FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v NU LIFE ORGANIC FARMS PTY LTD & ORS *[2010] FMCA 694*

INDUSTRIAL LAW – Pecuniary penalties – breaches of *Fruits and Vegetable Growing Industry Award - State 2002* – breaches of Australian Pay and Classification Scale (APCS) – failure to pay basic rate of pay – failure to pay casual leave loading

Workplace Relations Act 1996 (Cth), ss.6, 182(1), 185(1), 719
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), ss.11, 13 & 25
Fair Work Act 2009 (Cth), s.701
Workplace Relations Amendment (Work Choices) Act 2005 (Cth)

CPSU v Telstra Corporation Limited (2001) 108 IR 228
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Cotis v McPherson [2007] FMCA 2060
Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar [2007] FMCA 7
Fair Work Ombudsman v Sanada Investments Pty Ltd [2010] FMCA 401

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	NU LIFE ORGANIC FARMS PTY LTD
Second Respondent:	TREVOR JOHN BELL
Third Respondent:	PETER JOHN HILL
File Number:	BRG1000/2009
Judgment of:	Jarrett FM
Hearing date:	30 August 2010
Date of Last Submission:	30 August 2010
Delivered at:	Brisbane

Delivered on: 10 September 2010

REPRESENTATION

Counsel for the Applicant: Mr James

Solicitors for the Applicant: Gadens Lawyers

The Second Respondent appeared on behalf of the First Respondent

The Second Respondent appeared on his own behalf.

The Third Respondent appeared on his own behalf.

WITH THE CONSENT OF EACH OF THE PARTIES, I DECLARE THAT:

(1) The first respondent contravened:

(a) s.182(1) of the *Workplace Relations Act* 1996 (Cth) by failing to pay the basic rate of pay specified in the Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award - State 2002*; and

(b) s.185(2) of the *Workplace Relations Act* 1996 (Cth), by failing to pay the guaranteed casual loading percentage specified in the Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award – State 2002.*

(2) Pursuant to s.728 of the *Workplace Relations Act* 1996 (Cth), the second respondent was involved in the first respondent's contraventions namely:

(a) s.182(1) of the *Workplace Relations Act* 1996 (Cth) by failing to pay the basic rate of pay specified in the Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award – State 2002*; and

(b) s.185(2) of the *Workplace Relations Act* 1996 (Cth), by failing to pay the guaranteed casual loading percentage specified in the Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award – State 2002.*

(3) Pursuant to s.728 of the *Workplace Relations Act* 1996 (Cth), the third respondent was involved in the first respondent's contraventions namely:

(a) s.182(1) of the *Workplace Relations Act* 1996 (Cth) by failing to pay the basic rate of pay specified in the Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award – State 2002*; and

(b) s.185(2) of the *Workplace Relations Act* 1996 (Cth), by failing to pay the guaranteed casual loading percentage specified in the

Australian Pay and Classification Scales, as derived from the *Fruits and Vegetable Growing Industry Award – State 2002.*

I ORDER THAT:

(4) Pursuant to section 719(1) of the *Workplace Relations Act* 1996 (Cth), the first respondent pay a penalty of $25,500 in respect of the contraventions identified at paragraph 1 above, as follows:

(a) $12,750 for its contravention set out in (1)(a) above;

(b) $12,750 for its contravention set out in (1)(b) above.

(5) Pursuant to section 728 and 719(1) of the *Workplace Relations Act* 1996 (Cth), the second respondent pay a penalty of $4,930 in respect of the contraventions identified at paragraph 1 above, as follows:

(a) $2,465 for his contravention set out in (1)(a) above;

(b) $2,465 for his contravention set out in (1)(b) above.

(6) Pursuant to section 728 and 719(1) of the *Workplace Relations Act* 1996 (Cth), the third respondent pay a penalty of $4,930 in respect of the contraventions identified at paragraph 1 above, as follows:

(a) $2,465 for his contravention set out in (1)(a) above;

(b) $2,465 for his contravention set out in (1)(b) above.

(7) The penalties payable by each respondent be paid to the Commonwealth Consolidated Revenue Fund by 4.00 pm on 15 October, 2010.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG1000/2009

FAIR WORK OMBUDSMAN
Applicant

And

NU LIFE ORGANIC FARMS PTY LTD
First Respondent

And

TREVOR JOHN BELL
Second Respondent

And

PETER JOHN HILL
Third Respondent

REASONS FOR JUDGMENT

1. This is an application for the imposition of pecuniary penalties on the respondents for breaches of:

   a) The *Fruits and Vegetable Growing Industry Award – State 2002* which operates as a notional agreement preserving State award (NAPSA) under the *Workplace Relations Act* 1996 (Cth); and

   b) The Australian Pay and Classification Scale (APCS) derived from the Award.

2. There are two categories of breaches alleged against the respondents each of which relate to 7 separate employees. The two categories are:

   a) Breaches of s.182(1) of the Act by failing to pay the correct basic periodic rate of pay under the APCS in respect of the seven employees;

   b) Breaches of s.185(1) of the Act by failing to pay the casual loading percentage prescribed by the APCS in respect of the seven employees.

3. The first respondent was the employer of the seven underpaid employees. The second and third respondents are the directors of the first respondent.

4. The respondents admit the breaches. The second and third respondents admit their accessorial liability.

5. The issue to be determined in this application is the appropriate penalty for the admitted breaches for each respondent.

Legislative framework

6. There is no dispute about the legislative framework against which this application has been made. The respondents do not take issue with the applicant's submissions in this regard, and what follows is taken from the applicant's written submissions.

7. The applicant applies for the imposition of a penalty under s.719(1) of the WR Act. Section 719(1) of the WR Act enables a court of competent jurisdiction 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 Australian Fair Pay and Conditions Standard and a collective agreement.

8. Section 719(2) of the WR Act provides that where two or more breaches 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 of the WR Act, be taken to constitute a single breach of the applicable provision. Section 727 of the WR Act defines *civil remedy provisions*. By force of that section,

s.719 of the WR Act is a civil penalty provision. Similarly, s.728 of the WR Act (which provides for accessorial liability) is a civil penalty provision.

9. The maximum penalty for a breach of the s.719(1) is 300 penalty units for a body corporate and 60 penalty units for an individual. Section 4(1) of the WR Act provides that *penalty unit* has the same meaning as in the *Crimes Act* 1914 (Cth). Section 4AA of the *Crimes Act* provides a *penalty unit* to be $110 dollars.

10. Accordingly, the maximum penalty that may be imposed by the court for each breach of an applicable provision by the first respondent is $33,000. The maximum penalty that may be imposed by the court on Mr Hill and Mr Bell for each breach is $6,600.

Transitional issues

11. There is no dispute about the transitional arrangements that apply to these proceedings. The respondents do not take issue with the applicant's submissions in this regard, and what follows is taken from the applicant's written submissions.

12. The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) states that the WR Act continues to apply on or after 1 July, 2009 in relation to the contraventions of the WR Act that occurred before 1 July, 2009 subject to a contrary intention in that Act itself. There is no contrary intention apparent in the Transitional Act and the WR Act continues to apply to the conduct of the respondents the subject of these proceedings.

13. The Transitional Act expressly provides that Parts 5A and 6 of the WR Act (which deal with the Workplace Ombudsman and Workplace Inspectors) have no application after 1 July, 2009. This includes the provisions which appoint the Workplace Ombudsman as a Workplace Inspector and provide the Workplace Ombudsman with standing to bring proceedings under the WR Act.

14. However, in order to ensure that continuation and completion of legal proceedings under the WR Act's the Transitional Act provides than an application that could have been made or continued by a Workplace

Inspector in relation to conduct that occurred before 1 July, 2009 may be made or continued, after 1 July, 2009 by a Fair Work Inspector. The Fair Work Ombudsman is a Fair Work Inspector by virtue of s.701 of the *Fair Work Act* 2009 (FW Act).

15. The Fair Work Ombudsman has standing to bring this proceeding pursuant to s.719 of the WR Act under Schedule 18, Part 3 of the Transitional Act. The Court has the power to impose a penalty on the respondents by virtue of s.719(1) with respect to each breach of an applicable provision.

Agreed facts

16. The following recitation of facts comes from the statement of agreed facts filed by the parties shortly prior to the hearing before me.

17. The applicant is the Fair Work Ombudsman appointed pursuant to s.687 of the *Fair Work Act* 2009, is a Fair Work Inspector by virtue of s.701 of the Act and has standing pursuant to item 11 of Part 3 of Schedule 2 and item 13 of Part 3 of Schedule 18 to the *Fair Work (Transitional Provision and Consequential Amendments) Act* 2009 (Cth) to bring this application as it relates to conduct which occurred prior to the repeal of the *Workplace Relations Act* 1996 (Cth). Had the latter Act not been repealed this application could have been made pursuant to s.718(1) of the WR Act.

18. At the relevant times the first respondent was an employer within the meaning of s.6(1) of the WR Act and for the purposes of s.719 of the WR Act. At the relevant times it owned and operated a cucumber farm at Grantham, Queensland.

19. The first respondent employed the following people during the periods specified hereunder:

    a) Yukie Echigo – 29 May 2008 to 26 August 2008;

    b) Yuka Hirao – 18 June 2008 to 26 August 2008;

    c) Norio Matsumoto – 17 June 2008 to 26 August 2008;

    d) Mikiko Matsuki – 17 June 2008 to 3 August 2008;

e) Ayako Matsumura – 2 July 2008 to 26 August 2008;

f) Masahiro Endo – 20 May 2008 to 24 September 2008; and

g) Ryoko Togashi – 29 May 2008 to 24 September 2008.

20. Mr Bell and Mr Hill are, and were during the periods specified above, directors of the first respondent. Mr Bell was the company's secretary and its major shareholder.

21. Both Mr Hill and Mr Bell made or participated in making decisions that affected a substantial part of the first respondent's business and in particular the engagement of a labour force and the management of its finances and commercial activities. Together they were both what might be described as the senior management team of the first respondent.

22. The employees specified above were employed by the first respondent as fruit and vegetable pickers. They undertook duties that included planting, pruning, picking and packing cucumbers at the first respondent's farm. They:

a) Worked set regular hours each week;

b) Were supervised in their work and were required to report to the farm manager;

c) Were required to complete specific work and set tasks as directed by the farm manager;

d) Had no control over the work they performed;

e) Were provided with all the tools and equipment required to perform the duties directed;

f) Did not issue invoices for the work they performed;

g) Were paid regularly on the basis of hours worked;

h) Did not have authority to pledge the credit of the company or bind the company or each other to contractual arrangements with external third parties;

i) Were employed on a casual basis and did not accrue and were not permitted to take annual leave or personal leave in accordance with the provisions of the WR Act;

j) Had no expectation of ongoing employment; and

k) Were not provided with notice or payment in lieu of notice on the termination of their employment and were in turn entitled to terminate their employment without notice.

23. The duties performed by the employees were typically seasonal, short term and performed by casual labour.

24. At the relevant times there existed an Australian Pay and Classification Scale (APCS). The APCS was a *preserved APCS* within the meaning of that term given by s.208 of the WR Act and it applied to the duties and work performed by the employees. The APCS was derived from the *Fruits and Vegetable Growing Industry Award – State* (Qld) upon the commencement of the *Workplace Relations Amendment (Work Choices) Act* 2005 in March, 2006.

25. The APCS forms part of the Australian Fair Pay and Conditions Standard regulated by the WR Act and was binding on the first respondent and each of the seven underpaid employees.

The contraventions

26. Contrary to its obligations under s.182(1) of the WR Act the first respondent failed to pay each of the seven underpaid employees a guaranteed basic periodic rate of pay for each of their guaranteed hours that was at least equal to the rate payable under the APCS. Under the APCS the first respondent was obliged to pay the seven underpaid employees $13.74 for each hour worked.

27. The first respondent failed to pay to each employee at least the guaranteed basic periodic rate of pay for each of the hours worked by the seven underpaid employees.

28. Pursuant to s.185(2) of the WR Act, the first respondent was obligated to pay a casual loading that was at least equal to the guaranteed casual loading percentage provided in the APCS. Under the APCS, the first

respondent was obliged to pay the employees a loading of 23% calculated on $13.74 for each hour worked.

29. The first respondent failed to pay each of the seven underpaid employees the guaranteed casual loading percentage under the APCS for each of the hours the seven underpaid employees worked.

30. Following a review of the record of the hours and days alleged to have been worked by the employees, the total amount owing to them collectively as a result of the failure of the first respondent to pay the guaranteed basic rate of pay and guaranteed casual loading has been agreed between the parties at $20,001.71. That amount is calculated as follows:

Employee	Hours worked	Basic periodic rate of pay under APCS $13.74	Casual loading under APCS 23%	Total amount owing	Total amount paid	Total underpayment
Yuka Hirao	308.75	$4,242.23	$975.74	$5,217.94	$2,713.65	$2,504.29
Ryoko Togashi	486.75	$6,687.95	$1,538.23	$8,226.17	$4,940.00	$3,286.17
Masahiro Endo	524.75	$7,210.06	$1,658.31	$8,868.38	$5,420.25	$3,448.13
Yukle Echigo	406.50	$5,585.31	$1,284.62	$6,869.93	$3,837.75	$3,032.18
Norio Matsumoto	386.75	$5,313.94	$1,222.21	$6,536.15	$2,713.65	$3,822.50
Mikiko Matsuki	271.25	$3,726.97	$857.20	$4,584.18	$3,901.30	$682.88
Ayako Matsumura	300	$4,122.00	$948.06	$5,070.06	$1,844.50	$3,225.56

						$20,001.71

31. Mr Bell and Mr Hill authorised the payments made to each of the seven underpaid employees over the period of their employment. Mr Hill was responsible for the management of the books and accounts of the first respondent. Together, they determined the basis upon which the seven underpaid employees would be employed and the terms and conditions of their employment. Both gentlemen together were the operative and controlling mind of the first respondent, its business and the farm. Mr Hill was the person who monitored the day to day operations of the first respondent's business.

32. By reason of those facts, both Mr Bell and Mr Hill accept that they were directly or indirectly, knowingly concerned in or party to the first respondent's contraventions as those phrases are used in s.728 of the WR Act. They also accept that they were involved in the contraventions for the purposes of the WR Act.

These proceedings

33. Between 3 October, 2008 and 7 October, 2008 the Applicant received complaints from the seven underpaid employees in relation to their employment with the first respondent. On 21 October, 2008 the applicant sent a Request for Records to Mr Bell and Mr Hill seeking all records pertaining to employees engaged by the first respondent during the period 1 May, 2008 to 30 September, 2008. Attempts by the applicant to contact Mr Bell on 31 October were unsuccessful.

34. On 11 November, 2008 Mr Hill notified the applicant that he was interstate and would provide the requested information by 17 November, 2008. On 26 November, 2008 Mr Hill notified the applicant that no employee records existed for the period 1 May, 2008 to 30 September, 2008 as the first respondent had no employees during that period. Mr Hill asserted that all work on the farm was carried out as a partnership.

35. On 17 December, 2008 the applicant notified the first respondent in writing of the commencement of an investigation. On the same day the

applicant issued a Notice to Produce to Mr Bell and Mr Hill. No response was received to the Notice to Produce by 13 January, 2009. The applicant made various unsuccessful attempts to contact Mr Bell and Mr Hill to progress the investigation.

36. On 22 January, 2009 the applicant invited Mr Bell and Mr Hill to participate in a record of interview and produce documents in accordance with the Notice to Produce documents issued 17 December, 2008. The applicant received no response to the invitation.

37. On 6 March, 2009 the applicant issued a breach notice to the first respondent. This notice requested that the first respondent quantify and rectify each of the alleged breaches. On 20 March, 2009 Mr Bell notified the applicant that he intended to compile a response to the breach notice.

38. Following an investigation and full assessment of the underpayment, the applicant issued a final notice to the first respondent on 23 March, 2009.

39. On 2 April, 2009 the applicant invited Mr Bell to participate in a record of interview. On 7 April, 2009 Mr Bell participated in a record of interview.

40. On 10 December, 2009 the applicant invited Mr Hill to participate in a Record of Interview. Mr Hill did not participate in a record of interview.

41. On 23 December, 2009 after finalising its investigation, the applicant commenced these proceedings.

Consideration

42. The applicant submits that the following approach should be adopted in determining the appropriate penalties to impose in this case:

    a) Firstly, each of the separate contraventions must be identified. Each breach of each separate obligation found in the APCS in relation to each of the seven named employees is a separate contravention of a term of an applicable provision for the purposes of s.719(1) of the WR Act.

b) Second, 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 respondents 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 respondents did. This task is distinct from and in addition to the final application of the "totality principle."

c) Third, consideration should be given to an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.

d) Finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, consideration should be given to the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches. In determining whether the aggregate penalty is appropriate, regard is to be had to the "totality principle."

43. Section 719(2) of the WR Act requires the Court to consider two or more breaches of an applicable provision that arise out of a "course of conduct" to be taken to constitute one single breach of the applicable provision. The applicant points out that it has been held in relation to this clause that:

a) Where breaches of a particular term arise out of the same course of conduct, even if they involve different employees, they must be treated as a single breach: *Cotis v POW Juice Pty Ltd* [2007] FMCA 140;

b) Where there are breaches of two distinct terms of an industrial instrument, they are not to be treated as a single breach, even if they arise from one course of conduct: *Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar* [2007] FMCA 7.

44. The applicant submits that the contraventions are to be assessed for penalties as two distinct and separate contraventions of applicable provisions as follows:

a) A breach of s.182(1) of the WR Act (failing to pay the seven underpaid employees a guaranteed basic periodic rate of pay that was at least equal to the rate payable under the APCS); and

b) A breach of s.185(2) of the WR Act (failing to pay the seven underpaid employees the guaranteed casual loading percentage under the APCS).

45. I accept that submission. The respondents did not argue to the contrary. Further I accept that on that analysis, the maximum penalties that might be imposed in this matter are:

a) In relation to the first respondent, 300 penalty units for each of the 2 contraventions totalling $66,000;

b) In relation to Mr Bell, 60 penalty units for each of the 2 contraventions totalling $13,200; and

c) In relation to Mr Hill, 60 penalty units for each of the 2 contraventions totalling $13,200.

46. It is generally accepted that the approach to be adopted in determining an appropriate penalty is in accordance with the approach adopted by Mowbray FM in *Mason v Harrington Corporation Limited trading as Pangaea Restaurant and Bar* (above) (approved in *Kelly v Fitzpatrick* [2007] FCA 1080 at [14], *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FC AFC 8 at [46] and in *Blandy v Coverdale NT Pty Ltd* [2008] FCA 1533).

47. In *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 at [55], I pointed out that the principal objects of the WR Act emphasise the importance of an effective safety net of minimum terms and conditions of employment together with effective enforcement of those minimum standards. The provisions concerning compliance, at Part 14 of the WR Act is one of the ways that the WR Act seeks to give effect to this principal object. The importance of this 'safety net' is reflected not only in the magnitude of the maximum penalties available in respect of any breach of an applicable provision, but also in the Legislature's increase of those maximum penalties in August, 2004:

a) Maximum penalty for Individuals Increased from $2,000 to 60 penalty units ($6,600);

b) Maximum penalty for bodies corporate increased from $10,000 to 300 penalty units ($33,000).

48. The provisions now under consideration emphasise the importance of employers complying with their obligations and affording rights to employees under industrial instruments.

49. I accept that the relevant considerations when fixing penalties in this case include:

a) The nature and extent of the offending conduct;

b) The circumstances in which the conduct took place;

c) The nature and extent of any loss or damage;

d) Any similar previous conduct;

e) Whether the breaches were properly distinct or arose out of one course of conduct;

f) The size of the first respondent's undertaking;

g) The deliberateness of the breach;

h) The involvement of senior management;

i) The first respondent's contrition, corrective action and cooperation with the enforcement authorities;

j) Ensuring compliance with minimum standards by providing effective means for investigation enforcement of employee entitlements;

k) Deterrence.

50. The applicant submits that compliance with the APCS is important and should not be ignored by employers. For the reasons just expressed, I accept that submission.

51. The applicant submits that the nature and extent of the respondent's conduct was significant because:

a) The underpayments related to seven employees;

b) The seven employees were of all non-English speaking backgrounds, many of whom had a limited command of the English language;

c) The seven employees were all foreign nationals who were unfamiliar with Australia's labour practices.

52. I accept those submissions. In addition, the following facts which emerge from the evidence relied upon by the applicant are also significant in my view:

a) Some of the employees were in Australia on working holiday visas;

b) The employees were not paid their full entitlement at the end of each pay period. Rather, only half of their "wages" were paid with the balance withheld to be paid when the employee left the farm;

c) On of the employees was co-opted by the first respondent and Mr Hill and Mr Bell to be an interpreter at meetings of the employees, but that person did not interpret all that was said – only the "gist" of what he perceived others did not understand or he was asked to explain.

53. The amount of the underpayments to the employees are significant – whilst the underpayment totals $20,001.00, that figure represents, on average, 44% of the employees' entitlements.

54. In my view, the employees affected were particularly vulnerable because:

a) The employees were typically Japanese nationals holding working holiday visas;

b) The employees were transient employees that were employed by the first respondent for the short periods set out above;

c) Save for two employees, the employees had limited knowledge of the English language, either spoken or written.

55. There is no evidence before me as to the size of the first respondent's undertaking. Regardless of the size of the business, however, it does not absolve the respondent of its legal responsibility to comply with the law in relation to the employment of its employees: *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [26]-[30].

56. The respondents submit that they acted in the belief that the employees had agreed to be rewarded by a share of profits and that collectively they were in a partnership with the first respondent, sharing both risk and reward in respect of the farm crop. It was submitted that the partnership of "employees" was entitled to 75% of the farm profits. The individual share was proportionate to the amount that would have been paid as wages. The entitlements of each participant were recorded on a progressive statement showing their estimated share. The respondents submitted that advances were made to the participants as a loan (not from the respondents) and banked directly to the participants' bank accounts identified as an "advance." The respondents submitted that the farm made a loss rather than the anticipated profit but notwithstanding this, the participants were not asked to repay the loans.

57. The second and third respondents have each filed a very brief affidavit in these proceedings, but they do not elaborate upon any of the relevant issues. The evidence relied upon by the applicant establishes that at a meeting of the employees, Mr Hill, Mr Bell and another person Gary Klein. In early June, 2008, the idea of a profit sharing arrangement was mentioned by Mr Hill, but the employees, and in particular Mr Masahiro Endo (the co-opted interpreter) were concerned to endure that they would be paid their wages irrespective of the profit from the crop. According to Mr Endo's sworn evidence, they received that assurance. There was no mention of periodic payments being made by way of loan or advance. Indeed, the suggestion was that the payment arrangements would be as they were *"for tax purposes"* although there was no explanation from the respondents as to the meaning of that.

58. There was a document given to each employee at the meeting that set out an arrangement similar to that described by the respondents in submission, but it was not suggested that it had any contractual

significance. The "partnership" agreement was said to be a verbal agreement.

59. In *Cotis v McPherson* [2007] FMCA 2060 at para [17] Driver FM made clear that the issue of the deliberateness of the breaches is to be judged against something of a sliding scale where recklessness is as much a relevant factor as deliberate intention to breach.

60. If I accept the submissions of the respondents, they made a deliberate decision to adopt a method of employment for these seven employees that was out of the ordinary. Given the special vulnerabilities of the employees set out above and the nature of what was proposed, it seems to me that it was incumbent upon the respondents to make sure that what was proposed could be achieved legally and then was implemented in an appropriate way. On facts contended for by the respondents, their attempt was at best ill-conceived and poorly executed and at worst a deliberate attempt to avoid the industrial relations system in this country. I approach the case on the basis that the respondent's conduct demonstrates a reckless disregard for the first respondent's statutory obligations.

61. I also accept the applicant's submission that the applicant brought the obligation to pay the APCS rates to the attention of the first respondent by way of a Breach Notice issued on 6 March, 2009. From the time the Breach Notice was issued, the first respondent's failure to pay the underpayments has been deliberate.

62. The respondents have not fully cooperated with the applicant throughout the investigation. There was no meaningful response from the respondents for some time. Mr Bell eventually gave a record of interview. Mr Hill did not.

63. As I pointed out in at [75]:

> *It is well established that deterrence is a relevant factor in the imposition of a penalty. The applicant referred me to the following passages about the significance of the role of general deterrence in determining the appropriate penalty:*
>
> *Lander J. in Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543 at para 183:*

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is Imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217.*

Finkelstein J in CPSU v Telstra Corporation Limited (2001) 108 IR 228 at [9]:

> *....even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct.*

64. The applicant submits that in this case there is a need for both specific and general deterrence. I agree. The response provided by the respondents to the applicant during the course of the investigation indicates that the respondents have a particular interest in promoting arrangements such as the one they say was put in place with the seven employees in this case. That is not to suggest that such an arrangement cannot legally be put in place, or that such an arrangement might not represent an attractive alternative to the commonly understood concepts of "employment." But what attracts attention is the incomplete and ineffective way in which the respondents went about the arrangements in this case and the lack of clarity for the employees concerned.

65. I accept the applicant's submissions that the court should have regard to the message sent, in the imposition of penalties, to employers and the community generally that underpayment of wages will not be tolerated and this is particularly the case where vulnerable employees are involved.

66. The failure to rectify the underpayments is a relevant factor that I take into account.

Penalty

67. Having regard to the matters set out above, the breaches are serious. These were vulnerable employees, all of whom are now without their full entitlements. The respondents demonstrate no remorse and persist with the assertion that the employees were, in fact, entitled to nothing. It is suggested that the respondents have been accommodating because the employees are not asked to repay the "advances" that they received.

68. In my view penalties for each breach by the first respondent should be assessed at $15,000 per breach or $30,000 in total. Taking into account the less than fulsome co-operation of the first respondent, and the resolution of this case by way of penalty hearing, albeit after considerable preparation of evidence by the applicant there should be a discount of 15%. Applying that discount, the penalty for each breach is $12,750.00.

69. The aggregate penalty is $25,500.00. There is no evidence that such a penalty is likely to have a "crushing effect" upon the first respondent. In my view it is an appropriate response to the conduct which led to the breaches having regard to the matters set out above.

70. In my view penalties for each breach by Mr Hill and Mr Bell should be assessed at $2,900 per breach or $5,800 in total for each respondent. There is nothing in the evidence to suggest that I should treat Mr Bell differently from Mr Hill. Both were equally involved having regard to the agreed facts. Taking into account their less than fulsome co-operation, and the resolution of this case by way of penalty hearing (again after considerable preparation of evidence by the applicant) there should be a discount of 15%. Applying that discount, the penalty for each breach is $2,465.00.

71. The aggregate penalty for each of the second and third respondents is $4,930.00. There is no evidence that such a penalty is likely to have a "crushing effect" upon either gentleman. In my view it is an appropriate response to the conduct which led to the breaches having regard to the matters set out above.

72. I make the orders set out at the commencement of these reasons.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of Jarrett FM

Associate: Edmondson.

Date: 10 September 2010