CHIEF INDUSTRIAL MAGISTRATE'S COURT

NEW SOUTH WALES

JURISDICTION:	Civil (Federal)
PARTIES: **Plaintiff:**	FAIR WORK OMBUDSMAN
Defendant:	FAREY TRANSPORT & TRADING PTY LTD
Case No:	78162/09 (JL 2010/314759)
Hearing Date:	28 September 2010 (Penalty Hearing)
Date of Decision:	10 January 2011
Legislation:	Workplace Relations Act 1996, S719, S824
Magistrate:	G J T Hart
Representation:	Solicitor for the Plaintiff Ms L Andelman Office of the Fair Work Ombudsman Solicitor for the Defendant Mr D Bray A I Group Legal Counsel for the Defendant Mr P Coleman

REASONS FOR DECISION

1 By Decision published 30 August 2010, I made findings concerning a threshold matter regarding a dispute between the parties as to the identification of the relevant industrial instrument governing the engagement of truck drivers by the Defendant company. In that Decision, I found that the work in question was governed by the Notional Agreement Preserving the Transport Industry (State) Award, rather than the Notional Agreement Preserving the Milk Treatment etc and Distribution (State) Award as had been contended on behalf of the Defendant. Prior to that finding, it had been conceded by the Defendant that should the Court find in favour of the Prosecutor on the threshold issue, the Defendant would be unable to resist further findings to the effect that such industrial instrument had been breached in a number of respects as alleged by the Prosecutor in the Summons as subsequently amended.

2 The Amended Summons identifies eleven alleged separate breaches of the Notional Agreement Preserving the Transport Industry (State) Award. These include a breach of Clause 5, three breaches of Clause 6, a breach of Clause 3, three breaches of Clause 4, two breaches of Clause 23, and one breach of Clause 17. However, the Plaintiff, at page 9 of the written Outline of Submissions categorises such eleven alleged contraventions in a different fashion. In short, the stance adopted by the Plaintiff at the Penalty Hearing was that there were seven distinct contraventions of the industrial instrument but that they occurred in circumstances where there were three distinct *"courses of conduct"* and therefore the Defendant was guilty of a total of twenty-one separate breaches.

3 This approach is described in the Plaintiff's Outline of Submissions in the following fashion:-

> *"5.3 The Defendant's breaches are able to be categorised as follows:-*
>
> *(a) Failure to pay overtime rates to the Employees (Clause 5 of the NAPSA) (Maximum penalty of $33,000).*
>
> *(b) Failure to pay penalty rates for Saturday work to the Employees (Clause 6.1 of the NAPSA) (Maximum penalty of $33,000).*
>
> *(c) Failure to pay penalty rates for Sunday work to the Employees (Clause 6.2 of the NAPSA) (Maximum penalty $33,000).*

(d) *Failure to pay the rate of time and a half for ordinary hours worked on Saturday as an ordinary day to the Employees (Clause 3.2.1 of the NAPSA) (Maximum penalty of $33,000).*

(e) *Failure to pay applicable shift loadings to the Employees (Clause 4.3 of the NAPSA) (Maximum penalty of $33,000).*

(f) *Failure to pay penalty rates for time worked on a public holiday to the Employees (Clause 23 of the NAPSA) (Maximum penalty of $33,000).*

(g) *Failure to pay annual leave loading in respect of periods of annual leave to the Employees (Clause 17.2 of the NAPSA) (Maximum penalty of $33,000).*

5.4 The Defendant repeatedly breached these seven NAPSA provisions over a period of time. The Defendant breached these seven NAPSA provisions in relation to multiple employees. The Plaintiff accepts that the Defendants have the benefit of a S719(2) of the WR Act in relation to repeated breaches affecting multiple employees where those breaches arise as part of a course of conduct."

4 In this case, the Plaintiff submits, in effect, that S719(2) has the effect of multiplying the number of breaches rather than reducing the number of separate breaches as is commonly the case in this jurisdiction. The Plaintiff argues as follows:-

"5.5 The Plaintiff submits that there are three distinct course of conduct in this case. The separate courses of conduct arise from the decision taken by the Defendant to continue to pay employees flat rates of pay following both the 2007 and 2008 audits.

5.6 Therefore the Court should consider that the maximum penalty it could impose against the Defendant in this matter for the seven breaches set out above is $693,000."

5 The Plaintiff's submissions in this regard are set out in greater detail in the Plaintiff's Outline of Submissions on Penalty and Reply filed in the Court on 22 September 2010. At page 7 of those further submissions, the Plaintiff argues as follows:-

"36 As previously submitted, it is incumbent on the Defendant to lead evidence demonstrating that the breaches were committed by the same person and arose out of a course of conduct by the person.

37 the Plaintiff based on the evidence has formed the view that Mr Farey was the person responsible for the course of conduct.

38 The Plaintiff contends Mr Farey made three separate and deliberate decisions to pay employees a flat rate of pay:

(a) *from 27 March 2006 until 1 May 2007 put in place a system of paying employees a flat rate of pay and that during this time he may not have been aware that he was required to pay pursuant to the Transport NAPSA. (First course of conduct).*

(b) *On the 1 May 2007, the Defendant promised to the Plaintiff that it would pay pursuant to the Transport NAPSA.*

(c) *After the 1 May 2007, the Defendant, after advice from the Plaintiff, considered its position and determined afresh to pay a higher flat rate to*

employees. This conduct continued until 27 March 2009. (Second course of conduct).

(d) On the 27 March 2009, the Defendant informed the Plaintiff that it will not pay employees pursuant to the Transport NAPSA.

(e) After the 27 March 2009 and until the 31 December 2009 the Defendant continued to not pay employees pursuant to the NAPSA. (Third course of conduct).

39 Pursuant to Pt 4.1 of the Criminal Code Act 1995 (Cth): Conduct means an act, an omission to perform an act or a state of affairs. Pursuant to the Australian Oxford Dictionary conduct is defined as behaviour, the action or manner of directing or managing. Conduct requires an element of voluntariness. The conduct in this case was the act of paying employees a flat rate of pay.

40 Course of conduct pursuant to subsection 719(2) of the WR Act is where the same person was engaged in one multi-faceted course of conduct. The question in this case is whether the Defendant could fairly be regarded as engaging in one transaction or not.

41 It is the Plaintiff's submissions that the conduct was separate and distinct in time and place. The purpose of the conduct was different and there was no substantial common thread running through the decisions taken by the Defendant."

6 Whilst the Plaintiff submits that the maximum total fine facing the Defendant is $693,000, it is submitted on behalf of the Defendant that the maximum penalty is $33,000. The Defendant submits that whilst it concedes that there were seven breaches or contraventions of the industrial instrument by virtue of S719(2), the Court would find that all seven breaches flowed from the one course of conduct, namely the Defendant's failure to identify the correct industrial instrument to apply when paying its employed drivers. It is submitted that all seven breaches flowed from that single course of conduct, and as a consequence, the Defendant should receive the full benefit of S719(2) and receive a penalty appropriately calculated using $33,000 as the relevant starting point, that being the maximum penalty available to be imposed.

7 I reject the approach advanced on behalf of the Plaintiff. The Defendant is a company. The Plaintiff's approach requires the Court to identify the relevant decision maker or decision makers within the company over the course of a period of years, and reach a series of conclusions about the state of mind of such decision maker at various times during the relevant period. As I read S719(2), such a subjective approach is neither required nor permitted. In my view, the relevant test is to determine, in a logical fashion, the effect of a particular act or omission, and to group together the contraventions that flow from a particular act or omission, rather than treat them as a series of separate

contraventions. For example, a miscalculation of weekly pay flowing from a failure to properly apply the relevant industrial instrument may result in a particular employee receiving an underpayment of wages each pay day over a period of years. What might otherwise be a series of contraventions is to be treated as one contravention because of the provision found at S719(2). In my view, the result would be the same if the persons employed as payroll officers changed from time to time during the relevant period. There would still be one course of conduct by the corporation, and no requirement to investigate the state of mind of each payroll officer who repeated the error of their predecessor.

8 Nor do I accept the submission made on behalf of the Defendant that there was only one course of conduct, namely the failure to consult the appropriate industrial instrument. I am satisfied that for the purposes of S719(2), there are four separate courses of conduct which may be identified. The first is a failure on the part of the Defendant to comply with the requirements of the industrial instrument to pay overtime rates for overtime hours worked. The second course of conduct was the failure of the Defendant to apply the industrial instrument when remunerating its employees for weekend work including relevant penalty rates. The third course of conduct was the failure of the Defendant to apply the industrial instrument when remunerating its employees for work performed on public holidays, given that the industrial instrument makes specific provision for appropriate penalty rates for such work. Finally, the fourth course of conduct concerns the failure of the Defendant to pay its employees annual leave loading in accordance with the provisions of the industrial instrument. Consequently, I have reached the conclusion that the maximum penalty which I should take into account as the relevant starting point is $132,000, being $33,000 multiplied by 4 to comply with the requirements of S719(2) of the Workplace Relations Act.

9 It is necessary, next, to give consideration to the objective seriousness of the breaches before the Court. On behalf of the Plaintiff, it is submitted that the conduct of the director and controlling mind of the corporation, Mr Farey, was deliberate and deceitful, and that he stubbornly maintained a point of view concerning the non-applicability of the relevant industrial instrument, notwithstanding clear and expert advice to the contrary. It

is submitted that his conduct was deceitful in that he allegedly professed acceptance of what he was told by inspectors conducting audits, but subsequently continued the conduct of purporting to contract out of the award provisions and ignoring the minimum requirements of the relevant industrial instrument.

10 These allegations against Mr Farey were strongly denied by Mr Coleman of Counsel in his submissions on behalf of the Defendant.

11 In my view, the arguments placed before the Court during the hearing of the threshold matter, constituted a case that was reasonably arguable. I accept that Mr Farey did not have formal training or experience in the fields of industrial relations or industrial law. Further, it is reasonably clear from the evidence that administration staff employed in the Defendant company also lacked such training and experience although they were no doubt familiar with accountancy procedures and requirements. Mr Farey was told various things by a TWU organiser and by inspectors engaged by the Office of the Workplace Ombudsman. A prudent employer would not ignore such advice, but would not necessarily accept it at face value either. It was open to a prudent employer to seek legal advice and it would appear that Mr Farey did so. The evidence suggests that, at least initially, Mr Farey sought advice from local solicitors who informed him that the Milk Treatment and Distribution Award was an appropriate award for him to apply. It is unclear whether or not those solicitors had any extensive experience or expertise in industrial law matters. Such specialised practitioners are not always readily encountered in rural and regional areas. In addition, the period in question was one during which the general public was subjected to considerable misinformation concerning changes in the industrial relations field, and many people gained the impression during the late 1990s and following years, that awards were now less important, and that employers could bargain freely with their employees without too much attention being given to matters of award prescription.

12 It is clear that the Defendant company was operating a business which required driving work to be done virtually every day. The evidence is that customers require the delivery of milk on 363 days out of 365. Consequently, work on Saturdays and Sundays was a

constant requirement. Further, the nature of the service being provided required many drivers to commence work in the very early hours, eg 2.00 am, 3.00 am or 4.00 am. Again, this was a regular feature of the work. There are many industries which operate on the basis that weekend work and night work are required on a regular basis. In such industries, a shift system is usually worked, and awards are in place which taken into account the operational needs of the employer, whilst at the same time protecting the employees with appropriate minimum standards ensuring regular time off and hours of work which take occupational health and safety factors into consideration. For some reason, the Defendant sought to conduct regular weekend and night work without putting in place an appropriate shift system. In my view, appropriate expert advice in relation to an appropriate shift system would have greatly assisted the Defendant company. Unfortunately, such advice was apparently never sought, and instead the Defendant company purported to set up its own system believing that it was free to do so as long as the employees were content with the pay packet they took home at the end of each pay period.

13 In my view, the conduct of the Defendant company is consistent with a high degree of confusion, combined with real uncertainty as to which competing set of *"expert advice"* should be followed. I do not accept that the conduct of the Defendant through its various officers, including Mr Farey, was deliberately deceitful. In my view, Mr Farey genuinely believed at various times that the Milk Treatment and Distribution Award had application rather than the Transport Industry (State) Award, although the strength of his conviction in that regard presumably wavered up and down depending on the nature of the advice he received from various quarters over a period of time. It is clear that the advice received by Mr Farey and his company varied even during the conduct of this litigation, possibly as a result of the briefing of Counsel and the provision of fresh advice including advice concerning the making of admissions. I will return to that matter later in these Reasons for Decision when the question of costs is discussed.

14 In concluding that the Defendant's case on the threshold issue was arguable, I note that when the matter was before the Court, I was assisted by the submissions of the advocates before the Court which included submissions concerning the history of the two

competing awards, and included taking the Court to the detailed Decisions of Kelleher J and Gallagher J who conducted extensive award review enquiries concerning the milk treatment and distribution industry. It would be unreasonable, in my view, for the average employer to be expected to embark upon explorations of that type. Given that the Defendant company received conflicting or competing advice from inspectors, from the TWU union official, from local solicitors, from the employer association, and from its current legal team, including Counsel, the Defendant had every right to, and should not be criticised for, having the matter determined in a Court of law following a contested hearing. It is fundamental to our system of law that whenever a penalty is imposed or threatened, the defendant is entitled to have the matter judicially reviewed.

15 In my view, the essence of the offence is that the Defendant company failed at the relevant time to diligently pursue appropriate expert advice, but instead seized upon whatever advice best suited its perceived operational needs. The Defendant preferred to pay its drivers a flat rate, believing wrongly that it could set off over award hourly rates for ordinary hours of work against penalty rates required for overtime, weekend work and public holiday work.

16 It suited the Defendant to maintain that its employees were, in an overall sense, better off with the flat rate system than they would be with the relevant industrial instrument. There were two flaws to that argument. The first was the assumption that set-off was available. Secondly, the Defendant chose the wrong award against which to make the relevant comparison.

17 As a consequence, the employed drivers of the Defendant company were underpaid a very considerable sum of money greatly exceeding $100,000. It should be noted that full restitution has been made by the Defendant company, and this occurred at an early stage, and not following the Court's determination of the threshold issue in August 2010.

18 In my view, the Defendant should receive appropriate recognition for its action in making payments to its employees prior to the Court making any Orders requiring such back payments. Whilst the company wished to pursue its right to have the matter

determined in a Court of law, it clearly did not wish that decision to have a negative impact on the employees.

19 Counsel for the Defendant expresses on behalf of the Defendant, the Defendant's contrition in relation to this matter. The company thought it was in the right, but having lost the argument on the threshold point, it expresses remorse for having got it wrong. On behalf of the Plaintiff, it is submitted that the Court would find that no genuine remorse exists. In this regard, the Plaintiff also relies on the allegations referred to above concerning alleged deceitful conduct. As stated above, I do not find the conduct of the Defendant or its director to have been deceitful, and I accept Mr Coleman's submissions on behalf of the Defendant company concerning contrition and remorse.

20 The Plaintiff submits that whilst there was some cooperation on the part of the Defendant, there was not full cooperation. The Plaintiff relies again on the alleged deceitful conduct of the Defendant following the audits conducted by the inspector, as well as the Defendant's conduct in firstly agreeing to an Agreed Statement of Facts, and then withdrawing from it at a later time. In my view, there has been considerable cooperation by the Defendant and the Defendant should receive full credit for it. The Defendant maintained complete and detailed time and wages records and has readily produced them for examination by the inspectors whenever required to do so. There has been no attempt to do anything in a secretive or underhanded way. The Defendant failed to get appropriate and timely expert advice concerning its legal obligations. For purposes of determining appropriate penalties, the Defendant should be seen as a cooperative defendant.

21 Having considered the above matters, I am satisfied that there is a need for a general deterrence factor in any penalties which are imposed, as well as a specific deterrence factor in circumstances where the Defendant continues to operate in the transport industry. It is clear that the Defendant operates in a highly competitive field with many competitors, and with customers which are frequently very large corporations happy to squeeze their subcontractors financially at every opportunity. In such an environment, there is an obvious and constant temptation for an employer to endeavour to lower their

wages bill, and there is a need for specific deterrence in this case to remind the Defendant company of the existence of minimum standards set by industrial instruments which, if contravened, may result in substantial financial penalties being imposed.

22 In setting appropriate penalties in this matter, I take into account all of the above matters, as well as the fact that the Defendant has no prior convictions for breaches of the legislation, and also the fact that the Defendant, although incorporated, is a relatively small business run by a husband and wife team. It is not a large national corporation of the type which would be expected to employ human resources officers or other specialised staff concentrating fulltime on keeping up to date with developments in the industrial relations world.

23 As indicated earlier in these Reasons for Decision, I have concluded, after considering S719(2), that there are four separate contraventions before the Court. I regard the overtime contravention and the weekend work contravention as being considerably more serious than the public holidays and annual leave loading offences. The overtime and weekend work offences were constant breaches which affected the take home pay of every driver on a weekly basis and accounted for the vast majority of the underpayment made to the employees (and which has subsequently been rectified).

24 Having considered the objective seriousness of these offences, as well as the subjective matters which mitigate in favour of the Defendant company, I find that the appropriate penalty for the breach of the overtime provisions of the Award should be $15,000. The same penalty should be imposed in respect of the failure to pay weekend penalty rates as required by the Award. The breach of the Award provision relating to public holiday work should result in a penalty of $5,000, and the same penalty should be imposed in relation to the failure to pay annual leave loading to employees. Consequently, the total penalties equal $40,000.

25 It is necessary for the Court to given consideration to the principle of totality given that there are a number of separate contraventions before the Court, and a degree of overlap between those contraventions. In my view, there should be a discount of 25% in

acknowledgment of the principle of totality, reducing the total civil penalty to $30,000. The discount should be apportioned equally between the four contraventions.

26 The Plaintiff makes application for costs pursuant to S824(2) of the Workplace Relations Act. The Plaintiff alleges that $844.80 was thrown away in the following circumstances. Prior to the matter coming on for hearing, the Plaintiff and the Defendant agreed to present evidence to the Court in the form of an Agreed Statement of Facts. This document contained a number of admissions on the part of the Defendant. The Agreed Statement of Facts did not come into evidence because, approximately two months after it had been the subject of agreement, the Defendant withdrew from the agreement. On behalf of the Plaintiff, it is submitted that legal costs were expended in the negotiation of, and drafting of, the Agreed Statement of Facts, and that the unreasonable conduct of the Defendant in first agreeing to, and then withdrawing from, the agreement, resulted in costs being thrown away. It is clear that the Defendant was entitled to change its stance in the light of new or different legal advice. However, it was not the fault of the Plaintiff that it was put to the expense of legal work which was then thrown away as a result of the Defendant's withdrawal from the agreement. With the benefit of hindsight, it would have been better for the Defendant to have its legal team and legal advice consolidated prior to major decisions being made about admissions. This jurisdiction is not normally a costs jurisdiction, and the stance of the Defendant is that it objects to an order as to costs because, it is submitted, the Plaintiff has failed to demonstrate conduct that was unreasonable within the meaning of S824(2).

27 In my view, the Defendant acted unreasonably in the handling of the question of admissions generally. In all of the circumstances, the Agreed Statement of Facts should not have been the subject of agreement until such time as the Defendant's Counsel had had the proper opportunity to give consideration to the matter and advise. The quantum of costs sought is clearly reasonable as is admitted by Counsel for the Defendant. Consequently, I propose to make the costs order as sought.

28 The Orders of the Court are as follows:-

1 Pursuant to S719(1) of the Workplace Relations Act 1996, (WR Act), a penalty of $11,250.00 be imposed on the Defendant in respect of its contravention of Clause 3, 4 and 5 of the Transport Industry (State) Award (Transport NAPSA) S182(1).

2 Pursuant to S719(1) of the WR Act, a penalty of $11,250.00 be imposed on the Defendant in respect of its contravention of Clause 6.1 and 6.2 of the Transport NAPSA.

3 Pursuant to S719(1) of the WR Act, a penalty of $3,750.00 be imposed on the Defendant in respect of its contravention of Clause 17.2 of the Transport NAPSA.

4 Pursuant to S719(1) of the WR Act, a penalty of $3,750.00 be imposed on the Defendant in respect of its contravention of Clause 23.2 of the Transport NAPSA.

5 Pursuant to S824(2) of the WR Act, the Defendant is to pay the Plaintiff's costs in the sum of $844.80.

6 The civil penalties listed in paragraphs 1 to 4 and the costs referred to in paragraph 5, are to be paid within 28 days. The penalties are to be paid to the Commonwealth of Australia pursuant to S841(a) of the WR Act.

29 I publish my Reasons for Decision.

G J T Hart
Industrial Magistrate

10 January 2011