

**CHIEF INDUSTRIAL MAGISTRATE'S COURT**

**NEW SOUTH WALES**

**JURISDICTION:** Civil (Federal)

**PARTIES:**

**Plaintiff:** FAIR WORK OMBUDSMAN

**First Defendant:** LIGHTFIELD INVESTMENTS PTY LTD

**Second Defendant:** HOONG KEE TANG

**Case No:** 78107/09

**Hearing Dates:** 24 June 2010

**Date of Decision:** 8 July 2010 (sentencing)

**Legislation:** Workplace Relations Act 1996  
S182(3), S235(1), S235(2), S719, S722, S728

**Magistrate:** G J T Hart

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

Solicitor for the Second Defendant  
Mr Atticus Busby  
MacKellars Lawyers

## REASONS FOR DECISION

- 1 By Decision dated 3 May 2010 the First and Second Defendants herein were found to have breached the provisions of the Workplace Relations Act. As recorded in the earlier Decision, I found that the First Defendant, Lightfield Investments Pty Ltd, had breached the Workplace Relations Act by failing to pay two employees their lawful entitlements in accordance with S182(3), S189(3)(b), S235(1) and S235(2) of the Workplace Relations Act. Such breaches each carry a maximum civil penalty of \$33,000 in circumstances where S719 of the Workplace Relations Act provides the Court with jurisdiction to impose penalties up to that maximum in respect of each separate breach. As indicated in my earlier Decision, the First Defendant, Lightfield Investments Pty Ltd, elected not to participate at any stage of the liability hearing, and again, at the sentencing hearing on 24 June 2010, there was no appearance by or on behalf of the First Defendant.
- 2 The Second Defendant herein was found in my earlier Decision to be a person engaged in the management of the First Defendant within the meaning of S728 of the Workplace Relations Act. In those circumstances, he also is exposed to the imposition of penalties in respect of the four offences found to have been committed by the First Defendant. In each case the maximum penalty for an individual is \$6,600.
- 3 In relation to the First Defendant, the Plaintiff seeks an order pursuant to S719(6) of the Workplace Relations Act, directing the First Defendant to make payments of restitution to the two former employees who were underpaid during their period of employment with the First Defendant. The Plaintiff also seeks an order for interest to be paid by the First Defendant to each of the two former employees in question in relation to the period from the termination of their employment to the date of these orders. Further, the Plaintiff asks the Court to impose penalties on the First Defendant and submits that the penalties imposed by the Court should appropriately be in the high range.
- 4 In relation to the Second Defendant, the Plaintiff also submits that any penalties imposed by the Court pursuant to S728 should be in the high range.

5 I propose to deal firstly with the orders sought against the First Defendant. I am satisfied that the four offences committed by the First Defendant are objectively serious. Each employee was underpaid a substantial sum, being more than \$20,000 in each case. One of the employees was a relatively recent arrival in this country having previously resided in China and having very little understanding of English. Such employees are particularly vulnerable and readily exploited. In this case, both employees worked for a period of several months without receiving any pay whatsoever. They were induced to continue working by repeated assurances conveyed to them by the Second Defendant, clearly acting as the agent for the First Defendant, to the effect that their back pay would be made available in the near future.

6 This is not a case where the underpayment occurred because of the application of the wrong industrial instrument, or because of an honest but mistaken belief concerning the correct calculation of wages. At all material times both Defendants were clearly on notice that these two employees were working fulltime for the First Defendant and were being paid nothing for their services. All persons involved in the management of the First Defendant's operations, including the Second Defendant, would have been fully aware that such conduct was unlawful but it was allowed to continue for a period of many months.

7 There is no evidence to suggest that the First Defendant is no longer registered as a corporation and in those circumstances the penalties imposed by the Court should include a strong specific deterrence factor as well as a strong general deterrence factor. It is important for the Court to impose penalties which convey clearly to employers that serious and blatant unlawful conduct calculated to damage and exploit vulnerable employees will be met with serious penalties. In addition to the assessment of the objective seriousness of each offence, it is appropriate for the Court to take into account any matters of a subjective nature which mitigate in favour of a defendant. In this case, the First Defendant has elected not to come before the Court at any stage for the purpose of making any submissions either as to the question of liability or as to the question of penalty. Consequently, the only subject matter available for consideration is that the Plaintiff is unaware of any prior convictions against the First Defendant under this or any

other industrial legislation. In those circumstances, it is appropriate that I take into account the issue of whether there should be some leniency associated with the First Defendant being a first offender. If there was evidence before the Court to the effect that the First Defendant had been in operation as an employer for a substantial period of time and had performed that role without being convicted of any breaches, such a record would be of significance. In this case, there is simply no evidence of the period of time during which the First Defendant has been in existence and in particular its history as an employer.

8 Having considered the four breaches, I find that the breach of S182(3) of the Workplace Relations Act to be the most serious. This breach relates to the failure of the First Defendant to pay the employees the federal minimum wage for each hour worked from 1 March 2008 until 13 July 2008. The breach of S189(3)(b) relates to the failure of the First Defendant to pay the employees in a timely fashion. Given that the employees were not paid at all during this period there is an obvious overlap between the first charge and the second charge. The third charge relates to a failure to pay one of the employees, Mr Hu, for annual leave taken by him for a period of one week in June 2008. The fourth breach, pursuant to S235(2) of the Workplace Relations Act, relates to the failure of the First Defendant to pay the employees their accrued annual leave entitlements at the time of termination on 13 July 2008. Whilst these are by no means trivial offences, they do not, in my view, have the same degree of seriousness as the failure to pay to employees their ordinary wages for a period of some months.

9 Having considered the above matters and noting the maximum penalty for each offence of \$33,000, I find that in respect of the breach of S182(3), the appropriate penalty to be imposed on the First Defendant is \$27,000. In relation to each of the remaining three offences, the appropriate penalty is \$9,000 for each offence. Consequently, the total of the four penalties is \$54,000.

10 Whilst the non payment of salary to the two former employees caused each of them financial loss in excess of \$20,000, the scheme of the Act permits the Court to make orders for restitution pursuant to S719(6) of the Act in respect of the minimum payments

set by the legislation itself. This is not a case in which there is an Award or a Notional Agreement Preserving a State Award to be enforced. Consequently, the restitution orders are limited to amounts that are significantly lower than the actual loss suffered by the two men. In the case of Mr He, the First Defendant will be ordered to make restitution payments in the sum of \$13,135.14 (gross) together with a further sum for interest calculated at \$2,364.32. In the case of Mr Hu, the orders of the Court will be that the First Defendant make payment to Mr Hu in the sum of \$12,377.65 (gross) with an additional payment of \$2,227.97 being for interest on the abovementioned sum.

- 11 In the case of the Second Defendant, Mr Tang, the Court has the benefit of submissions made at both the liability hearing and the sentencing hearing, by the Second Defendant's solicitor, Mr Busby. Unlike the First Defendant, the Second Defendant elected to make submissions in relation to the matters appropriate for the Court to take into consideration as part of the sentencing process.
- 12 The Second Defendant asks the Court to accept that he provided cooperation to the Fair Work Ombudsman, including the taking of an active role in negotiations designed to bring about an agreement whereby Mr He and Mr Hu would be repaid the money owed to them in staggered payments over a period of some twelve months or so. Whilst this proposal was ultimately rejected by the two former employees, it is submitted by the Second Defendant that his active involvement is indicative of a cooperative attitude as well as a genuine desire to help Mr He and Mr Hu in circumstances where he felt sorry for them and wished to assist them.
- 13 The difficulty I have with this submission is that the Second Defendant's involvement and the cooperation he provided fell far short of the level of candour that would satisfy the Court that the Second Defendant displayed genuine contrition and a genuine desire to make amends for his conduct. Whilst consistently claiming that his role was that of a mere volunteer and a mere intermediary who was not engaged in any managerial role for the First Defendant, the Second Defendant persisted in refusing to provide cooperation which extended to providing information concerning the role of the Director, Mr Clarke and the Manager, Mr Wong, within the operations of the First Defendant.

14 In his written submissions which are presented more in the form of a witness statement than as final submissions, the Second Defendant states:-

*“30 I now appreciate that I acted unwittingly as shield for the First Respondent and, that was a naive attitude and I am deeply embarrassed by my association with the business and the final outcome.”*

15 I find it difficult to conclude that the Second Defendant’s conduct resulted entirely from naivety on his part. I am satisfied on the evidence before the Court that at all material times he was the managerial representative of the First Defendant who had direct supervision of both Mr He and Mr Hu, and his refusal to acknowledge that in a candid fashion does not assist him. Further, the Second Defendant must have been fully aware that his refusal to provide information relevant to the role of Mr Clark and the role of Mr Wong could well result in an outcome whereby he would be prosecuted but they would not. Having consciously conducted himself in a fashion likely to bring about that outcome, it is somewhat fanciful for the Second Defendant to now, in the context of a sentencing hearing, to suggest that his conduct was at all times motivated by honest intentions.

16 I regard the offences committed by the First Defendant as being objectively serious for the reasons discussed above in these Reasons for Decision. By virtue of the provisions of S728 and the findings I have made in relation to the Second Defendant’s managerial involvement, he is deemed to be guilty of the same four offences. I find the Second Defendant’s conduct to be less culpable than that of the First Defendant, but not to any significant extent. I do take note of the fact that the Second Defendant has had the decency to come before the Court and attempt to explain his conduct. He has expressed contrition and regret in relation to his conduct and has incurred legal expenses by participating in the proceedings. These factors distinguish him from the First Defendant, at least to a degree.

17 Again, I find that there is a need for a strong general deterrence factor and a strong specific deterrence factor in any penalty imposed by the Court. Noting that the maximum penalty for each of the four offences is \$6,600, the civil penalties imposed on

the Second Defendant will be \$4,000 in relation to the S182(3) offence and \$1,500 for each of the three remaining offences. Consequently, the total civil penalty payable by the Second Defendant will be \$8,500.

18 The orders of the Court, therefore, are as follows:-

- 1 The First Defendant is to pay a civil penalty in the sum of \$54,000 which is to be paid at the Level 4 Registry of the Court, Downing Centre, 143-147 Liverpool Street, Sydney, within 28 days hereof.
- 2 The Second Defendant is to pay a civil penalty in the sum of \$8,500 payable at the Level 4 Registry of the Court, Downing Centre, 143-147 Liverpool Street, Sydney, within 28 days hereof.
- 3 The First Defendant is to pay to the Plaintiff within 28 days on behalf of Mr Weidong He the sum of \$13,135.14 (gross), together with an additional payment of \$2,364.32 being interest on the aforementioned sum.
- 4 Within 28 days the First Defendant is to pay to the Plaintiff on behalf of Mr Wenfeng Hu the sum of \$12,377.65 (gross), together with the additional sum of \$2,227.97 being interest on the aforementioned sum.
- 5 In the event that the Plaintiff seeks further orders pursuant to S841 of the Workplace Relations Act, liberty to apply is granted on the giving of seven days notice.

19 I publish my reasons for decision.

G J T Hart  
Industrial Magistrate

8 July 2010