FEDERAL COURT OF AUSTRALIA

Mastwyk v Crisp [2011] FCA 349

Citation:	Mastwyk v Crisp [2011] FCA 349
Parties:	**STEPHEN JOHN MASTWYK v GLENN ANTHONY CRISP, MECHANICAL ENGINEERING CORPORATION PTY LTD (ACN 111 479 684), MECHANICAL ENGINEERING SERVICES PTY LTD (ACN 109 193 348) and ANTHONY GORDON ELIOTT**
File number:	VID 749 of 2008
Judge:	**NORTH J**
Date of judgment:	1 April 2011
Date of hearing:	1 April 2011
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	No Catchwords
Number of paragraphs:	35
Counsel for the Applicant:	Mr S Moore
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the First Respondent:	Mr T Donaghey
Solicitor for the First Respondent:	Mills Oakley
Counsel for the Second, Third and Fourth Respondents:	Ms S Bingham
Solicitor for the Second, Third and Fourth Respondents:	Maddison & Associates

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 749 of 2008**

BETWEEN:	**STEPHEN JOHN MASTWYK** **Applicant**
AND:	**GLENN ANTHONY CRISP** **First Respondent**
	MECHANICAL ENGINEERING CORPORATION PTY LTD (ACN 111 479 684) **Second Respondent**
	MECHANICAL ENGINEERING SERVICES PTY LTD (ACN 109 193 348) **Third Respondent**
	ANTHONY GORDON ELIOTT **Fourth Respondent**

JUDGE:	**NORTH J**
DATE OF ORDER:	**1 APRIL 2011**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

1. On or about 15 January 2007, the First Respondent contravened s 400(5) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by his conduct relating to an offer of employment with the Second Respondent made by him on behalf of the Second Respondent to each of those persons on terms and conditions prescribed by an Australian Workplace Agreement.

2. On or about 15 January 2007, the Second Respondent contravened s 400(5) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by the First Respondent's conduct on behalf of the Second Respondent referred to in paragraph 1.

3. On or about 15 January 2007, the Third Respondent contravened s 400(5) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by being a person involved in the First Respondent's contraventions of s 400(5) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 1.

4. On or about 15 January 2007, the Fourth Respondent contravened s 400(5) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by being a person involved in the First Respondnet's contraventions of s 400(5) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 1.

5. On or about 23 January 2007, the Third Respondent contravened s 792(1)(a) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by dismissing each of those persons for reasons including the reason proscribed by s 793(1)(m) of the *Workplace Relations Act 1996* (Cth).

6. On or about 23 January 2007, the Fourth Respondent contravened s 792(1)(a) of the *Workplace Relations Act 1996* (Cth) in respect of each person listed in the Schedule to these declarations and orders by being a person involved in the Third Respondent's contraventions of s 793(1)(a) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 5.

THE COURT ORDERS THAT:

7. A penalty in the total sum of $3,300.00 be imposed on the First Respondent in respect of the contraventions of s 400(5) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 1.

8. A penalty in the total sum of $20,000.00 be imposed on the Second Respondent in respect of the contraventions of s 400(5) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 2.

9. A penalty in the total sum of $30,000.00 be imposed on the Third Respondent in respect of the contraventions of s 400(5) and s 792(1)(a) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 3 and 5.

10. A penalty in the total sum of $5,000.00 be imposed on the Fourth Respondent in respect of the contraventions of s 400(5) and s 792(1)(a) of the *Workplace Relations Act 1996* (Cth) referred to in paragraph 4 and 6.

11. Each of the penalties referred to above be paid to the Consolidated Revenue Fund on or before 1 May 2011.

12. The application otherwise be dismissed.

SCHEDULE

1. David Alderson;
2. Hardy Alko;
3. Steve Attrill;
4. Wayne Bastin;
5. Alan Bennett;
6. Cory Berkhout;
7. Patrick Brown;
8. Steven Buhagiar;
9. John Cropley;
10. Alan Dingwall;
11. John Geremia;
12. Terry Grech
13. Sydney Grima;
14. Peter Grummisch;
15. Peter Harber;
16. Ray Jordan;
17. Hubert Kerkvliet;
18. Brett Kistemaker;
19. John Kuklinsky;

20. Rodney Marks;

21. Ralph Marshall;

22. Keith McKendry;

23. Joseph Micallef;

24. David Mitchell;

25. Geoffrey Morland;

26. Greg Nicklen;

27. Geoffrey Rea;

28. Chris Robertson;

29. John Scholtes;

30. Ron Schostek;

31. Kevin Sim;

32. Ian Strong;

33. Andrew Tucker;

34. Joseph Vella;

35. David Ward;

36. David Warner;

37. George Wawrzkow.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION VID 749 of 2008

BETWEEN:	**STEPHEN JOHN MASTWYK** **Applicant**
AND:	**GLENN ANTHONY CRISP** **First Respondent**
	MECHANICAL ENGINEERING CORPORATION PTY LTD (ACN 111 479 684) **Second Respondent**
	MECHANICAL ENGINEERING SERVICES PTY LTD (ACN 109 193 348) **Third Respondent**
	ANTHONY GORDON ELIOTT **Fourth Respondent**
JUDGE:	**NORTH J**
DATE:	**1 APRIL 2011**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 The applicant seeks declarations and penalties against the respondents for breaches of the *Workplace Relations Act 1996* (Cth) (the Act). The facts upon which the Court should decide have been agreed and involve admissions made by the respondents of contraventions of certain provisions of the Act. The parties have also agreed on the amount of penalties to be paid by the respondents. The agreement has been arrived at by way of both direct negotiations between the parties, and also by the assistance of Registrar Caporale of the Court.

2 The applicant has filed written submissions in support of the agreement reached by the parties. The submissions authored by Mr Moore, who appeared as counsel on behalf of the applicant, are a model of the submissions which the Court should expect in cases such as the present. They are both comprehensive and to the point. As a consequence, these reasons will broadly follow the submissions made on behalf of the applicant.

3 The first respondent filed short submissions which, in essence, together with oral submissions made by Mr Donaghey, who appeared as counsel for the first respondent, supported the applicant's written submissions. The second, third and fourth respondents also supported the applicant's submissions in oral submissions made to the Court.

FACTUAL BACKGROUND

4 The following recitation of the facts comes from the summary in the written submissions of the applicant, which has been taken from voluminous statements of agreed facts filed by the parties.

5 The second respondent, Mechanical Engineering Corporation Pty Ltd (MEC), conducted the business of mechanical engineering in Yallourn. The third respondent, Mechanical Engineering Services Pty Ltd (MES) provided labour to MEC. MEC and MES were part of a group of companies, the Eliott Group of Companies. The fourth respondent, Anthony Gordon Eliott (Eliott), was the sole director and shareholder, and governing will of the Eliott Group of Companies.

6 On 27 December 2006, MEC was placed into voluntary administration by Eliott. The voluntary administration ended on 6 June 2007. Whilst MEC was in administration the first respondent, Glenn Anthony Crisp (Crisp), was appointed administrator.

7 The conditions of employment of the employees of MES were governed by a certified agreement which came to an end. It is unnecessary to describe the circumstances in which that occurred. However, the negotiations for a new agreement were protracted and particularly hostile. The employees took industrial action, which started with limited bans, and then escalated into a strike. In response, MES locked out these employees.

8 From 3 November 2006 the employees were locked out again, and the strike continued indefinitely. As a result of the pressure placed on the business by these events, on 27 December 2006, Eliott, constituting the board of MEC, resolved that the company was insolvent and that it be placed into voluntary administration. Eliott advised Crisp that MES could not continue to supply labour to MEC, and MEC should try to provide alternative employment to the MES employees.

9 On 15 January 2007 Crisp wrote to each of the 37 employees of MES referred to in the schedule to the orders made by the Court (the employees) offering them employment under an Australian Workplace Agreement (the AWA offer). The key terms of the offer were as follows:

(a) a term of four years;

(b) a 4% annual wage increase over the term of the workplace agreement after the first 12 months;

(c) one RDO per 28 day / four week period (13 per year); and

(d) salary sacrifice option available for employees who wished to take income protection insurance.

10 In the covering letter sent to the employees with the offer, Crisp stated that:

(a) MEC operated as part of the Eliott Group and that MES was the labour supply company to MEC. MES employed the MES Trades Employees at the Site;

(b) the continuing industrial dispute had impaired the ability of MEC to service its customers and led to MEC being placed into voluntary administration;

(c) unless MEC could procure a reliable supply of labour in the immediate future, he would have no option but to close its business operations;

(d) MES had been unable to supply labour to MEC and the labour supply agreement with MES had been partially terminated;

(e) MES had provided Crisp with details of all the MES employees to enable the MES employees affected by the partial termination of the labour supply agreement between MES and MEC to obtain alternative employment;

(f) the employment offer was conditional upon him receiving acceptances from a satisfactory number of MES employees in each category of skilled employees to make the business viable;

(g) employees should advise him within 7 days whether he or she accepted employment on the terms of the enclosed AWA. Later in the letter, he stated that acceptances were required by 5pm on 19 January 2007; and

(h) if he did not receive adequate responses by the deadline, he would "have no option but to discontinue operations at" the Site.

11 By a letter dated 23 January 2007, Eliott, wrote to the employees on behalf of MES terminating their employment from about 22 February 2007. He stated that this had occurred because of the failure of MES to supply labour, and the consequent cancellation of the labour supply agreement with MEC.

STATUTORY PROVISIONS

12 As at the date of the relevant contraventions, sections 400(5) and (6) of the Act provided:

> (5) A person must not apply duress to an employer or employee in connection with an AWA.
>
> (6) To avoid doubt, a person does not apply duress for the purposes of subsection (5) merely because the person requires another person to make an AWA as a condition of engagement.

13 Section 792(1)(a) provided:

> (1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
>
> (a) dismiss an employee;
>
> ...

14 Section 793(1) provided:

> (1) Conduct referred to in subsection 792(1) or (5) is for a *prohibited reason* if it is carried out because the employee, independent contractor or other person concerned:
>
> (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
>
> ...
>
> (m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions – is dissatisfied with his or her conditions;

15 Sections 728(1) and (2) provided:

> (1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
>
> (2) For this purpose, a person is *involved in* a contravention of a civil remedy provision if, and only if, the person:
>
> (a) has aided, abetted, counselled or produced the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
>
> (d) has conspired with others to effect the contravention.

16 Section 826(2) provided:

Any conduct engaged in on behalf of a body corporate by:

(a) an officer, director, employee or agent of the body corporate within the scope of his or her actual or apparent authority; or
(b) any other person at the direction or with the consent or agreement (whether express or implied) of an officer, director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the officer, director, employee or agent;

THE CONTRAVENTIONS

17 The respondents have admitted the following contraventions of the Act:

Crisp admitted that:

1. The making of, and the giving effect to, the AWA Offer by him to each of the employees amounted to the application of duress to the employees in connection with an AWA contrary to subsection 400(5) of the WR Act.

2. The abovementioned conduct resulted in 37 separate contraventions by him of subsection 400(5) of the WR Act.

MEC admitted that:

1. The making of, and the giving effect to, the AWA Offer by it to each of the employees amounted to the application of duress to the employees in connection with an AWA contrary to subsection 400(5) of the WR Act.

2. The abovementioned conduct resulted in 37 separate contraventions by it of subsection 400(5) of the WR Act.

MES admitted that:

1. It was knowingly concerned in the breaches by Crisp of subsection 400(5) of the WR Act referred in paragraph 75 above.

2. Its dismissal of the employees was contrary to section 792 of the WR Act in that it was for reasons which included the fact that the Employees were each members of the AMWU which was seeking better industrial conditions on their behalf, and were each dissatisfied with their existing conditions including wages.

Eliott admitted that:

1. He was knowingly concerned in the breaches by Crisp of subsection 400(5) of the WR Act referred to in paragraph 75 above.

2. He was knowingly concerned in the breaches by MES of section 792

of the WR Act referred to in paragraph 77.2 above.

THE AGREED RELIEF

18 The parties agreed that the Court should make declarations reflecting the respondents' admitted contraventions. They also agree that the Court should impose the following penalties:

- In relation to Crisp, a penalty of $3,300 in respect of his contraventions of s 400(5) of the Act.
- In relation to MEC, a penalty of $20,000 in respect of its contraventions of s 400(5) of the Act.
- In relation to MES, a penalty of $30,000 in respect of its contraventions of s 400(5), and s 792(1)(a) of the Act.
- In relation to Eliott, a penalty of $5,000 in respect of his contraventions of s 400(5) and s 792(1)(a) of the Act.

THE ROLE OF THE COURT

19 Although the parties have come to an agreement as to the penalties to be imposed for the admitted contraventions, it is a matter for the Court ultimately to determine whether the agreement should take effect. The question for the Court is not whether it would have arrived at the same penalty. The Court must determine whether the penalties are appropriate in the circumstances of the case. The Court will not reject an agreement of the parties, if it is within the permissible range of penalties, and the penalties agreed upon are neither manifestly inadequate nor manifestly excessive.

20 There are two issues which arise in the context of the facts of this case, which require particular attention. First, it is necessary to consider the meaning of the concept of duress in s 400(5). The submissions of the applicant set out accurately the state of the law on this subject as follows:

> 86.1 Duress involves the application of illegitimate pressure which is likely to deny the exercise of free will and which is applied with the intention of

having that result. This reflects a policy intention that AWAs should be negotiated openly and freely at arms length without outside interference and without either party being deceived or misled.

86.2 In order for duress to be established, it is not necessary that the pressure applied in fact had the effect of overbearing the will of one party so as to result in the making of an AWA.

86.3 Lawful conduct can, depending upon the circumstances, constitute duress. Duress focuses on the effect of the pressure upon the quality of the consent of the pressured party. The possible or probable impact of the conduct in question must be considered.

86.4 The presence or absence of duress will depend on the particular circumstance of each case. The circumstances which may indicate that the offering of an AWA involved the illegitimate application of pressure including whether there is in existence a relationship of employer and employee or some other relationship. It is likely to be duress to threaten an existing employee with loss of employment if they do not enter into an AWA. It will likewise be particularly significant if an employee is offered the same position as he or she presently occupies, on the condition that they enter into an AWA.

21 Second, it is necessary to examine the single course of conduct principle. The parties have accepted in their admissions that there have been separate contraventions in respect of each of the 37 employees. However, they contend that the contraventions should be viewed as a single course of conduct for the purpose of assessing the adequacy of the penalties agreed. The written submissions of the applicant rely on a passage in the judgment of Middleton and Gordon JJ in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 (*Cahill*) at [39], as follows:

> The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is 'the same criminality' and that is necessarily a factually specific enquiry.

22 The precise basis of the single course of conduct concept is not easy to grasp. It is perhaps best explained as a relevant factor by which to analyse certain factual circumstances, in order to determine the justice or appropriateness of the penalty.

23 So much seems to flow from decisions such as *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417 (*Williams*) upon which reliance was placed in *Cahill*. In *Williams* the Court relied upon an explanation given by Owen JA in *Royer v The State of Western Australia* [2009] WASCA 139 (*Royer*) at [30], as follows:

> Against that general background how is the one transaction principle to be understood and applied? Save for the instances in which the interrelationship between multiple offences is so close that injustice can only be avoided by concurrency of terms, the answer will usually emerge from considerations of proportionality to or with the criminality of the offender's conduct viewed in its entirety. Looked at in this way, the one transaction principle and the totality principle are closely connected. A sentencing judge is obliged to impose an effective term that she or he judges to be appropriate for the overall criminality of the offender's conduct. Even where, on a strict and literal understanding of the one transaction principle, it might be said that the concurrency of terms can be justified, the need for proportionality might demand cumulative or partly cumulative terms.

24 His Honour in *Royer* correctly drew attention to the connection between the totality principle and the one transaction, or single course of conduct, principle in the criminal context. In the end, they are both tools which the Court is able to utilise in the analysis of facts in order to determine the appropriateness or justice of the penalty in individual cases. To call them principles may be to elevate them beyond their true character.

25 However, I accept the parties' submission that it is appropriate in the circumstances of this case for the events relating to the AWA offer to be viewed as a single contravention of s 400(5) of the Act. The offer was made in identical form to each of the employees on the same date. The covering letters, which attach the AWA, were identical in form. More particularly, as the applicant contended in its written submissions:

> the making of the AWA offer was part of a single strategy which was not targeted at any of the employees in their individual capacity, but was rather targeted at all of the employees as a group, and without distinction.

26 It is now necessary to address the factors relevant to each of the respondents. In relation to Crisp, the maximum penalty for contravention of s 400(5) is $6,600. The factors which indicate the seriousness of his contraventions are set out in the applicant's submissions as follows:

> 87.1 The duress applied to the Employees by the covering letter of the AWA offer was real and substantial. It included a statement that, absent sufficient acceptances, Crisp would shut down the business.
>
> 87.2 The AWA offer was stated to be open for a very short time (4 days) and was conditional upon Crisp receiving a sufficient, but unstated, number of acceptances within each category of employee.
>
> 87.3 The terms of the AWA were fixed and unalterable and included provisions which, to the knowledge of Crisp, the Employees had already been offered and had rejected.

87.4 In practical terms, when the AWA Offer was made, there was a pre-existing relationship between Crisp and the Employees as the Employees worked in the Business operated by the company of which Crisp was administrator, which company was closely related to their employer, MES.

87.5 The circumstances of the AWA offer included a change in the business situation and structure which resulted, in practical terms, in a compulsory change in employer. The termination of the Labour Arrangement was effected by Crisp and Eliott on behalf of MES without any consultation with the Employees or the AMWU [Australian Manufacturing Workers Union].

87.6 Given the terms of the letter from Crisp under which the AWA offer was made and the circumstances in which it was provided and in particular the termination of the Labour Arrangement, the making of the AWA offer presented the Employees with an invidious choice; they could keep working for the business, but only on the terms offered by Crisp, or lose their jobs. This conduct is properly viewed as being at the higher end of the range of unconscionability and the means by which illegitimate pressure may be applied to employees.

27 The mitigating factors applicable to Crisp are set out in the applicant's submissions as follows:

88.1 Although Crisp deliberately engaged in the contravening conduct, he did not intend to contravene s 400(5).

88.2 The contravening conduct occurred in circumstances where protected action had been occurring at the Site since September 2006 and where Crisp's obligations as an administrator under the Corporations Act included acting in the interest of MEC and its creditors. It is agreed that Crisp had formed the view that it was in the best interest of MEC and its creditors to have the company resume operations rather than be liquidated.

88.3 Crisp made an offer to the Employees at the request of the union officials which he believed did not contravene section 400(5) of the Act which he did not intend to contravene.

28 The parties also contended that it is relevant to the amount of the agreed penalty in relation to Crisp that a substantial penalty is proposed for MEC.

29 In relation to MEC, the operation of s 826(2) means that the conduct of Crisp is taken to have been engaged in by MEC. Thus, the factors indicating the seriousness of the contravention applicable to Crisp, set out in [26] of these reasons, are relevant to the circumstances of MEC. It is accepted that a relatively greater penalty against MEC is appropriate because of its pre-existing relationship with the employees of MES, arising from

the fact that MEC was the operator of the business in which they were engaged. The maximum penalty for a body corporate for breach of s 400(5) is $33,000. The agreed penalty of $20,000 properly reflects the elements to which the Court's attention has been drawn.

30 Then, in relation to MES, the agreed penalty is $30,000 both for the contravention of s729(1)(a), which arises from the dismissal of the employees, and for its accessorial liability for Crisp's contravention of s 400(5) in making the AWA offer. The maximum penalty for a contravention of s 792(1)(a) by a body corporate is $33,000. The dismissal of each of the 37 employees constituted a separate contravention of s 729(1)(a). Again, the parties have treated the dismissals as a single course of conduct. The parties contend that the same level of culpability is common to each of the dismissals. The dismissals were all effected on the same date by letters in the same form from Elliott on behalf of MES. MES has admitted that all the dismissals were made for reasons which included the reason prohibited by s 793(1)(m). It follows, so it is submitted, that the employees were dismissed as part of a single strategy which was not directed at any of the employees in their individual capacity but, rather, targeted at them as a group and without distinction. I accept that this is a proper analysis of the facts in this case, whether by reliance upon the single course of conduct concept or by application of the totality principle. It is only the former on which the parties rely.

CONSIDERATION

31 The dismissals were a serious contravention of the Act. However, there are factors which contributed to those contraventions which should be taken into account. These are set out in the applicant's submissions as follows:

> 95.1 the failure to reach agreement on a replacement collective agreement to the certified agreement;
>
> 95.2 the protracted industrial dispute which resulted in the voluntary administration of MEC;
>
> 95.3 the cancellation of the labour hire agreement; and
>
> 95.4 the fact that, although MES deliberately terminated the employment of the Employees, it did not intend to contravene s 792 of the Act and had sought and received advice prior to terminating the employment of each of the Employees.

32 As to the accessorial liability of MES for Crisp's contraventions, it is also appropriate to treat the liability of MES as arising from the single course of conduct for the same reasons.

MES was, through Eliott, centrally involved in the contravention of s 400(5). I agree with the conclusion expressed in [98] of the applicant's submissions, which reflects the agreement of the parties in relation to MES as follows:

> The proposed penalty of $30,000 in respect of MES' contravention of ss 400(5) and 792(1)(a) reflects the seriousness of the primary and accessorial contraventions of the WR Act by MES; the existence of mitigating factors in relation to those contraventions and the fact that it is proposed that substantial penalties be imposed on Crisp, MEC and Eliott for contraventions of s 400(5) in respect of the same conduct and on Eliott in relation to s 792(1)(a).

33 In oral submissions, Mr Moore drew attention to other litigation arising out of the circumstances of the dismissal of the 37 employees. In those proceedings, Finkelstein J made orders that the employees were entitled both to redundancy payments and additional notice. In a separate judgment, his Honour found that the failure to make those payments amounted to contraventions of the Act. The parties did not rely on these contraventions as relevant to the imposition of penalties in this proceeding, because the earlier proceedings arose out of the very same circumstances as this proceeding.

34 Finally, the agreed penalty for Eliott is $5,000 for contraventions of both s 400(5) and s 792(1)(a). Treating the contraventions of each of these sections as a single course of conduct would expose Eliott to a total penalty of $13,200. It is therefore possible to view the agreed penalty as somewhat on the light side in the circumstances. Eliott was the governing mind and will of MEC and MES. He had a close involvement in the making of the AWA offer and in the circumstances in which it was made. He also had a close involvement in the dismissal of the employees. On the other hand, he is the sole shareholder in both companies, and the substantial penalties imposed on them will ultimately be an impost on Eliott himself. Whilst the Court would not have fixed $5,000 as the appropriate penalty for to Eliott, nonetheless, that amount is within the permissible range. It therefore does not represent a reason for the Court refusing to make orders consistent with the agreement of the parties.

35 For these reasons, the Court will make orders and declarations in the terms agreed by the parties and reflected in a minute of proposed declarations and orders. These orders reflect the monetary penalties which have been discussed in these reasons. They reflect the admissions made of the contraventions referred to in these reasons and provide for the penalties to be paid by 1 May 2011 and to be paid to consolidated revenue.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice North.

Associate: 

Dated: 11 April 2011