FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SPECIALISED SECURITY SERVICE PTY LTD & ANOR *[2011] FMCA 170*

INDUSTRIAL LAW – Penalty hearing – admitted contraventions of *Workplace Relations Act 1996* – breaches of award – underpayment of employees – agreed statement of facts – appropriate discount to allow for cooperation by the respondent to the applicant's investigations.

Crimes Act 1914 (Cth), s.4AA
Fair Work Act 2009 (Cth), s.701
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Workplace Relations Act 1996 (Cth) s.4, s.6, s.185(2), s.719(1), s.728(1), s.841

CPSU v Telstra Corporation [2001] FCA 1364; (2001) 108 IR 228
Kelly v Fitzpatrick [2007] FCA 1080; (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant and Bar [2007] FMCA 7
Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	SPECIALISED SECURITY SERVICE PTY LTD
Second Respondent:	PETER CONROY
File Number:	BRG 371 of 2010
Judgment of:	Burnett FM
Hearing date:	17 February 2011
Date of Last Submission:	17 February 2011
Delivered at:	Brisbane
Delivered on:	17 February 2011

REPRESENTATION

Counsel for the Applicant:	
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr D.M. Cormack
Solicitors for the Respondents:	Rostron Carlyle Solicitors

ORDERS

(1) That the First Respondent has, by failing to pay correct entitlements to 32 employees, contravened the following:

(a) Section 185(2) of the *Workplace Relations Act 1996* (*WR Act*);

(b) Clause 6.3 (overtime) of the *Security Industry (Contractors) Award – State 2004* which operates as a notional Agreement Preserving a State Award under the *WR Act* (NAPSA);

(c) Clause 6.7 (shift allowances) of the NAPSA;

(d) Clause 6.8 (weekend penalty rates) of the NAPSA; and

(e) Clause 7.6 (public holiday penalty rates) of the NAPSA.

(2) That the Second Respondent was, by reason of section 728(1) of the *WR Act*, involved in the First Respondent's contraventions in paragraph 1 above.

(3) That pursuant to section 719(1) of the *WR Act*, the First Respondent pay a penalty of $16,912.50 in respect of the contravention identified at paragraph 1 above, which may be broken down as follows:

(a) $2,887.50 for its contravention of section 185(2) of the *WR Act*;

(b) $3,712.50 for its contravention of clause 6.3 (overtime) of the NAPSA;

(c) $3,712.50 for its contravention of clause 6.7 (shift allowances) of the NAPSA;

(d) $3,712.50 for its contravention of clause 6.8 (weekend penalty rates) of the NAPSA; and

(e) $2,887.50 for its contravention of clause 7.6 (public holiday penalty rates) of the NAPSA.

(4) That pursuant to section 719(1) of the *WR Act*, the Second Respondent pay a penalty of $3,382.50 in respect of the contravention identified at paragraph 2 above, which may be broken down as follows:

(a) $577.50 for his contravention of section 185(2) of the *WR Act*;

(b) $742.50 for his contravention of clause 6.3 (overtime) of the NAPSA;

(c) $742.50 for his contravention of clause 6.7 (shift allowances) of the NAPSA;

(d) $742.50 for his contravention of clause 6.8 (weekend penalty rates) of the NAPSA; and

(e) $577.50 for his contravention of clause 7.6 (public holiday penalty rates) of the NAPSA.

(5) That in accordance with section 841 of the *WR Act*, an order that the penalties in Paragraph 3 and 4 above be paid to the Commonwealth over a period of six (6) months from the date of this order, such payments to be made in equal monthly instalments with the first payment **commencing on 17 March 2011** and a payment to be made by the **17th of each month** thereafter until payment of the full sum has been paid.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG 371 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

SPECIALISED SECURITY SERVICE PTY LTD
First Respondent

And

PETER CONROY
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. In this application, the applicant, the Fair Work Ombudsman seeks declarations that the first respondent has contravened various provisions of the *Workplace Relations Act* 1996 (Cth) (*WR Act*), which I will particularise shortly, and also declarations that the second respondent too has been involved in the contraventions of the provisions of the *WR Act* in respect of conduct of the first respondent.

2. In particular, the contraventions alleged are, first, s.185(2) of the *WR Act* by failing to pay the guaranteed casual loading percentage. Second, clause 6.3 of the National Agreement Preserving the Security Industry (Contractors) Award - State 2004 (the NAPSA), by failing to pay the appropriate overtime rates. Third, clause 6.7 of the NAPSA by failing to pay the appropriate shift allowances. Fourth, clause 6.8 of

the NAPSA by failing to pay the appropriate penalty rates for work performed on weekends and, fifth, clause 7.6 of the NAPSA by failing to pay the appropriate penalty rates for work performed on public holidays.

3. The parties have largely agreed the facts relevant to this matter. The respondents each concede contraventions alleged against them and the matter proceeds by way of hearing for penalty. So far as the relevant agreed facts are concerned, the applicant is a Fair Work Inspector pursuant to s.701 of the *Fair Work Act 2009* (Cth) (*FW Act*) and has standing pursuant to item 13, Part 3 of Schedule 18 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) to bring this application in respect of the conduct that is alleged to have occurred prior to the repeal of the *WR Act 1996*.

4. The first respondent is and was at all times the operator of a security services business based at Amberley, Queensland. That business was a body corporate capable of suing and being sued and was a constitutional corporation within the meaning of that phrase as defined in s.4 of the *WR Act*. It was an employer as defined by s.6 of the Act insofar as it employed the employees that are listed in schedule 1 to the statement of claim.

5. The second respondent is and was at all material times a director of the first respondent and was involved in and responsible for the day-to-day operation and management of the first respondent. He was an officer of the first respondent involved in the management of the employment of the employees and was responsible in a practical sense for ensuring that the first respondent comply with its legal obligations to the employees.

6. So far as is relevant to this application, the first respondent is and was at all times bound by the Security Industry (Contractors) Award – State 2004 which operates as a national agreement preserving a state award under the *WR Act*, or otherwise known as the NAPSA. It was also bound by the Australian Pay Classification Scale derived from the rate provisions in the NAPSA, that is, the APCS and it was obliged to comply with the *WR Act* in relation to employees' employment with the first respondent.

7. It seems that the first respondent was selected to be audited as part of the applicant's Queensland security industry campaign – South East Queensland which commenced in January 2008. Following a random audit of the first respondent, it appeared that between 28 June 2006 and 25 June 2008 the first respondent employed the persons listed in schedule 1 of the statement of claim as security guards and patrol officers within its business. There were in all 32 people listed in schedule 1.

8. At that time, those employees' duties fell within the scope of the NAPSA and the APCS, and they performed those duties as employees within the classifications of Security Officer Level 1 and Security Officer Level 2 in accordance with clause 5.1 of the NAPSA. The employees were paid by the first respondent a flat rate of pay for each hour of work performed which varied between $17.00 and $20.00 an hour.

9. Before proceeding with an analysis of the contraventions first alleged there is a framework relevant to this application and the scheme overall. The applicant's application, as earlier noted, is for the imposition of penalties pursuant to s.719(1) and s.728 of the Act. Section 719(1) of the Act enables the Court 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, or the AFPCS, and a collective agreement. The NAPSA may be enforced as if it were a collective agreement and s.182(2) of the Act is a term of the AFPCS.

10. Section 119(2) of the Act provides that:

> *(a) where two or more breaches of an applicable provision are committed by the same person; and*
>
> *(b) the breaches arose out of a course of conduct by the person;*
>
> *the breaches shall, for the purposes of the section 119, be taken to constitute a single breach of the applicable provision.*

Section 728 of the Act provides that a person who is involved in a contravention of a civil remedy provision is treated as having

contravened the civil remedy provision, which section defines "civil remedy provisions" to include breaches under s.719 of the Act.

11. The maximum penalty for breach of s.719(1) is 300 penalty units for a body corporate and 60 penalty units for an individual. A penalty unit has the same meaning as in the *Crimes Act 1914* (Cth) and s.4AA of the *Crimes Act* provides that a penalty unit presently has a value of $110.00. It follows that the maximum penalty that may be imposed by the Court for each contravention is $33,000.00 for a body corporate and $6,000.00 for an individual. So far as the transitional issues are concerned, the *Fair Work (Transitional Provisions and Consequential Amendments) Act* states that the *WR Act* continues to apply on or after 1 July 2009 in relation to contraventions of that Act that occurred before 1 July 2009, subject to a contrary intention in the Act itself, none are evident here.

12. There is no contrary intention and it follows that the Act continues to apply. The *Transitional Act* expressly provides that parts 5A and 6 of the *WR Act* which deal with the Workplace Ombudsman and inspectors have no application after 1 July 2009. This includes the provisions which appoint the Workplace Ombudsman as a workplace inspector and provide he has standing to bring proceedings under the Act.

13. However, in order to ensure the continuation and completion of legal proceedings in the Act, the *Transitional Act* provides that 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 continued after 1 July 2009 by a Fair Work inspector. It follows that the Fair Work Ombudsman here, being a Fair Work Inspector by virtue of s.701 of the *FW Act*, has standing to bring this application and the Court is empowered to impose a penalty in respect of the respondent's conduct.

14. So far as the approach of the Court is concerned, the first step is for the Court to identify the separate contraventions involved. Each breach of each separate obligation found in the Act and the NAPSA in relation to each employee is a separate contravention of a term of an applicable provision for the purposes of s.719. However, ss.(2) of that section does provide for the treating of multiple breaches involved in the course of conduct as a single breach.

15. 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 and the penalties imposed by the Court should be an appropriate response to the respondent's conduct. This task is distinct from and in addition to the final application of the totality principle which there will be more of later.

16. 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, 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 contraventions. It is said that the Court should apply an instinctive synthesis in making this assessment. This is what is commonly known as the application of the totality principle.

17. Dealing then with the contraventions. At the outset it ought be restated that, as s.719(2) of the Act provides, the Court is to consider two or more breaches of an applicable provision that arose out of a course of conduct to be taken to constitute one single contravention of the applicable provision. It has been earlier determined that in relation to that clause where breaches of a particular term arise in the same course of conduct, even if they involve different employees, they must be treated as a single breach.

18. Further, where a breach is of two distinct terms of an industrial instrument, they are not to be treated as a single breach even if they arose from one course of conduct. It follows then, having regard to that approach, that the contraventions of the respondents will give rise to five distinct and separate breaches of the applicable provisions.

19. They are, as I have earlier noted, a contravention s.185(2) of the Act, that is, failing to pay 22 of the employees a guaranteed casual loading percentage in the APCS. Second, a contravention of clause 6.3 of the NAPSA by failing to pay 26 of the employees the appropriate overtime rates. Third, a contravention of clause 6.7 of the NAPSA by failing to pay 28 of the employees the appropriate shift allowances. Fourth, a

contravention of clause 6.8 of the NAPSA by failing to pay 30 of the employees the appropriate penalty rates for work performed on weekends and, fifthly, a contravention of clause 7.6 of the NAPSA by failing to pay 13 of the employees the appropriate penalty rates for work performed on public holidays.

20. It was submitted by the applicant in its submissions on penalty that the court should consider the maximum penalties it could impose in this matter then are:

    a) in relation to the first respondent 300 penalty units for each of the five contraventions or a sum totalling $165,000.00; and

    b) in relation to the second respondent 60 penalty units for each of the five contraventions or a sum totalling $33,000.00.

21. Dealing then with the specifics of those contraventions, in the agreed statement of facts filed 19 July 2010 it was agreed that the APCS provided that a casual loading of 23 per cent should be applied to the relevant basic hourly rate of pay for casual employees. The hourly rate inclusive of a casual loading that the first respondent was required to pay was as set out in paragraph [14] of the submission.

22. The respondent failed to pay the casual employees that sum and to that extent those employees were underpaid in the manner particularised in the schedule to the statement of claim. So far as the second item was concerned, that is, failing to pay appropriate overtime rates, again in the agreed statement of facts the statement identifies the relevant rates which ought to have been paid having regard to overtime hours, and notes that in respect of those matters the first respondent failed to pay to the employees identified in the first schedule of the statement of claim the overtime rate and, accordingly, those employees were underpaid in the manner expressed in the second schedule.

23. So far as the third contravention is concerned, that is, failing to pay appropriate shift allowances, again these agreed statement of facts identifies first the relevant clause being clause 1.3.8 of the NAPSA which governed the appropriate definitions of shifts for the purpose of calculating shift allowances and continued then to particularise the relevant allowances that were underpaid. Again, by reference to the

schedules to the statement of claim, the particulars of the underpayment have been agreed. In respect of the fourth contravention, that is, the failure to pay appropriate penalty rates for work performed on the weekends, the agreed statement of facts identified the relevant provision of the NAPSA and the requirement under that provision.

24. In respect of the payment of casuals weekend penalty rates, that sum is particularised in the outline together with the quantum by reference to the matters expressed in the schedules to the statement of claim. Finally, in respect of the appropriate penalty rates for the work performed on public holidays, those rates are stated in the agreed statement of facts with the relevant provisions of the NAPSA, being particularly clause 7.6.1 and 7.6.5. They identify the appropriate hourly rate and reference is made to agreement of the quantum of the underpayment by reference to the schedule attached to the statement of claim.

25. It is in my view unnecessary for present purposes to further particularise those matters as the substance of them will be apparent from an examination of factors relevant to penalty. So far as the involvement of the second respondent is concerned, it is agreed between the parties that the second respondent aided, abetted and counselled or procured to each of the contraventions or induced each of the contraventions and was by his acts and omissions, directly or indirectly, knowingly concerned in, or party to, each of the contraventions.

26. That fact is self-evident given that the corporation involved is a small corporation with a paid-up capital of $2,000.00 and in respect of which the relevant officers are the second respondent and his wife, Rita Patricia Conroy, who is also a director of the company. The second respondent has been a director since 3 June 1977 and his wife, Patricia Conroy, has been a director since 30 October 1987. It is apparent, given the nature of the corporation and that the second respondent is involved in the day-to-day management of the operation he accordingly would have been involved in the contraventions.

27. So far as assessment of penalty is concerned, it requires consideration of a number of issues which are now well settled. See generally

discussion in *Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant and Bar* [2007] FMCA 7, where the principal factors for consideration were identified as the nature and extent of the conduct, the circumstances in which the conduct took place, the nature and extent of any loss or damage, the similar previous conduct and whether the breaches were properly distinct or arose out of one course of conduct, the size of the company, deliberateness of the breach and involvement of senior management, corporation's contrition, corrective management and cooperation with the enforcement authorities and the need to ensure compliance with minimum standards by providing effective means for investigation, enforcement of employee entitlements and finally deterrence both specific and general.

28. Dealing then with each of those factors as is relevant to this case. First the nature and extent of the conduct and the circumstances in which the conduct took place; compliance with the minimum entitlements contained in the AFPCS and the NAPSA is important and should not be ignored by employers. In this instance, there were underpayments made to 32 employees in total and this conduct occurred over a period of approximately two years. The quantum of the underpayment is significant. It totalled $46,205.21. The contraventions occurred in circumstances where the respondent determined the amounts that would be paid to employees arguably with little regard to the employer's obligations under law, and it follows that the employees were disadvantaged by the first respondent's failure to pay their correct wages and entitlements under the APCS and the NAPSA.

29. There is nothing to indicate that the contraventions would not have continued had the applicant not conducted its investigation in or about January 2008.

30. For the respondent, the following other matters were submitted. First, it is submitted that if one closely examines the particulars of the employees who were affected by this conduct, as is identified in the schedule to the statement of claim, it can be seen that in respect of employees impacted in a gross sense, that is to say, by at least four or more contraventions, only 23 of 32 employees were significantly impacted. Other employees, whilst impacted, were only impacted in a minor sense.

31. Secondly, if one examines the weight of underpayments, it can be seen that while 32 employees in total were impacted by the conduct, 10 employees represent in effect approximately $30,000.00 worth of underpayments out of the total $46,000.00. In other words, a factor of about one-third of the employees account for two-thirds of the loss meaning that two-thirds of the employees suffered only a third of the losses between them. That factor of weighting is, in the respondent's submission, significant.

32. Furthermore, the respondent says that prior to the intervention of the Workplace Ombudsman, the first respondent's approach was to adopt what it regarded as an industry practice which was to pay in the order of $2.00 to $3.00 above the base rate. It is conceded in their submissions, however, that the shortcoming in that system was that it did not properly reflect the division between day, afternoon, night and weekend shift loadings together with penalty rates and I would expect also loadings in respect of public holidays and weekends. It is conceded by the respondent that it was a somewhat simplistic tool for wages utilised across the industry, but that the system had been introduced with good faith with the intention of balancing up the different pay periods.

33. It was contended, and I accept, that when the employer introduced the system, it did so not intending to produce disadvantage to any of its employees. As I will note in due course, there has been appropriate restitution to those employees, but, furthermore, it says in terms of the conduct that since these events and these matters came to its attention, it has remedied the system by engaging a wages consultant. It has implemented a workplace agreement for employees and it is now using MYOB payroll computer with the relevant awards, shift allowances, penalty and other loadings accounted for so that these problems will not occur again.

34. Furthermore, in respect to this matter and by way of corroboration of its submissions that it was not intending to disadvantage its employees, it points to the fact that while the Workplace Ombudsman has correctly identified underpayments, there were also overpayments made to various employees by the employment of the employer of the system.

In exhibit 3, it particularises overpayments in the order of $4,719.20 as evidence of that matter.

35. Next is the nature and extent of any loss or damage. The amount of underpayments to the employees I have earlier noted, that the underpayment approximates $46,000.00. It is a significant amount. However, following the audit conducted by the applicant, the first respondent has made payment to the employees in rectification of the underpayments. This is, in my view, a significant factor when assessing the penalty. There is no evidence of any previous conduct of this kind on the part of either of the respondents.

36. Next is whether the breaches arise out of one course of conduct. In this instance, the applicant submits there were five contraventions of distinct applicable provisions and as such five separate penalties ought to be imposed. There is no dispute about that and there is no dispute between the applicant and the respondents as to the breaches of the applicable provisions which underpin the underpayments.

37. Next is the size of the business. In this regard, in *Kelly v Fitzpatrick* [2007] FCA 1080 Tracey J at [28] observed that:

> *"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."*

38. I take his Honour's remarks to mean two things. First, that (a) there is an obligation upon small businesses such as the respondents in this instance to ensure compliance with the legislation and (b) that the sanction must be meaningful. That, by inference, also means not oppressive, and for that reason, I sought the respondent's counsel to provide me with some financial information concerning the profitability of the enterprise involved. In this instance, the enterprise is not a large enterprise. As earlier noted, the basic ASIC records reflect it is a small corporation.

39. I am informed that it is capitalised at about $75,000.00 which principally comprises computers and motor vehicles. In terms of its

turnover, it has increased from about 2007 to the present. In 2007, its turnover was $375,000.00, in 2008 $466,000.00 and in 2009 $529,000.00. In 2007, it made a loss. It seems its loss making position was reversed in 2008, although, as it was expressed by counsel, the losses having been carried forward would seem to have largely been offset against any profits made that year. It is now making modest profits. As one would expect in an enterprise of this kind, which is basically involved in managing labour, the greater part of turnover relates to operational overhead and costs in what might otherwise be expected to be a low-margin business.

40. Next are questions of the deliberateness of the breach or the breaches. This, of course, again is a significant matter. It is obvious in this instance that the respondents decided to pay the employees a flat rate of pay without any apparent consideration of their statutory obligations and to that end, the omission was in circumstances of some disregard for statutory obligations in an environment where it is well known and understood there is a high degree of regulation. That matter could be indicative of deliberateness. However, although I accept the submission there is an element of deliberateness, I do not attribute any Machiavellian intent but accept the submissions made by the respondent that it sought to short cut its obligations on a swings and roundabout basis by adopting its hourly rate plus margin formula.

41. So far as the involvement of senior management is concerned, it is apparent by reason of the second respondents present on the record that as a director or manager of the first respondent, he was involved in the contraventions and so it follows the contraventions were at a senior management level. In terms of contrition, corrective action, and cooperation with the enforcement authorities, it is apparent that the applicant has acknowledged the respondents have substantially cooperated with the applicant's representatives throughout the investigation.

42. Although it does not appear that the first respondent immediately admitted liability after the audit was conducted, it did follow shortly after the issue of the initial breach notice, but following the first respondent's refusal to comply with the requirements of that notice and the consequent conduct of a full investigation. It is submitted on behalf

of the applicant that the first respondent did not rectify the underpayments in the timeframe required by the final notice issued by representatives of the applicant in or about 26 May 2009. However, on or about 2 July 2009 the first respondent confirmed that the underpayments had been rectified.

43. I note in this regard, the first respondent's submissions that, so far as, the repayment was concerned, it sought to cooperate with the applicant and that the repayment was made nine months prior to proceedings commencing. It particularly submitted that there was some issue about the quantum of repayments to be made, with the sum ultimately settled upon being significantly less than the sum which was initially calculated by the applicant.

44. It is submitted that there was an amended breach notice dated 10 December 2008 claiming for an amount of $59,759.00 in full and that was subsequently varied to $45,798.66 on 11 May and before the final notice was delivered on 26 May. Having regard to those matters, I do not draw any adverse inference in respect of the immediate non-payment following the final notice given that the payment was indeed made by 2 July. Following the instigation of these proceedings, the respondents have cooperated by admitting the contraventions and entering into the agreed statement of facts, thereby minimising the need for extended or extensive litigation.

45. In terms of ensuring compliance with minimum standards, the principal objects of the Act emphasise the importance of an effective safety mechanism and safety net of minimum terms and conditions of employment together with effective enforcement of these minimum standards. There have been many cases before this court of a like kind and I am not going to rehearse decisions in them in this instance. I am cognisant of them and accept them as affording some guidance in relation to the penalties appropriate in this case. It is fair, however, to say that it is only with the imposition of significant penalties that the message will ever get out into the broader commercial community that it is important to comply with the statutory requirements in respect of one's workplace obligations.

46. So far as specific and general deterrence is concerned, again it is well established that deterrence is a relevant factor in the imposition of a

penalty and there is a need for both specific and general deterrence. The role of general deterrence has been earlier illustrated by comments by Lander J in *Ponzio v B & P Caelli Construction Pty Ltd* (2007) 158 FCR 543, which I need not restate here and likewise the observations of Finkelstein J in *CPSU v Telstra Corporation* [2001] FCA 1364. The applicant submits that there is also a need to generally deter employees in the security services industry.

47. This industry appears to have been the subject of a number of targeted campaigns in recent times which have brought these contraventions to the applicant's attention. These campaigns have been instigated by the applicant because of the identified low levels of compliance in the security services industry and it follows that the applicant contends the court should have regard to the message that needs to be sent by imposition of penalties to employers, company directors and the community generally concerning the underpayment of wages and the fact that it will not be tolerated.

48. Having regard then to the penalties that ought be imposed, the applicant contends that, having regard to the maximum provided in respect of each of the first and second respondents, and of the circumstances as I have particularised them, that this is an instance where the contraventions fall within the low range of seriousness and that accordingly penalties in the low range ought be imposed. The respondents in their outline contend for penalties for the first respondent in the range of $15,000.00 to $25,000.00 and the second respondent in the range of $3,000.00 to $5,000.00 as being appropriate.

49. The applicant did concede that insofar as the financial or the monetary range of penalties articulated by the respondents in their outline was concerned, that those penalties fell within its appreciation of a low-range penalty. I also agree that the sums articulated by the respondent in their outline accord with a low-range penalty. So far as the specific contraventions are concerned, it is of course necessary to assess the penalty appropriate for each contravention. In the respondent's draft order being part of exhibit 4, it contends in respect of the first and fifth contraventions a penalty of 35 penalty units.

50. In respect of the second, third and fourth contraventions, penalties in the order of 45 penalty units. I agree that penalties in that range are

appropriate having regard to the particulars of each of those offences and in particular noting that in respect of the first and fifth offences, fewer employees were involved than in respect of the second, third and fourth offences. The respondent also contends that there ought to be a discount afforded by reason of its general cooperation. It submits a sum of 30 per cent ought to be allowed. I also agree that a discount ought to be allowed, however I do not accept 30 per cent as being necessarily appropriate in this instance.

51. For reasons that I have outlined earlier, it seems apparent that initially there was some pushback by the respondents in respect of the applicant's initial inquiries and investigations and it was not until the applicant delivered the notices and was caused to commence and carry out a full investigation that there was a true cooperation from the respondents to the inquiries made by the applicant. It follows that, in my view, an appropriate discount ought to be 25 per cent to allow for the initial pushback in terms of cooperation by the respondents to the applicant's investigations.

52. Likewise, those comments concern the second respondent – I accept the respondent's contentions in respect of the appropriate penalty units that ought to be applied to the contraventions relevant to the second respondent and likewise for reasons I have earlier given, consider a discount of 25 per cent as being appropriate in this instance. In having regard to those matters and before I touch upon the matters of totality, I am also conscious that in the context of the sort of enterprise involved here, the second respondent will ultimately incur, in a direct sense, the penalty which is imposed upon the first respondent because in a closed corporation such as the small enterprise involved in this case, any impact upon the bottom line flows directly through to the respondent.

53. The imposition of a penalty here will clearly impact upon the bottom line and any dividend which the second respondent might ordinarily expect to receive from the first respondent. So far as totality is concerned, as I have earlier indicated, having set upon the penalties, it is then necessary to consider whether the aggregate penalties against the respondent are just and appropriate in all the circumstances.

54. The penalties will approximate at nearly $17,000.00 in respect of the first respondent and a little over $3,000.00 in respect of the second

respondent, something approaching $20,000.00 when totalled together, having regard to the closed nature of the corporation. But, irrespective, looking at each penalty separately, it seems to me having regard to the individual penalties in respect of each contravention and the penalties in their totality that the result does not necessarily produce an inappropriate penalty, having regard to all the factors in this case, and it follows that, the penalties not being inappropriate, oppressive or crushing. The penalties ought to be made in those terms.

I certify that the preceding fifty-four (54) paragraphs are a true copy of the reasons for judgment of Burnett FM.

Date: 17 March 2011