FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v PRAGLOWSKI *[2010] FMCA 621*

INDUSTRIAL LAW – Underpayment of basic rates of pay and non payment of casual loadings – civil penalty – consideration of matters relevant to penalty.

PRACTICE AND PROCEDURE – Removal of a company in liquidation as an unnecessary and inappropriate respondent.

Corporations Act 2001 (Cth), s.471B
Crimes Act 1914 (Cth), ss.4AA, 346ZD
Fair Work Act 2009 (Cth), ss.687, 701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), s.11
Workplace Relations Act 1996 (Cth), ss.4, 171, 182, 185, 208, 717, 718, 719, 722, 728

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Clothing and Allied Trades Union v Snugglerite Industries Pty Ltd (1990) 34 IR 124
Cotis v Macpherson [2007] FMCA 2060
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Lynch v Buckley Sawmills Pty Ltd [1984] FCA 306; (1984) 3 FCR 503
McIver v Healey [2008] FCA 425
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Ponzio v B&P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Quinn v Martin (1977) 16 ALR 141
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor [2009] FMCA 38
Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors [2009] FMCA 700

ORDERS

The Court notes the following admissions:

(1) Country Hospitality Pty Ltd (in liquidation) contravened the following provisions of the *Workplace Relations Act 1996* (Cth):

(a) section 182(3) by failing to pay its employees at a rate at least equal to the federal minimum wage for each hour worked; and

(b) section 185(2) by failing to pay its employees a guaranteed casual loading of 20 per cent for each hour worked.

leading to an underpayment of $38,895.13.

(2) The respondent, by reason of the operation of s.728(1) of the Workplace Relations Act, was involved in the contraventions of the Workplace Relations Act as set out above.

The Court orders that:

(1) The respondent pay a penalty of $5,940 for his involvement in the contraventions.

(2) The penalty be paid within 28 days.

(3) The penalty payable under order (1) be paid to the Consolidated Revenue of the Commonwealth, pursuant to s.841(a) of the *Workplace Relations Act 1996* (Cth).

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG956 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

ANDRE PRAGLOWSKI
Respondent

REASONS FOR JUDGMENT

Introduction and background

1. By application and statement of claim filed on 3 May 2010, the applicant (the Fair Work Ombudsman) sought declarations against a company (Country Hospitality Pty Ltd) in respect of breaches of s.182(3) and s.185(2) of the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act"). The Fair Work Ombudsman now relies upon an amended statement of claim filed in court by leave on 16 August 2010. The Fair Work Ombudsman seeks a declaration that the respondent (Andre Praglowski) was involved in contraventions within the meaning of s.728 of the Workplace Relations Act and has thereby contravened those provisions.

2. The Fair Work Ombudsman also seeks orders pursuant to s.719(1) of the Workplace Relations Act that Mr Praglowski pay pecuniary penalties by reason of his involvement in the contraventions by Country Hospitality. No penalties are sought against the company in view of the fact that it is in liquidation. I made a procedural order

(without argument) that Country Hospitality be removed as a respondent in light of its liquidation. Country Hospitality is not a necessary or appropriate respondent and its removal does not affect the liability of Mr Praglowski[1] which is admitted in any event.

3. On 29 July 2010 the parties filed an agreed statement of facts whereby Country Hospitality admitted the contraventions alleged and Mr Praglowski admitted his involvement in contraventions within the meaning of s.728 of the Workplace Relations Act. It is also agreed between the parties in the agreed statement of facts that the total underpayment to the employees is $38,895.13.

4. The parties are in dispute only in relation to the amount of penalty that should be imposed for the breaches.

5. In relation to Country Hospitality, the Fair Work Ombudsman sought an order that Country Hospitality make good the underpayments identified in the statement of claim. Interest was also sought in accordance with s.722 of the Workplace Relations Act. I gave no leave for that claim to be pursued[2].

6. By agreement, the amount of underpaid wages sought by the Fair Work Ombudsman is $38,895.13.

7. The amount sought in the Fair Work Ombudsman's statement of claim was $87,174.73.

8. Country Hospitality was a constitutional corporation under the Workplace Relations Act and operated a business involving the sale of holiday packages. The employees were each employed on a casual basis and were employed as "telemarketers" making outbound telephone calls to customers to sell holiday packages.

9. On 28 January 2009, the Fair Work Ombudsman received a complaint from Ann Garling in relation to her employment with Country Hospitality as a casual telemarketer. Ms Garling's claim was allocated to Inspector Alicia Kingmohr for investigation[3].

---

[1] *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Carlton Sheet Metal Pty Ltd & Ors* [2010] FMCA 280.
[2] See s.471B of the *Corporations Act 2001* (Cth) ("Corporations Act").
[3] See affidavit of Alicia Kingmohr affirmed 25 June 2010 at paragraphs 5 to 7.

10. Inspector Kingmohr issued a Breach Notice to Mr Praglowski regarding Ms Garling's claim on 9 March 2009. Ms Garling's underpayment of $982.10 was rectified in full by Mr Praglowski on 23 March 2009[4].

11. Following the rectification of Ms Garling's claim, the Fair Work Ombudsman commenced an audit to ensure Country Hospitality was complying with its obligations regarding minimum wages and casual loadings[5].

12. The audit revealed that Country Hospitality had failed to pay the employees a basic periodic rate of pay at least equal to the Federal Minimum Wage[6] (FMW) and had also failed to pay the employees a guaranteed casual loading in addition to their basic periodic rate of pay[7].

13. The Fair Work Ombudsman filed the current proceedings on 3 May 2010.

14. On 26 June 2010, Country Hospitality was placed into liquidation.

15. Since the initiation of these proceedings, Country Hospitality and Mr Praglowski adopted a cooperative approach to progress the resolution of this matter.

16. The Fair Work Ombudsman acknowledges that Country Hospitality and Mr Praglowski have admitted liability in these proceedings[8].

Legislative provisions

17. I accept the submissions of the Fair Work Ombudsman in relation to the applicable law. The proceedings are brought under s.718(1) of the Workplace Relations Act in relation to breaches of the Australian Fair Pay and Conditions Standard (AFPCS), namely the entitlement to a basic periodic rate of pay and guaranteed casual loading.

---

[4] See affidavit of Alicia Kingmohr affirmed 25 June 2010 at paragraphs 8 to 10.
[5] See affidavit of Alicia Kingmohr affirmed 25 June 2010 at paragraph 11.
[6] Subsection 182(3) of the Workplace Relations Act.
[7] Subsection 185(2) of the Workplace Relations Act.
[8] See paragraphs 56(a) to (c) of the agreed statement of facts filed on 29 July 2010.

18. On 1 July 2009, the Workplace Relations Act was repealed by the provisions of the *Fair Work Act 2009* (Cth) ("the Fair Work Act").

19. In respect of breaches occurring prior to 1 July 2009, s.11(1) of Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("Transitional Act") provides that the Workplace Relations Act continues to apply on or after 1 July 2009 in relation to conduct that occurred before that date.

20. Section 13(1) of Part 3 of Schedule 18 of the Transitional Act gives Fair Work Inspectors the power to make or continue applications under the Workplace Relations Act.

21. The Fair Work Ombudsman is a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument, pursuant to s.687 of the Fair Work Act and a Fair Work Inspector pursuant to s.701 of the Fair Work Act.

22. Section 719(1) of the Workplace Relations Act enables a court of competent jurisdiction[9] may impose a penalty in respect of a breach of an applicable provision by a person bound by the provision. An "applicable provision" is defined in s.717 of the Workplace Relations Act to include a term of the AFPCS.

23. Section 719(2) of the Workplace Relations 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, be taken to constitute a single breach of the term.

24. Section 719(4)(a) of the Workplace Relations Act proscribes the maximum penalty that may be imposed by this Court to be, in the case of an individual, 60 penalty units and in the case of a body corporate, 300 penalty units. Section 4(1) of the Workplace Relations Act provides that "penalty unit" has the same meaning as in the *Crimes Act 1914* (Cth) ("the Crimes Act"). Section 4AA of the Crimes Act defines "penalty unit" to be $110. The maximum penalty that may be imposed by the Court for breach of s.346ZD by an individual is therefore $6,600.

[9] Defined to include this Court.

Breaches of the Workplace Relations Act

25. Part 7 of the Workplace Relations Act (Part 7) is entitled, "The Australian Fair Pay and Conditions Standard". The stated purpose of Part 7 is to set out key minimum entitlements of employment[10].

Breach of s.182(3) of the Workplace Relations Act

26. The effect of s.182(3) of the Workplace Relations Act is that an employee must be paid a basic periodic rate of pay for each of his or her guaranteed hours that is at least equal to the standard Federal Minimum Wage (FMW).

27. Pursuant to s.208 of the Workplace Relations Act, to the extent that an award contained rate provisions which determined an employee's basic periodic rate of pay, a preserved Australian Fair Pay and Classification Scale was derived from that award (APCS) on and from 27 March 2006.

28. Where the employment of an employee is not covered by an APCS, the employee must be paid a basic periodic rate of pay at least equal to the standard FMW pursuant to s.182(3) of the Workplace Relations Act.

29. As the employees in this case were not covered by any award they were not covered by an APCS. Accordingly, Country Hospitality was required to pay each of the employees at a rate at least equal to the FMW, as adjusted from time to time by the Australian Fair Pay Commission, for each hour that they worked.

30. The FMW payable to each employee during the relevant period was:

    a) $12.75 per hour from 1 July 2006 to 30 November 2006;

    b) $13.47 per hour from 1 December 2006 to 30 September 2007;

    c) $13.74 per hour from 1 October 2007 to 30 September 2008; and

    d) $14.31 per hour from 1 October 2008.

---

[10] Subsection 171(1) of the Workplace Relations Act.

31. Country Hospitality paid its employees in accordance with a performance payment scheme that offered $10.00 per hour plus an additional payment based on weekly sales performance[11]. Accordingly, Country Hospitality failed to pay each of the employees at a rate at least equal to the FMW for each hour worked[12].

Breach of s.185(2) of the Workplace Relations Act

32. The effect of s.185(2) is that an employee must be paid, in addition to their actual basic periodic rate of pay, a guaranteed casual loading that is at least equal to the default casual loading.

33. Country Hospitality was required under s.185(2) to pay each of the employees a casual loading of 20 per cent for each hour that they worked[13].

34. The casual loaded rate payable to employees during the relevant period was:

    a) $15.30 per hour from 1 July 2006 to 30 November 2006;

    b) $16.16 per hour from 1 December 2006 to 30 September 2007;

    c) $16.49 per hour from 1 October 2007 to 30 September 2008; and

    d) $17.17 per hour from October 2008.

35. Country Hospitality failed to pay each of the employees a casual loading of 20 per cent for each hour that they worked[14].

Involvement in the breaches

36. The authorities[15] show that in order for a person to have accessorial liability under s.728(2) of the Workplace Relations Act he or she:

    a) must have knowledge of the essential facts constituting the contravention;

---

[11] See paragraphs 9 to 11 of the agreed statement of facts filed on 29 July 2010.
[12] See paragraph 20 of the agreed statement of facts filed on 29 July 2010.
[13] See paragraphs 21 and 22 of the agreed statement of facts filed on 29 July 2010.
[14] See paragraph 24 of the agreed statement of facts filed on 29 July 2010.
[15] *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661.

b) must be knowingly concerned in the contravention;

c) must be an intentional participant in the contravention based on actual not constructive knowledge of the essential facts constituting the contravention – although constructive knowledge may be sufficient under s.728(2)(c) in cases of wilful blindness; and

d) need not know that the matters in question constituted a contravention.

37. Mr Praglowski was "involved" in the alleged contraventions in that he:

a) had knowledge of the facts and matters constituting the contraventions by virtue of his position as sole director and company secretary of Country Hospitality;

b) was the person solely responsible for determining and setting wage rates and conditions for the employees;

c) made enquiries with the Industrial Relations Commission of New South Wales (IRC NSW) in 2002 and 2005 concerning the appropriate award coverage for telemarketers;

d) received a breach notice from the Fair Work Ombudsman on 9 March 2010 in relation to Ms Garling's claim which informed him of the FMW applicable to a casual adult employee employed as a telemarketer;

e) did not increase pay rates for other casual adult employees until on or about 12 June 2009;

f) was aware prior to the commencement of these proceedings that the rectification payments owed to the relevant employees were outstanding;

g) had control of Country Hospitality's finances; and

h) was the person with the authority to direct any rectification payments of entitlements to the relevant employees.

He has conceded that involvement.

The evidence and submissions

38. In addition to the agreed statement of facts, the Fair Work Ombudsman relies upon an affidavit of Alicia Jane Kingmohr made on 25 June 2010 and an affidavit of Benjamin Ryszard Ziolkowski made on 24 June 2010. Neither deponent was examined on their affidavits. Mr Praglowski relies upon his two affidavits made on 6 June 2010 and 16 August 2010. Mr Praglowski was cross-examined on his affidavits.

39. The Fair Work Ombudsman submits that the circumstances of this case call for the imposition of penalties in the mid range. Mr Praglowski submits that no penalty or only nominal penalty should be imposed.

40. In relation to the underpayment figure, and making good the underpayments, Mr Praglowski submits as follows:

    a) he was the sole director of Country Hospitality;

    b) more than 55 per cent of the underpayments initially sought were in relation to Mr Praglowski's wife Christina Gabriel and his sister in law, Justina Gabriel;

    c) underpayments in relation to Christina Gabriel amount to $28,423.60, whilst underpayments in relation to Justina Gabriel amount to $19,856;

    d) neither Christina Gabriel or Justina Gabriel wish the Fair Work Ombudsman to pursue Country Hospitality or Mr Praglowski in relation to the underpayment;

    e) at no time during the investigation undertaken by the Fair Work Ombudsman or its predecessor did an inspector seek to clarify whether any of the employees were in fact related to or connected to Mr Praglowski. Given the size of the company, enquiries should have been made of Mr Praglowski and the employees to ascertain:

        i) whether any employees who were working for Country Hospitality were in fact family members or had a connection to Mr Praglowski; and

ii) who of the employees ultimately indentified in the Fair Work Ombudsman's statement of claim wanted the Fair Work Ombudsman to pursue the underpayments owed to them.

41. Mr Praglowski submits that Country Hospitality has committed a single breach of s.182(3) of the Workplace Relations Act. The single breach arises out of one course of conduct, being the failure to pay employees at a rate at least equal to the guaranteed FMW. As such, if the Court is minded to impose penalty against Mr Praglowski, that penalty is said to be in relation to a single breach and not multiple breaches of the Workplace Relations Act: *Mason v Harrington Corporation Pty Ltd*[16].

Consideration

The Court's approach to determining penalty

42. The Fair Work Ombudsman's submissions traverse the now relatively well settled principles concerning the proper approach for the Court to adopt in fixing appropriate penalties.

43. The first step is to identify each of the separate contraventions involved. Each breach of each separate obligation found in the Workplace Relations Act in relation to the employees is a separate contravention of a term of an applicable provision for the purposes of s.719[17].

44. The second step is to consider whether the breaches arising in the first step constitute a single course of conduct[18].

45. Thirdly, 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. Mr Praglowski should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate

[16] [2007] FMCA 7 at [14]-[15].
[17] *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).
[18] Subsection 719(2) of the Workplace Relations Act.

response to what Mr Praglowski did[19]. This task is distinct from and in addition to the final application of the "totality principle"[20].

46. The fourth step is to consider the appropriate penalty for the single breach(es) and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.

47. Finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches[21]. The Court should apply an "instinctive synthesis" in making this assessment[22]. This is what is known as an application of the "totality principle".

Application of facts to law

Identification of the contraventions

48. Country Hospitality's breaches are:

a) failure to pay its employees a basic periodic rate at least equal to the FMW for each hour worked pursuant to s.182(3) of the Workplace Relations Act (maximum penalty for the involvement of Mr Praglowski is $6,600); and

b) failure to pay its employees a guaranteed casual loading of 20 per cent for each hour that they worked in addition to their basic periodic rate of pay pursuant to s.185(2) of the Workplace Relations Act (maximum penalty for the involvement of the Mr Praglowski is $6,600).

---

[19] *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (Merringtons).

[20] *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (Mornington Inn).

[21] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

[22] *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

Course of conduct

49. I accept that breaches of a particular applicable provision in relation to a number of different employees may, depending upon the particular circumstances, attach the operation of s.719(2)[23]. Particularly relevant is whether the breaches arose out of separate acts or decisions of the employer, or out of a single act or decision. The latter case will constitute a course of conduct but the former will not[24].

50. In this case, each term was breached repeatedly by Country Hospitality in respect of 62 employees. Whilst there are at least 62 contraventions of s.182(3), they constitute a single course of conduct as one decision was made by Country Hospitality to pay the employees the incorrect hourly base rate. Similarly, whilst there are at least 62 contraventions of s.185(2), they also constitute a single course of conduct. The Fair Work Ombudsman therefore submits, and I accept, that there are two contraventions.

51. The onus of establishing the benefit of s.719(2) of the Workplace Relations Act is on the respondents[25]. The Fair Work Ombudsman accepts that based on the facts in this case Mr Praglowski has the benefit of s.719(2) of the Workplace Relations Act in relation to repeated breaches of each term and in regard to each of the employees. However, s.719(2) operates only in relation to two or more breaches of the *same term* of the Workplace Relations Act[26].

52. Mr Praglowski makes admissions at paragraph 56(c) of the agreed statement of facts demonstrating that he was "involved in" the contraventions by Country Hospitality within the meaning of s.728 of the Workplace Relations Act.

53. Therefore the maximum penalty the Court could impose on Mr Praglowski in this matter is $13,200.

---

[23] See eg. *Clothing and Allied Trades Union v Snugglerite Industries Pty Ltd* (1990) 34 IR 124 at 126.
[24] *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-267 per Gray J (with whom Northrop J agreed at 245.
[25] *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors* [2009] FMCA 700 at [5].
[26] Each repeated breach is treated as part of the same course of conduct (see *Quinn v Martin* (1977) 16 ALR 141 at 143-5 (Smithers, Evatt and Keely JJ) and *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 266-7 (Gray J, Northrop J agreeing)). *Gibbs v Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223.

Determination of penalties

54. The parties' submissions on the relevant principles do not conflict. The factors relevant to the imposition of a penalty under the Workplace Relations Act have been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar*[27] (*Pangaea*) at [26]-[59], as follows:

a) the nature and extent of the conduct which led to the breaches;

b) the circumstances in which that conduct took place;

c) the nature and extent of any loss or damage sustained as a result of the breaches;

d) whether there had been similar previous conduct by the respondent;

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

f) the size of the business enterprise involved;

g) whether or not the breaches were deliberate;

h) whether senior management was involved in the breaches;

i) whether the party committing the breach had exhibited contrition;

j) whether the party committing the breach had taken corrective action;

k) whether the party committing the breach had cooperated with the enforcement authorities;

l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and

m) the need for specific and general deterrence.

[27] [2007] FMCA 7.

55. This summary was adopted by Tracey J in *Kelly v Fitzpatrick*[28]. While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion: *Sharpe v Dogma Enterprises Pty Ltd*[29]; *Merringtons* at [91] per Buchanan J.

56. Each of the relevant factors identified in *Pangaea* is addressed in turn below.

Circumstances in which the conduct took place and nature and extent of the conduct

57. The conduct in this case involved the failure by Country Hospitality to pay its employees the minimum legislative rate of pay and casual loading.

58. The breaches took place in circumstances whereby Country Hospitality employed its employees in accordance with a performance payment scheme[30] it had continued upon purchasing the business from New South Wales Accommodation Corporation[31].

59. In 2002 and 2005, Mr Praglowski, on behalf of Country Hospitality, made enquiries with the IRC NSW as to whether the performance payment scheme was in accordance with applicable industrial laws[32]. Although Mr Praglowski was advised by the IRC NSW that the employees were not covered by an award, the Fair Work Ombudsman submits that Mr Praglowski failed to make further enquiries as to whether there was any statutory minimum rate of pay applicable to the employees. Mr Praglowski submits that he was led to believe that there was no minimum wage applicable. He further submits that on being informed of the correct position by the Fair Work Ombudsman he took steps to ensure all staff were paid their entitlements.

60. Mr Praglowski was the sole Director and Company Secretary of Country Hospitality. He was the person solely responsible for determining and settling wage rates and conditions for the employees.

---

[28] (2007) 166 IR 14; [2007] FCA 1080 at [14].
[29] [2007] FCA 1550 at [11].
[30] See paragraph 9 and 11 of the agreed statement of facts filed on 29 July 2010.
[31] See paragraph 10 of the agreed statement of facts filed on 29 July 2010.
[32] See paragraph 12 of the agreed statement of facts filed on 29 July 2010.

Mr Praglowski was informed by the Fair Work Ombudsman on 9 March 2009 that Country Hospitality had contravened ss.182(3) and 185(2) in relation to one of his casual telemarketer employees, Ms Garling. Mr Praglowski did not take steps to increase all his casual employees' wages to the correct casual hourly rate of $17.17 until on or about 12 June 2009[33].

Nature and extent of loss or damage

61. The detriment caused to many of the 62 affected employees is significant and equates to a total of $38,895.13. These losses have not been rectified and are unlikely to be paid as Country Hospitality was placed into liquidation on 26 June 2010[34]. It appears that many employees were employed only short term. I also accept that more than half the money is owed to two relatives of Mr Praglowski who do not require repayment.

62. Country Hospitality also underpaid another former employee, Ms Garling in the amount of $982.10. This amount was later rectified and is not subject to these proceedings.

Similar previous conduct

63. There is no evidence or any suggestion that Mr Praglowski has previously engaged in similar conduct. It appears that the conduct predated the acquisition of the business by Country Hospitality.

Whether the breaches arose out of the one course of conduct

64. I accept that the breaches arose from two separate courses of conduct.

65. I accept that there were breaches of two distinct provisions, being:

    a) breach of s.182(3) of the Workplace Relations Act; and

    b) breach of s.185(2) of the Workplace Relations Act.

[33] See paragraph 29 of the affidavit of Andre Praglowski filed 4 June 2010.
[34] See paragraph 49 of the agreed statement of facts filed on 29 July 2010.

Size and financial circumstances of the business

66. Country Hospitality employed at least 62 casual employees between July 2006 and July 2009.

67. Mr Praglowski has put on some evidence concerning Country Hospitality's cash flow and the effects that the underpayments, adjusting wages to the correct casual hourly rate and media coverage of the current proceedings had on the viability of Country Hospitality. As noted above, Country Hospitality is now in liquidation. It appears that the underpayments liability was a factor in the company decision to cease trading. However, there is no evidence before the Court about the financial circumstances of Mr Praglowski.

68. To the extent that Mr Praglowski relies on the size and financial circumstances of Country Hospitality as justification for the failure of Country Hospitality to pay its employees their minimum entitlements, the Fair Work Ombudsman relies upon *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor*[35] and the authorities referred to in those paragraphs:

> *27. In* Rajagopalan v BM Sydney Building Materials Pty Ltd *[2007] FMCA 1412 at paras. 27 to 29 it was said:*
>
> > Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevant to a Court's consideration of penalty.
>
> *28. Notwithstanding financial hardship that an employer may be experiencing* Lynch v Buckley Sawmills Pty Ltd *[1984] FCA 306; (1984) 3 FCR 503, 508 Keely J said:*
>
> > In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligation to comply with particular provisions of the award or the award generally should only be taken

[35] [2009] FMCA 38 at [27]-[28].

> after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.

69. Further, despite the liquidation of Country Hospitality, the Fair Work Ombudsman submits that any sanction is to be imposed at a meaningful level[36] and insolvency, personal or corporate, is not a refuge from sanction[37]. I reject that submissions insofar as it relates to corporate insolvency, having regard to s.471B of the Corporations Act.

70. The Fair Work Ombudsman submits that notwithstanding the size and financial circumstances of the business, Mr Praglowski was the controlling mind of Country Hospitality and the decision maker in relation to the contraventions. I accept that submission.

Deliberateness of the breaches

71. As to whether the breaches were deliberate, the Fair Work Ombudsman does not suggest that Mr Praglowski deliberately set out to breach the Workplace Relations Act but submits that Mr Praglowski was ignorant in relation to his responsibilities as an employer. Country Hospitality maintained the salary and incentives scheme put in place by the previous owner of the business. While I accept that Mr Praglowski contacted the IRC NSW to understand Country Hospitality's obligations as an employer, Mr Praglowski took no further steps to understand whether there was a statutory minimum wage applicable to the employees, upon being advised that they were not covered by an award.

Involvement of senior management

72. Mr Praglowski was a director and secretary of Country Hospitality and has admitted[38] that he was involved in the contraventions of Country

---

[36] *Kelly* at [28].
[37] *Cotis v Macpherson* [2007] FMCA 2060 at [12]. That reasoning, however, only relates to personal insolvency.
[38] See paragraph 56(c) of the agreed statement of facts filed on 29 July 2010.

Hospitality within the meaning of s.728(2)(c). It is not alleged that any other person has been involved in the contraventions.

Contrition, corrective action, co-operation with authorities

73. Although Mr Praglowski has expressed an appreciation of the need to reimburse the employees[39], Mr Praglowski did not accept any moral responsibility for the conduct.

74. The Fair Work Ombudsman acknowledges that Country Hospitality took steps in June 2009 to adjust employee wages to the correct rate of $17.17 per hour and back pay employees to 30 March 2009 following advice from the Fair Work Ombudsman that all casual employees must receive at least the FMW and guaranteed casual loading. Further, the Fair Work Ombudsman acknowledges that Country Hospitality rectified an earlier claim made by former employee Ms Garling in the amount of $982.10[40].

75. However despite being cooperative during the investigation and since commencing proceedings, the Fair Work Ombudsman submits, and I accept, that no corrective action has been taken by the company or Mr Praglowski in relation to the total underpayment of $38,895.13 which remains outstanding. Due to Country Hospitality being placed into liquidation it is unlikely that such entitlements will be recovered.

Ensuring compliance with minimum standards

76. I accept that this is an important consideration in the present case given that the employees are not covered by any award. One of the principal objects of the Workplace Relations Act has been the maintenance of an effective safety net, and effective enforcement mechanisms.

77. The substantial penalties set by the legislature for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards.

---

[39] See paragraph 38 of the affidavit of Andre Praglowski filed 4 June 2010.
[40] See paragraphs 33 and 34 of the agreed statement of facts filed on 29 July 2010.

General deterrence

78. It is well-established that "the need for specific and general deterrence" is a factor that is relevant to the imposition of a penalty under the Workplace Relations Act. See for example, Mowbray FM in *Pangaea* at [26]-[59].

79. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd*[41] at [93]:

> *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.*

80. Similarly in *CPSU v Telstra Corporation Limited*[42] at 231 where Finkelstein J said:

> *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.*

81. The contraventions in the current case concern the minimum entitlements of casual employees in the outbound call centre industry. The Fair Work Ombudsman submits and I accept that penalties in this case should be imposed on a meaningful level so as to deter other employers from committing similar contraventions.

---

[41] (2007) 158 FCR 543.
[42] (2001) 108 IR 228.

Specific deterrence

82. I accept that the need for specific deterrence is high because of the following factors:

a) Mr Praglowski is currently the director of three companies, at least one of which is a still operating;

b) despite being aware of Country Hospitality's obligations to make rectification payments to the employees, nearly $39,000 is outstanding;

c) Mr Praglowski placed Country Hospitality into voluntary liquidation following the commencement of these proceedings. It appears from his evidence that that decision was based in part on the false premise that his wife and sister-in-law would require payment to them of the underpayments.

Totality

83. Having fixed an appropriate penalty for each course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing: see *Kelly v Fitzpatrick* at [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

84. I have decided that the appropriate penalty for each breach is $3,300 resulting in an aggregate penalty of $6,600. Mr Praglowski co-operated with the Fair Work Ombudsman in order to seek to ensure that Country Hospitality became compliant with its obligations but believed that substantially more money was owed to two employees (his relatives) than was ultimately the case. Mr Praglowski gave evidence that he attempted to raise funds to pay the outstanding entitlements through the company but the amount sought was far greater than that required and I am far from satisfied that neither he nor Country Hospitality had the means to raise the sum which remains outstanding.

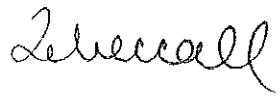
85. Country Hospitality has escaped the burden of a repayment obligation or penalties by reason of its liquidation. While I do not have evidence of Mr Praglowski's capacity to pay penalties personally, I note that he remains an active businessman and I have no reason to believe he is impecunious. In my view, the imposition of a penalty in the mid range in all the circumstances of this case is appropriate. I will apply a discount of 10 per cent to take account of Mr Praglowski's co-operation in the course of proceedings which has assisted the administration of justice.

Conclusion

86. Having taken into account all of the above matters, I conclude that the appropriate penalty to impose on Mr Praglowski for the breaches is $3,300 for each breach. After a 10 per cent reduction for co-operation, the penalty is $5,940.

87. I will order that the penalties be paid to the Commonwealth into consolidated revenue.

I certify that the preceding eighty-seven (87) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate: 

Date: 28 October 2010