

FEDERAL MAGISTRATES COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v NO. 1
RIVERSIDE QUAY PTY LTD*

[2010] FMCA 31

INDUSTRIAL LAW – Penalty – Australian Workplace Agreements – civil penalty provisions – contraventions of ss.342(1) and 341(1) of the *Workplace Relations Act 1996* (Cth) – procedural and technical breaches only – penalty agreed.

Workplace Relations Act 1996 (Cth), ss.4, 6, 166D, 167, 341, 342 and 405
Workplace Relations Regulations 2006 (Cth), Chapter 2, regs.14, 8.12 and 8.13
Fair Work (Transitional Arrangements and Consequential Amendments) Act 2009 (Cth), Schedule 2 and Schedule 18

Hills v Sutton [2007] FCA 2033

NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission
(1996) 71 FCR 285

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	NO. 1 RIVERSIDE QUAY PTY LTD
File Number:	ADG 159 of 2009
Judgment of:	Simpson FM
Hearing date:	15 March 2010
Date of Last Submission:	15 March 2010
Delivered at:	Adelaide
Delivered on:	28 January 2011

REPRESENTATION

Counsel for the Applicant: Mr Dalton (with Ms Clark)

Solicitors for the Applicant: Hunt & Hunt

Counsel for the Respondent: Mr Gostencnik (with Ms Willekes)

Solicitors for the Respondent: Corrs Chambers Westgarth

ORDERS

- (1) A total penalty of \$25,000 (twenty five thousand dollars) be imposed on the respondent for its contraventions of ss.341(1) and 342(1) of the *Workplace Relations Act 1996* (Cth) arising from its processes relating to the making of AWAs in the period March to September 2006;
- (2) A declaration that in the course of its processes relating to the making of AWAs in the period of March to September 2006, the Respondent contravened:
 - (i) Regulation 8.12(1) of Chapter 2 of the *Workplace Relations Regulations 2006* (Cth);
 - (ii) Regulation 8.12(2) of Chapter 2 of the *Workplace Relations Regulations 2006* (Cth); and
 - (iii) Regulation 8.13(1) of Chapter 2 of the *Workplace Relations Regulations 2006* (Cth).
- (3) The penalty imposed on the Respondent be paid into the Consolidated Revenue Fund within 28 days of the date of this order.
- (4) There be no order as to costs.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
ADELAIDE**

ADG 159 of 2009

FAIR WORK OMBUDSMAN
Applicant

And

NO. 1 RIVERSIDE QUAY PTY LTD
Respondent

REASONS FOR JUDGMENT

1. I have before me an application by the Fair Work Ombudsman (formerly the Workplace Ombudsman) seeking certain declarations in relation to contraventions of ss.341(1) and 342(1) of the *Workplace Relations Act 1996* (Cth) (“WR Act”) and regs.8.12(1), 8.12(2) and 8.13(1) of Chapter 2 of the *Workplace Relations Regulations 2006* (Cth). The applicant also seeks the imposition of penalties in relation to these breaches of the WR Act.
2. The parties have been able to agree on a number of matters including the contraventions that occurred, the mitigating factors and the penalty that should be imposed. Their agreement is contained in a document titled ‘Statement of Agreed Facts’ filed on 21 December 2009. The Statement of Agreed Facts states:
 1. *The Statement of Agreed Facts (SAF) is submitted to assist the Court in determining the appropriate final orders, including penalty, resulting from the contraventions of the Workplace Relations Act 1996 (WR Act) and the Workplace Relations Regulations 2006 (Regulations) admitted by the Respondent, in its Amended Defence.*

2. *The parties have agreed to the SAF solely for the purposes of finalising this proceeding, No. ADG 159 of 2009 (Proceeding) and no assertion or matter in this document may be relied upon as an admission so as to support a cause of action in any other proceeding.*
3. *The Applicant, the Fair Work Ombudsman (FWO), is and was, at all material times:*
 - (a) *a statutory appointee of the Commonwealth appointed by the Governor General by written instrument on 1 July 2007, pursuant to subsection 166D(1) of the Workplace Relations Act 1996 (WR Act);*
 - (b) *a person appointed as a workplace inspector under subsection 167(1A) of the WR Act; and*
 - (c) *a workplace inspector capable of bringing this proceeding pursuant to section 405(1)(f) of the WR Act, Regulation 2.14.3 of the Regulations, subitem 11(10) of Part 3 of Schedule 2 of the Fair Work (Transitional Arrangements and Consequential Amendments) Act 2009 (Transitional Act) and subitem 13(1) of Part 3 of Schedule 18 of the Transitional Act.*
4. *The Respondent is and was, at all material times:*
 - (a) *a company incorporated in the State of Victoria;*
 - (b) *a constitutional corporation within the meaning of section 4(1) of the WR Act;*
 - (c) *an employer within the meaning of section 6(1) of the WR Act; and*
 - (d) *the employer of a significant number of persons as part of its national business operating retail outlets.*

Circumstances surrounding the making and lodgement of AWAs

5. *Between March and September 2006, part of the following businesses were transferred to the Respondent, on or about the following dates:*
 - (a) *Agostino Petroleum Pty Ltd (Agostino) – 8 July 2006;*
 - (b) *Jasbe Multi Pty Ltd (Jasbe) – 19 May 2006;*
 - (c) *Expotech Pty Ltd (Expotech) – 22 August 2006; and*

(d) *Keti Pty Ltd (Keti) – 2 June 2006;*

(collectively the Multi-Site Franchisees (MSFs)).

6. *In the period between March and September 2006, the Respondent's business and number of employees employed in its business grew significantly.*
7. *With the intention of managing a smooth transition of part of MSF businesses to the Respondent, the following processes were adopted by the Respondent:*
 - (a) *prior to the date of transfer of the MSF businesses to the Respondent, the Respondent conducted information and assessment centre sessions for those employees employed by MSFs who wished to apply for employment with the Respondent;*
 - (b) *at the assessment centre, MSF employees completed a number of pre-employment checks and were provided with an opportunity to sign an Australian Workplace Agreement (AWA);*
 - (c) *the AWA was titled "No 1. Riverside Quay Australian Workplace Agreement 2004" and was in a standard form document;*
 - (d) *at this time, the Respondent informed the MSF employees that employment with the Respondent would not occur unless and until the Respondent subsequently confirmed an offer of employment to the MSF employee;*
 - (e) *subsequently, MSF employees who passed the assessment centres were offered employment by the Respondent, although not all MSF employees who signed an AWA were offered or accepted employment with the Respondent;*
 - (f) *those employees who accepted the Respondent's offer of employment commenced employment with the Respondent and on or about this time, the AWA for each of those employees was lodged by the Respondent; and*
 - (g) *in the period between making the AWA and commencing employment with the Respondent, MSF*

employees continued to be employed by the relevant MSF.

8. *Between 27 March 2006 and 26 September 2006, as a result of the process outlined above, the Respondent lodged approximately 1,100 of the AWAs in the States/Territories of New South Wales, Victoria, Queensland, Western Australia, South Australia and the Australian Capital Territory.*

Contraventions in this Proceeding

9. *In the period 27 March to 26 September 2006, the Respondent admits it contravened:*
 - (a) *section 342(1) of the WR Act by failing to lodge 355 AWAs within 14 days of receiving employee approval in accordance with section 340(1);*
 - (b) *section 341(1) of the WR Act by lodging 105 AWAs that were not approved in accordance with section 340(1);*
 - (c) *regulation 8.12(1) of the Regulations because 27 AWAs were improperly witnessed with insufficient details of the witnesses' full names and address;*
 - (d) *regulation 8.12(2) of the Regulations because 27 AWAs were improperly witnessed by disqualified persons; and*
 - (e) *regulation 8.13(1) of the Regulations because, on 17 occasions, the AWAs were not signed by the employer.*
10. *The lodgement of the AWAs by the Respondent in contravention of section 341(1) of the WR Act occurred in 43 batches, on 21 separate days.*
11. *The lodgement of the AWAs by the Respondent in contravention of section 342(1) of the WR Act occurred in 56 batches, on 24 separate days.*
12. *The AWAs which were not lodged within 14 days were lodged after varying periods of time ranging from 15 to 207 days after approval as detailed in Annexure E to the Further Amended Statement of Claim.*

Mitigating circumstances

13. *At all times, the Respondent fully cooperated with the Applicant (and its predecessors) in the course of its*

investigations. In particular, on 30 August 2006, representatives of the Respondent travelled to Adelaide to discuss issues concerning the transmission of Adelaide Petroleum Pty Ltd and MSF businesses.

14. In September 2006, the Respondent offered new AWAs to former employees of MSFs in order to rectify any defects that might have arisen as a result of its processes identified above.
15. In mid 2007, lawyers for the Respondent sent a letter to the OWS requesting advice in relation to the defects and deficiencies in the processes adopted by the Respondent in obtaining approval and lodgement of AWAs.
16. Prior to this proceeding, the Respondent had already incurred significant time and expense in defending an earlier proceeding brought by the Applicant's predecessor organisation. The earlier proceeding included similar allegations of contraventions of the WR Regulations in respect of some 63 AWAs in August 2006 with employees of another MSF (Adelaide Petroleum Pty Ltd) whose business had been transferred to the Respondent (**First Proceeding**). The AWAs were in the same form as the AWAs the subject of this proceeding and were approved and lodged in comparable circumstances and as part of a comparable series of transactions as this proceeding.
17. On 1 February 2008, Justice Branson delivered her judgement in relation to the First Proceeding.
18. On 11 February 2008, Justice Branson made further orders by consent that no order as to penalty be imposed on the Respondent for breaches of regulation 8.13 of the Regulations.
19. By the Applicant bringing the present proceedings separately from the First Proceeding, the Respondent has incurred further expense some of which could have been avoided had the matters the subject of both proceedings been brought in a single action.
20. The requirements of the WR Act and Regulations contravened by the Respondent in this case are technical and procedural in nature.

21. *The Respondent did not engage in any conduct that sought to deliberately undermine the scheme of the WR Act or Regulations.*
22. *The Applicant has not alleged that any employee has suffered any financial detriment as a result of the contraventions.*
23. *The Respondent has at all times been cooperative with the Applicant (and its predecessors).*
24. *Prior to the dates of contraventions relevant to this proceeding, the Respondent had no prior convictions in relation to the WR Act or Regulations.*
25. *There is no need for specific deterrence as:*
 - (a) *in September 2006, the Respondent took steps to rectify defects in its processes and the signature page of its standard form AWA;*
 - (b) *in September 2007, the Respondent made a collective agreement with its employees nationally which led to a number of AWAs made between the Respondent and its employees being terminated;*
 - (c) *the Respondent has shown contrition for the contraventions.*
26. *The need for general deterrence is limited to an extent because AWAs are no longer an instrument available under legislation.*

Penalty

27. *Taking all of the above considerations into account, the parties agree that it is appropriate that the Court impose a penalty. The parties agree that a penalty of \$25,000.00 is an appropriate total penalty.*
28. *The parties jointly submit to the Court that the following orders are appropriate:*
 - (a) *A total penalty of \$25,000.00 be imposed on the Respondent for its contraventions of section 341(1) and section 342(1) of the WR Act arising from its processes relating to the making of AWAs in the period March to September 2006;*

(b) *A declaration that in the course of its processes relating to the making of AWAs in the period March to September 2006, the Respondent contravened:*

- i) regulation 8.12(1) of the Regulations,*
- ii) regulation 8.12(2) of the Regulations; and*
- iii) regulation 8.13(1) of the Regulations.*

(c) *The penalty imposed on the Respondent be paid into the Consolidated Revenue Fund within 28 days of the date of the Order.*

(d) *There be no order as to costs.*

3. The following schedule summarises the admitted contraventions, the maximum penalty that might be imposed and the penalties that the parties suggest should be imposed:

Nature of breach	Number of contraventions	Maximum penalty for each breach	Total maximum penalty	Proposed penalty
s.341(1) (lodging unapproved AWAs)	105	\$33,000	\$3,456,000	\$25,000
s.342(1) (Failing to lodge AWAs with Workplace Authority Director)	355	\$16,500	\$5,857,500	
Regulation 8.12(1) (Failing to have AWAs properly witnessed with complete details of witness)	27	N/A	N/A	N/A
Regulation 8.12(2) (Having AWAs witnessed by a person not entitled to be witness)	27	N/A	N/A	

Regulation 8.13 (Failing to have employee sign the AWAs)	17	\$5,500	\$93,500	Nil
--	----	---------	----------	-----

4. The parties agree that \$25,000 (twenty five thousand dollars) is an appropriate total penalty for the admitted contraventions having regard to all relevant matters. The parties agree that the circumstances in which the contraventions occurred and the nature of the respondent's conduct require a "meaningful" penalty to be imposed having regard to the object of the Act and, in particular, the need for general deterrence.
5. It was submitted by the parties that whilst it is ultimately for the court to fix the appropriate penalty, where the parties agree on a penalty, the court should not disturb it unless it falls outside the appropriate range. This approach is supported by recent authority. In *Hills v Sutton* [2007] FCA 2033, a case also concerning an agreed penalty for breach by an employer of the Act, Tracey J came to the same view stating at paragraph 7 of his reasons:
- "The court is not bound to accept and impose these proposed penalties but will do so if persuaded that, in all the circumstances, they fall within the permissible range: NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission (1996) 71 FCR 285 at 290-1. In Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543 at 565, Jessop J expressed the view, of which I respectfully agree, that the phrase "permissible range" in this context "refers to a range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor manifestly excessive."*
6. Taking into account the mitigating factors referred to in the Statement of Agreed Facts, I have come to the conclusion that the penalty proposed adequately reflects the seriousness of the conduct of the respondent and that the proposed penalty is within the permissible range. In coming to this conclusion, I have also taken into account the submissions of counsel for each of the parties. I am particularly influenced by the fact that counsel join in the submissions that the contraventions were "... of a technical and procedural nature", that the respondent at all times fully co-operated with the authorities and that

the matters raised in this application could and should have been included in earlier proceedings.

7. I make the orders to be found at the beginning of these reasons.

I certify that the preceding seven (7) paragraphs are a true copy of the reasons for judgment of Simpson FM

Associate:

Date: 28 January 2011