of paramount importance.

Penalty

29. Taking into account each of the factors identified above, I consider the following penalties to be appropriate in respect of the contraventions by DMB:

    (a) Breach of clause 10.4.2(b) of the Award and clause 6(e)(ii) of the Roping-In Award as preserved by the APCS - $8,250.00
    (b) Breach of clause 6(d)(iii) of the Award - $5,5000.00
    (c) Breach of clause 10.4.2(e) and clause 32.5 of the Award - $8,250.00

30. In written submissions provided on behalf of the defendants, it was submitted that the imposition of additional penalties on the second defendant would effectively amount to double jeopardy (see s735 of the WR Act) as Mr Black is essentially responsible for the debts and liabilities of DMB.

31. In oral submissions before me, counsel for the defendants conceded, appropriately, that the double jeopardy provisions did not have strict application here where the first and second defendants are separate legal personalities and the liability of Mr Black arises due to his involvement in the breaches under the accessorial liability provisions of the WR Act.

32. In my view, it is appropriate that a separate penalty be imposed on Mr Black in relation to his involvement in each of the breaches, whilst acknowledging that in a practical sense, the conduct of the company is his conduct. I therefore consider an appropriate penalty in respect of the second defendant to be as follows:

(a) Breach of clause 10.4.2(b) of the Award and clause 6(e)(ii) of the Roping-In Award as preserved by the APCS - $1650.00

(b) Breach of clause 6(d)(iii) of the Award - $1320.00

(c) Breach of clause 10.4.2(e) and clause 32.5 of the Award - $1650.00

33. Having fixed an appropriate penalty for each breach, I am required to consider whether the aggregate penalty in each case is an appropriate response to the conduct that led to the breaches and is not oppressive or crushing.

34. Having regard to the totality principle, or what is commonly referred to as the "instinctive synthesis" test, I consider the imposition of aggregate penalties of $22,000.00 on the first defendant and $4,620.00 on the second defendant to be reasonable and just in response to the breaches identified with respect to Ms Rowe. Given the defendants have already derived significant benefit from s719(2) of the WR Act, I do not consider any further reduction warranted in light of the totality principle.

35. Accordingly, the first defendant is ordered to pay an aggregate penalty of $22,000.00 and the second defendant is ordered to pay an aggregate penalty of $4,620.00 pursuant to section 719 of the WR Act.

36. I order that the pecuniary penalty referred to in paragraph 35 be paid into the Consolidated Revenue, with a stay of 30 days on my order.

AJ Chambers

Magistrate

12 August, 2010.