FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v ROSELANDS FRUIT MARKET PTY LTD & ANOR *[2010] FMCA 599*

INDUSTRIAL LAW – Shop Employees (State) Award and annual holidays loadings – breach – civil penalty – consideration of matters relevant to penalty.

Annual Holidays Act 1944 (NSW), s.4
Crimes Act 1914 (Cth), ss.4, 4AA
Evidence Act 1995 (Cth), s.135
Fair Work Act 2009 (Cth), s.701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Shop Employees (State) Award
Workplace Relations Act 1996 (Cth), ss.4, 182, 185, 719, 728

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
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
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
McIver v Healey [2008] FCA 425
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors [2009] FMCA 700

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ROSELANDS FRUIT MARKET PTY LTD
Second Respondent:	JOE ALOISIO
File Number:	SYG687 of 2010
Judgment of:	Driver FM
Hearing date:	9 August 2010

Delivered at:	Sydney
Delivered on:	21 October 2010

REPRESENTATION

Solicitors for the Applicant:	Ms L Andelman
Counsel for the Respondents:	Ms E Brus
Solicitors for the Respondents:	Dooley & Associates

ORDERS

The Court declares that:

(1) The first respondent contravened s.182(1) of the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act") by failing to pay the 40 employees (collectively defined as the "employees") the basic periodic rate of pay under the Australian Pay and Classification Scale derived from the terms of the *Shop Employees (State) Award* ("APCS").

(2) The first respondent contravened s.185(2) of the Workplace Relations Act being a term of the Standard by failing to pay casual employees a 15 per cent casual loading in addition to and based on their rate of pay under the APCS.

(3) The first respondent contravened subclause 14(a)(i) of the notional agreement preserving the terms of the *Shop Employees (State) Award* ("NAPSA") by failing to pay permanent employees time and one quarter for work performed on Saturdays.

(4) The first respondent contravened subclause 14(a)(iii) of the NAPSA in failing to pay casual employees the fixed loading on Saturdays:

(a) adult fixed loading of $5.90; and

(b) junior fixed loading of $3.90.

(5) The first respondent contravened subclause 14(b)(i) of the NAPSA in failing to pay employees penalty rates of time and a half for time worked on Sundays.

(6) The first respondent contravened subclause 17(A)(i) of the NAPSA in failing to pay employees penalty rates of double time and a half on public holidays.

(7) The first respondent contravened subclause 17(A)(ii)(b) of the NAPSA in failing to pay permanent employees for public holidays not worked.

(8) The first respondent contravened s.4(3)(b)(ii) of the *Annual Holidays Act 1944* (NSW) ("the Annual Holidays Act") in failing to pay casual employees a loading of 1/12 of ordinary earnings.

(9) The second respondent contravened s.182(1) of the Workplace Relations Act by failing to pay the Wagga Wagga employees the minimum hourly rate of pay that was at least equal to the basic periodic rate of pay under the APCS.

(10) The second respondent contravened s.185(2) of the Workplace Relations Act being a term of the Standard by failing to pay casual employees in Wagga Wagga a 15 per cent casual loading in addition to and based on their rate of pay under the Shop APCS.

(11) The second respondent contravened subclause 14(a)(i) of the notional agreement preserving the terms of the NAPSA by failing to pay permanent employees in Wagga Wagga time and one quarter for work performed on Saturdays.

(12) The second respondent contravened subclause 14(a)(iii) of the NAPSA in failing to pay casual employees in Wagga Wagga the fixed loading on Saturdays:

(a) adult fixed loading of $5.90; and

(b) junior fixed loading of $3.90.

(13) The second respondent contravened subclause 14(b)(i) of the NAPSA in failing to pay employees in Wagga Wagga penalty rates of time and a half for time worked on Sundays.

(14) The second respondent contravened subclause 17(A)(i) of the NAPSA in failing to pay employees in Wagga Wagga penalty rates of double time and a half on public holidays.

(15) The second respondent contravened subclause 17(A)(ii)(b) of the NAPSA in failing to pay permanent employees in Wagga Wagga for public holidays not worked.

(16) The second respondent contravened s.4(3)(b)(ii) of the Annual Holidays Act in failing to pay casual employees in Wagga Wagga a loading of 1/12 of ordinary earnings.

THE COURT ORDERS THAT:

(17) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $13,200 be imposed on the first respondent in respect to its contravention of s.182(1) of the Workplace Relations Act in relation to the employment of the employees.

(18) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $11,200 be imposed on the first respondent in respect to its contravention of s.182(2) of the Workplace Relations Act in relation to the employment of the employees.

(19) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $8,000 be imposed on the first respondent in respect to its contravention of subclause 14(a)(i) of the NAPSA in relation to the employment of the employees.

(20) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $8,000 be imposed on the first respondent in respect to its contravention of subclause 14(a)(iii) of the NAPSA in relation to the employment of the employees.

(21) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $8,000 be imposed on the first respondent in respect to its contravention of subclause 14(b)(i) of the NAPSA in relation to the employment of the employees.

(22) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $8,000 be imposed on the first respondent in respect to its contravention of subclause 17(A)(i) of the NAPSA in relation to the employment of the employees.

(23) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $8,000 be imposed on the first respondent in respect to its contravention of subclause 17(A)(ii)(b) of the NAPSA in relation to the employment of the employees.

(24) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $6,400 be imposed on the first respondent in respect to its contravention of s.4(3)(b)(ii) of the Annual Holidays Act in relation to the employment of the employees.

(25) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,560 be imposed on the second respondent in respect to his contravention of s.182(1) of the Workplace Relations Act in relation to the employment of the employees in Wagga Wagga.

(26) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,400 be imposed on the second respondent in respect to his contravention of s.185(2) of the Workplace Relations Act in relation to the employment of the employees in Wagga Wagga.

(27) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,000 be imposed on the second respondent in respect to his contravention of subclause 14(a)(i) of the NAPSA in relation to the employment of the employees in Wagga Wagga.

(28) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,000 be imposed on the second respondent in respect to his contravention of subclause 14(a)(iii) of the NAPSA in relation to the employment of the employees in Wagga Wagga.

(29) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,000 be imposed on the second respondent in respect to his contravention of subclause 14(b)(i) of the NAPSA in relation to the employment of the employees in Wagga Wagga.

(30) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,000 be imposed on the second respondent in respect to his contravention of subclause 17(A)(i) of the NAPSA in relation to the employment of the employees in Wagga Wagga.

(31) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $2,000 be imposed on the second respondent in respect to his contravention of subclause 17(A)(ii)(b) of the NAPSA in relation to the employment of the employees in Wagga Wagga.

(32) Pursuant to s.719(1) of the Workplace Relations Act a penalty of $1,600 be imposed on the second respondent in respect to his contravention of s.4(3)(b)(ii) of the Annual Holidays Act in relation to the employment of the employees in Wagga Wagga.

(33) The combined penalties payable under orders 17-32 be paid to the Consolidated Revenue of the Commonwealth pursuant to s.841(a) of the Act.

(34) The penalties imposed under orders 17 to 32 inclusive be paid within 28 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG687 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

ROSELANDS FRUIT MARKET PTY LTD
First Respondent

JOE ALOISIO
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant Fair Work Ombudsman in these proceedings seeks a series of orders pursuant to s.719(1) and s.728 of the *Workplace Relations Act 1996* (Cth) ("the Workplace Relations Act"). In a statement of claim filed on 29 March 2010, the Fair Work Ombudsman alleges that during the period from 27 March 2006 to 15 November 2009 the first respondent ("Roselands") breached the following:

    a) Section 182(1) of the Workplace Relations Act being a term of the Australian Fair Pay and Conditions Standard ("the Standard") by failing to pay the 40 employees (collectively defined as the "employees") the minimum hourly rate of pay that was at least equal to the basic periodic rate of pay under the Australian Pay and Classification Scale derived from the terms of the *Shop Employees (State) Award* ("APCS");

b) section 185(2) of the Workplace Relations Act being a term of the Standard by failing to pay casual employees a 15 per cent casual loading in addition to and based on their rate of pay under the Shop APCS;

c) subclause 14(a)(i) of the notional agreement preserving the terms of the *Shop Employees (State) Award* ("NAPSA") by failing to pay permanent employees time and one quarter for work performed on Saturdays;

d) subclause 14(a)(iii) of the NAPSA in failing to pay casual employees the fixed loading on Saturdays:

    i) adult fixed loading of $5.90; and

    ii) junior fixed loading of $3.90.

e) subclause 14(b)(i) of the NAPSA in failing to pay employees penalty rates of time and a half for time worked on Sundays;

f) subclause 17(A)(i) of the NAPSA in failing to pay employees penalty rates of double time and a half on public holidays;

g) subclause 17(A)(ii)(b) of the NAPSA in failing to pay permanent employees for public holidays not worked; and

h) section 4(3)(b)(ii) of the *Annual Holidays Act 1944* (NSW) (Annual Holidays NAPSA) being a term of both the NAPSA in failing to pay casual employees a loading of 1/12 of ordinary earnings.

2. The breaches relate to payments to employees working at three stores: "Roselands Fruit World" located at Roselands in Sydney; "Fruit Market" and "Fruit World", both located in Wagga Wagga.

3. Roselands was incorporated on 12 February 2002. At the time of the breaches set out in the statement of claim as they relate to Roselands, the second respondent (Mr Aloisio) was a director and shareholder of Roselands. Mr Aloisio ceased being a director and shareholder of Roselands on 30 September 2009.

4. As at 1 September 2009 Roselands ceased operating the stores in Wagga Wagga and Mr Aloisio ceased to have any involvement with the operations of Roselands. From 1 September 2009, the Wagga Wagga stores were owned and operated by a separate legal entity controlled by Mr Aloisio. Roselands continued to operate the Roselands store.

The evidence

5. The parties have agreed to a statement of facts.

6. Briefly, the respondents admit the facts pleaded in the statement of claim. The Fair Work Ombudsman admits that it has finalised its investigations of all the employees of Roselands for the relevant period on the records provided by the respondents.

7. The respondents admit the authenticity and admissibility of documents relied upon by the Fair Work Ombudsman.

8. In addition, the Fair Work Ombudsman sought to rely upon two affidavits by Ms Alexandra Louise Mountford made on 9 June 2010 and 30 July 2010. I declined to receive those affidavits on the basis of s.135 of the *Evidence Act 1995* (Cth) because Ms Mountford's evidence related to grievances against Mr Aloisio which went far beyond the matters in dispute between the parties bearing on the imposition of penalties under the Workplace Relations Act. On the basis that that evidence was excluded, the respondents did not seek to read an affidavit by Mr Aloisio. I did receive an affidavit by Mr Dominic Fedele made on 23 July 2010. Mr Fedele is the accountant for Roselands and his evidence bears on the issue of penalty. He was cross-examined on his affidavit.

Submissions

9. The Fair Work Ombudsman submits that the Court should impose a penalty in the low to moderate range, up to 50 per cent of the maximum penalty. The Fair Work Ombudsman submits that the Court should pay particular attention to the reason why the contraventions occurred. It submits that there was a long period of non enquiry by the respondents as to their responsibilities to pay the applicable rates of

pay and that there is evidence of reckless indifference. The Fair Work Ombudsman acknowledges that the respondents have co-operated and that the underpayments have been made good. On the other hand, the Fair Work Ombudsman submits that the employees were vulnerable and there is a need for specific and general deterrence.

10. The respondents submit that only a nominal penalty is called for, for both respondents. They submit that the regime under which the applicable rates of pay applied is a complex one and the situation was rendered obscure by the enactment in 2006 of the Work Choices legislation. They submit that they were not recklessly indifferent to their responsibilities and that once they realised there had been underpayments, all employees were paid in full. They also draw attention to the fact that the person responsible for determining rates of pay has died.

Consideration

11. There is no dispute on liability. The issue between the parties goes only to the imposition of an appropriate penalty for each respondent.

Legislative provisions

12. The Fair Work Ombudsman is a "Fair Work Inspector" pursuant to s.701 of the *Fair Work Act 2009* (Cth) ("Fair Work Act").

13. A Fair Work Inspector may bring proceedings relating to conduct that occurred before the repeal of the Workplace Relations Act pursuant to subitem 13(1) of Part 3 to Schedule 18 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("Transitional Act").

14. The Workplace Relations Act continues to apply after its repeal in relation to conduct that occurred before the Workplace Relations repeal day, pursuant to subitem 11(1) of Part 3 to Schedule 2 of the Workplace Relations Act.

15. This prosecution is brought under the Workplace Relations Act in relation to breaches of the Australian Fair Pay and Conditions Standard

("AFPCS"), Shop NAPSA and the Annual Holidays NAPSA. These breaches occurred between 27 March 2006 and 1 July 2008.

16. On 27 March 2006 the APCS was taken to be replaced by an instrument called notional agreements preserving State awards. Part 3 of Schedule 8 to the Workplace Relations Act deals with notional agreements preserving State awards.

17. Pursuant to subclause 43(1) of Part 3 to Schedule 8 of the Workplace Relations Act a notional agreement preserving a State award may be enforced as if it were a collective agreement.

18. Section 719(1) of the Workplace Relations Act enables a court of competent jurisdiction[1] 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 a collective agreement, and a term of the AFPCS.

19. Subsection 719(2) 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.

20. Section 719(4)(a) prescribes 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 dollars. The maximum penalty that may be imposed by the Court for breach by an individual of term of the NAPSA or a term of the AFPCS is therefore $6,600 and for a body corporate of a term of the NAPSA or a term of the AFPCS is therefore $33,000. This maximum penalty was in force during the whole of the relevant period under subsection 719(4)(a).

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[1] Also defined to include this Court.

The Court's approach to determining penalty

21. I accept the applicant's submission that the following is the correct approach in determining an appropriate penalty to impose.

22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.[2]

23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.

24. Secondly, 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 respondent did.[3] This task is distinct from and in addition to the final application of the "totality principle".[4]

25. Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.

26. Fourthly and 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.[5] The Court should apply an "instinctive synthesis" in making this assessment.[6] This is what is known as an application of the "totality principle".

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[2] *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).

[3] *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*).

[4] *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*).

[5] 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).

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

Application of facts to law

Grouping of contraventions: s.719(2) and single course of conduct

27. In relation to the first and second steps in the process of determining an appropriate penalty, I accept that Roselands' breaches should be categorised as follows:

    a) failure to pay minimum rates of pay to employees (s.182(1) of Workplace Relations Act) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    b) failure to pay required casual loading to casual employees (s.185(2) of the Workplace Relations Act) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    c) failure to pay permanent employees Saturday penalty (subclause 14(a)(i) of the NAPSA) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    d) failure to pay required fixed loadings to casual employees for time worked on Saturdays (subclause 14(a)(iii) of the NAPSA) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    e) failure to pay employees at a rate of time and one half on Sundays (subclause 14(b)(i) of the NAPSA) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    f) failure to pay employees at rate of double time and one half on public holidays (subclause 17(A)(i) of NAPSA) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent);

    g) failure to pay permanent employees annual leave loading (subclause 23(ii) of NAPSA) (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent); and

    h) failure to pay casual employees a required annual leave loading (subparagraph 4(3)(b)(ii) of the *Annual Holidays Act 1944*

(NSW) ("the Annual Holidays Act") (maximum penalty $33,000 for the first respondent and $6,600 for the second respondent).

28. Therefore the Court should consider that the maximum penalty it could impose in this matter is for eight contraventions being $264,000 for Roselands and $52,800 for Mr Aloisio.

29. Each term was breached repeatedly by Roselands in respect of each of the employees.

30. The onus of establishing the benefit of s.719(2) of the Workplace Relations Act is on the employer.[7] The Fair Work Ombudsman accepts that based on the facts in this case Roselands 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 in relation to two or more breaches of the same term of an award or order: see *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223.

Factors relevant to penalty

31. 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* [2007] FMCA 7 (*Pangaea*), [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;

[7] *Workplace Ombudsman v Securit-E Holdings Pty Ltd (In Liquidation) & Ors* [2009] FMCA 700 at [5].

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.

32. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080, [14]. 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* [2007] FCA 1550, [11]; *Merringtons* at [91] per Buchanan J.

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

Nature and extent of the conduct

34. The Fair Work Ombudsman investigation extended over more than a year and identified substantial underpayments of over $94,000 in respect to 40 employees over a period of three years. I accept that the underpayment amounts were significant given that employees were being paid a flat rate. Some of the underpayments to particular employees exceeded $10,000 each.

35. The breaches identified by the investigation all stemmed from an incorrect application of the provisions of the NAPSA and/or the Annual

Holidays Act. There is no evidence that the breaches were intentional or deliberate.

Circumstances in which the conduct took place

36. The underpayments came to light as a result of a complaint made by Ms Mountford to the Fair Work Ombudsman, which conducted an investigation. The investigation broadened over time from the two shops at Wagga Wagga to the shop at Roselands.

37. Breaches identified involved payment below the minimum wage in 2009 and also failure to pay penalties for work performed on Saturdays, Sundays and public holidays as well as failure to pay loadings to casual employees. The failure to pay the minimum wage stems from the respondents' application of the minimum wage as it stood prior to 1 December 2006, without applying increases. As a result of the involvement of the Fair Work Ombudsman, Roselands conducted an audit of all existing employees from 1 December 2006. Mr Fedele informed the Fair Work Ombudsman that the breaches were attributable to naivety and a lack of understanding of the legislative requirements. Roselands gave an undertaking to rectify the breaches but there was some delay in the rectifications being made. It took approximately 12 months for all of the underpayments to be remedied. That may in part be explained by the number of employees, the extent of the underpayments, and the application of an audit by Roselands.

38. On 5 January 2009, Inspector Hehir wrote to Roselands and Mr Aloisio informing them that the NAPSA applied to Roselands[8]. The breach notice also informed the respondents that there were increases to the minimum wage from 1 October 2007 and 1 October 2008.

39. Based on the calculations provided to the Fair Work Ombudsman and evidence from Roselands[9], Roselands was paying the minimum wage based on the APCS rate as was current from 28 July 2006 and made no adjustments to the rate in 2007 or 2008.

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[8] Doc 11 ASOF.
[9] Doc 35 ASOF.

40. The minimum wage was increased from 1 December 2006, 1 October 2007 and 1 October 2008[10].

41. The Industrial Relations Commission of New South Wales increased the wage rates in the APCS from 28 July 2005 and again on from the 28 July 2006, 28 July 2007 and 28 July 2008.

42. On 19 February 2009, Mr Fedele informed Inspector Hehir that Roselands was undertaking an audit of all existing employees from 1 December 2006 to date[11].

43. On 4 March 2009, Mr Fedele informed Inspector Hehir that Roselands:

> *...has taken action to ensure they met the requirements of the" NAPSA and that "breaches can be attributable to being naïve and a lack of understanding of the legislative requirements. It was not by choice or their unwillingness to comply with their obligations. It is simply a lack of understanding.*[12]

44. On 30 April 2009 Inspector Hehir wrote to both respondents asking that there be future compliance with the NAPSA including the Annual Holidays NAPSA[13].

45. On 13 July 2009, Mr Fedele informed Inspector Hehir that "*our client wants to ensure you that they will rectify the breaches and have taken action to ensure that they meet the requirements of the" NAPSA.... Given the above circumstances, we request your favourable consideration to take no further action against the company or its officers for breaches of the Act."* The calculations provided included calculations for annual holiday entitlements to casual employees engaged at Wagga Wagga[14].

46. On 28 August 2009, Inspector Hehir wrote to both respondents as a follow up to check whether or not there was compliance with the NAPSA[15].

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[10] Docs 5, 6 and 7 of the ASOF.
[11] Doc 15 ASOF.
[12] Doc 16 ASOF.
[13] Doc 17 ASOF.
[14] Doc 21 ASOF.
[15] Doc 25 of the ASOF.

47. On 22 October 2009, Inspector Hehir wrote to both respondents advising them that the company was still in breach of Annual Holidays NAPSA[16].

48. On 18 November 2009, Inspector Hehir again wrote to both respondents as a follow up to check whether or not there was compliance with the NAPSA in the Roselands shop[17].

49. On 5 February 2010, Inspector Hehir again wrote to both respondents outlining that not only the company was still in breach of the NAPSA but no back payments were made for past breaches that were to be rectified in early 2009[18].

50. On 11 February 2010, Roselands wrote to Inspector Hehir stating that the business has been paying $14.81 an hour:

> *We apologise for our omission, unfortunately at this time we had been without a bookkeeper and when our current person was employed in March, wage rates were updated. We were not aware that the matter had not been addressed before this and have taken steps to ensure that all employees have been back paid for the shortfall in their wage rates.*

51. The hourly rate of $14.81 an hour is the rate in the APCS as at 24 July 2006.

52. The evidence shows that despite the company stating that it had taken steps to become compliant in early 2009 there was delay in achieving compliance. It did not happen until February 2010.

53. Mr Aloisio was a Director of Roselands until 17 February 2010[19].

54. On 22 June 2010 Mr Aloisio became a sole director of a new company registered as Fruitologist Wagga Wagga Pty Ltd[20] which operates a fruit and vegetable retail shop in Wagga Wagga.

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[16] Doc 29 of the ASOF.
[17] Doc 31 of the ASOF.
[18] Doc 34 of the ASOF.
[19] Doc 36 of the ASOF.
[20] Doc 37 of the ASOF.

Nature and extent of loss or damage

55. The loss to employees is significant. The extent of the loss is particularly significant in light of the fact that many of the employees were juniors and or casual employees.

Similar previous conduct

56. There is no evidence of similar previous conduct.

Whether the breaches arose out of the one course of conduct

57. I accept that the respondents are entitled to the benefit of s.719(2) in respect of multiple breaches of each term that has been committed by the respondents. This benefit relates only to multiple breaches of the same term, it does not relate to breaches of different subsections of the Workplace Relations Act or subclauses of either the NAPSAs.

Size of the business

58. There is no reliable evidence about the size of the business. The financial records of Roselands provide only a partial picture. It is clear that Roselands employed at least 18 employees between 1 December 2006 and 1 July 2008 indicating that the business could be classified as a medium size business. On the other hand many of the employees were casual and worked at different times.

59. In my view, the size and financial circumstances of Roselands' business should be of some but limited relevance in the Court's determination of penalty: see *Kelly v Fitzpatrick* [2007] FCA 1080 at [28] where it was said:

> *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.*

Deliberateness of the breaches

60. Mr Aloisio admits that he was the ultimate decision maker in respect of human resourcing decisions of Roselands and was in charge of the day to day management of the company in Wagga Wagga.

61. The chronology demonstrates that the company was in the first instance careless and by mid 2009 tardy in failing to comply with the NAPSA and the Annual Holidays NAPSA.

62. The respondents have referred to evidence before the Court to explain how the alleged breaches occurred. In particular, they refer to the absence of a bookkeeper, and the reliance on outdated rates of pay.

Contrition, corrective action, co-operation with authorities

63. I accept the Fair Work Ombudsman's submission that this involves three related, yet distinct elements.

64. In relation to corrective action, the underpayments were rectified in 2009-2010. However had the Fair Work Ombudsman not conducted audits in August 2009 and in early 2010 some of the underpayments would probably not have been rectified and the business would have continued to be in breach of the Annual Holidays NAPSA and the NAPSA despite assurances that it was compliant in early 2010.

65. There is no evidence that new structures and processes have been put in place to avoid further breaches.

66. The Fair Work Ombudsman acknowledges that during the investigation the respondents co-operated with it and took some corrective action. Since commencing these proceedings the respondents have adopted a co-operative approach to resolving these proceedings by entering into an agreed statement of facts.

67. In relation to contrition, the company has apologised, albeit that it has not explained to the employees why the underpayments have come

about or why the underpayments were being rectified. The letters simply stated "we apologise for any inconvenience"[21].

Ensuring compliance with minimum standards

68. This is an important consideration in the present case. One of the principal objects of the Workplace Relations Act is the maintenance of an effective safety net, and effective enforcement mechanisms.

69. 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 by the increase in those maximum penalties from August 2004.

Specific and general deterrence

70. 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].

71. 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* (2007) 158 FCR 543 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.*

[21] Doc 23 of the ASOF.

72. Similarly in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231 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.*

73. The Fair Work Ombudsman submits that penalties in this case should be imposed at a meaningful level so as to deter other similar sized business operating in the food retail industry from committing similar contraventions.

74. The need for specific deterrence is high because of the following factors:

    a) both respondents continue to employ employees who may be identified as vulnerable as they are juniors and or casual employees; and

    b) on being informed about the underpayments on numerous occasions the business did not become compliant with the legislative requirements for a significant period.

75. In my view, in this case, the need for specific deterrence is at least as strong as the need for general deterrence, taking into account the lack of enquiry by the respondents, their ineffective management of employee entitlements and their tardiness in rectifying the position when it was brought to attention by the Fair Work Ombudsman. I am not persuaded that the respondents have put in place systems to prevent a recurrence of the breaches and accordingly, specific deterrence plays an important factor.

76. As to general deterrence, it is important that employers in a similar position to the respondents are put on notice that a failure by them to meet their obligations to employees will have substantial consequences. In that regard, however, there is a distinction between an employer who understands its responsibilities and chooses not to meet them, and an employer who does not know what its responsibilities are to its employees. The employee entitlements in the

present case derived from a rather obscure continuation of state based entitlements under the Commonwealth legislation and I accept that there was a period of uncertainty in 2006.

77. There are several sources of information available to employers in order for them to determine accurately what the relevant employee entitlements are. There is a division of responsibility between Commonwealth and State authorities. That in itself may cause some confusion, especially where the relevant entitlements are derived from State instruments but continue under Commonwealth legislation. In my view, where the Fair Work Ombudsman identifies problems in a particular industry in circumstances where the understanding of employee entitlements may be poor, it would be worthwhile considering a publicity campaign as to what the entitlements are, together with an offer of an amnesty for a limited period for those employers who seek assistance in order to clarify their position and to rectify underpayments.

Instinctive synthesis test

78. 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* [2007] FCA 1080, [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J.

79. Making good the underpayments to employees has already been a very substantial burden on Roselands. The experience may well have been a factor leading to the separation of the business as between Roselands and Mr Aloisio. That separation of the business is, in my view, a relevant factor to take into account. Mr Aloisio now has a significant interest in the business through a separate legal entity. The interest of Roselands has been reduced. While the penalty imposed for a corporate respondent is appropriately higher than that placed on a natural person, the penalties imposed in this case should reflect the realities of the business division between the respondents, and respective culpability.

80. The circumstances, in my view, call for the imposition of a meaningful penalty on both respondents. While the conduct was not deliberate, it came about from a failure to enquire, involved substantial breaches and continued for a significant period of time, even after the breaches were brought to the attention of Roselands by the Fair Work Ombudsman. On the other hand, the respondents have been co-operative, the employees have all been paid and the respondents have shown contrition. Their co-operation has appropriately reduced the scope of the dispute between the parties. I consider that a reduction of 20 per cent in the penalties which the Court would otherwise impose gives appropriate recognition to the admissions made by the respondents.

Conclusion

81. Having taken into account all of the above matters, I conclude that the appropriate penalty to impose on Roselands for the breaches is $88,500 and that the appropriate penalty to impose on Mr Aloisio in respect of the breaches attributable to him is $20,700. After a 20 per cent reduction for co-operation, the total penalty is $70,800 for Roselands and the total penalty for Mr Aloisio is $16,650.

82. The Fair Work Ombudsman applied for any penalties to be paid to the Commonwealth into consolidated revenue and there will be an order to that effect.

I certify that the preceding eighty-two (82) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate: Zuvecall

Date: 21 October 2010