FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v AUSTY PTY LTD & ANOR *[2011] FMCA 867*

INDUSTRIAL LAW – Penalty hearing for contraventions of ss.182(1) and 185(2) of the *Workplace Relations Act 1996* (Cth) – failure to adhere to minimum wage standards – failure to pay casual loading – involvement of company manager in contravention – where agreed statement of facts – where breaches admitted – imposition of penalty – factors relevant to calculation of penalty.

Minimum Conditions of Employment Act 1993 (WA)
Workplace Relations Act 1996 (Cth), ss.182(1), 185(2), 719(2)

AWU v QCC [2005] QIRComm 123; 179 QGIG 882 (15 August 2005)
Alfred v the CFMEU [2011] FCA 556
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543; [2007] FCAFC 65

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	AUSTY PTY LTD
Second Respondent:	KIYOMI MARUOKA
File Number:	PEG 169 of 2011
Judgment of:	Raphael FM
Hearing date:	8 November 2011
Date of Last Submission:	8 November 2011
Delivered at:	Perth
Delivered on:	8 November 2011

REPRESENTATION

Counsel for the Applicant:	Mr G Spain
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Ms R Airey
Solicitors for the Respondents:	McDonald Balanda & Associates

ORDERS

(1) The appropriate penalty payable by the First Respondent for breach of:

(a) s.182(1) of the *Workplace Relations Act 1996* (Cth) is $13,000; and

(b) s.185(2) of the *Workplace Relations Act 1996* (Cth) is $10,000,

payable within 2 months.

(2) The appropriate penalty payable by the Second Respondent for breach of s.182(1) of the *Workplace Relations Act 1996* (Cth) is $2,500, payable within 3 months.

(3) Both penalties are payable to the Commonwealth.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT PERTH

PEG 169 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

AUSTY PTY LTD
First Respondent

KIYOMI MARUOKA
Second Respondent

REASONS FOR JUDGMENT

1. There comes before me today an application by the Fair Work Ombudsman for penalties against the First and Second Respondent for breaches of the former *Workplace Relations Act 1996* (Cth)[1], arising out of the underpayment of certain employees in both Western Australia and Queensland. Although the First Respondent is an Australian company, it is wholly owned by Japanese interests, and the Second Respondent is a Japanese national. The business operated by the First Respondent through the Second Respondent, its manager, is that of providing wedding planning facilities to Japanese nationals who wish to be married in Australia.

2. The original application to this Court was made on 24 June in this year, and was supported by a Statement of Claim. Since the commencement

[1] "*WR Act*".

of the proceedings, the parties have agreed on a Statement of Facts which was filed in this Registry on 4 November 2011. The First Respondent admits breaches of sections 182(1) and 185(2) of the *WR Act*. The Second Respondent admits that she was a person involved in the contraventions.

3. The Agreed Statement of Facts notes that from 27 March 2006, the First Respondent was bound to pay its:

   a) Western Australian employees in accordance with the Australian Pay and Classification Scale[2] derived from the *Minimum Conditions of Employment Act 1993* (WA);[3] and

   b) Queensland employees in accordance with the Pay Scale derived from the rate and coverage provisions of the Queensland Minimum Wage as provided for by the *State Wage Case 2005 General Ruling* (Qld), *AWU v QCC* [2005] QIRComm 123; 179 QGIG 882 (15 August 2005).

   All of the employees were entitled to a basic hourly wage rate pursuant to section 182(1) of the *WR Act*, and the WA Pay Scale required a casual loading of 20 per cent pursuant to section 185(2) of the *WR Act*.

4. The Agreed Statement of Facts sets out in full a calculation of the underpayments, which are the subject of these proceedings. In total, they amount to $16,340.74. A final calculation of that amount was made on 11 May 2011, and the amount was paid in full on 19 May 2011. However, the underpayments relate to periods some considerable time prior to 2011, so that whilst the First Respondent's response to the calculation was speedy and commendable, it should not be ignored that its employees were out of pocket for a much longer period, the last employee involved having left the First Respondent's employment on 26 February 2010, over a year and some months before the payments were made.

5. The Agreed Statement of Facts notes that the Second Respondent was the Manager of the First Respondent's business in Australia. It appears that she had been promoted into this position from her original position

[2] "Pay Scale".
[3] "WA Pay Scale".

as a wedding planner. In the position of manager, she had responsibility for the direction of employees, the settling of their wage rates, their rosters and hours of work, and ensuring that they were paid. While she sought the approval for her decisions from a director of the First Respondent, she was the "on the ground" representative of the company. It is also noted in the Agreed Statement of Facts, the Second Respondent, whilst having conversational English, is by no means fluent in the language.

6. There is one concerning feature about the conduct of the First and Second Respondents noted in the Agreed Statement of Facts: that is that their conduct first came to the notice of the authorities in late 2008, when some other employees complained about their underpayments. Although those complaints were resolved by January 2009, other employees continued to be underpaid up until February 2010, and it would appear that even though the company had warning of underpayment problems, it sought only to rectify the particular problems about which it had been advised, rather than go back through its records to ensure that all its former employees had been properly remunerated, and where they had not, any underpayments rectified.

7. The Applicant has accepted that the actions of the Respondents constitute a single course of conduct as defined in section 719(2) of the *WR Act*, so that in respect of the First Respondent there are two breaches:

   a) one of section 182(1) for underpayment; and

   b) one of section 185(2) for failure to pay casual loadings.

   In respect of the Second Respondent, there is only one breach and that is of section 182(1) of the *WR Act* for underpayment.

8. Both the Federal Court and this Court, since the conferral of industrial relations jurisdiction upon it, have had considerable experience in dealing with cases where matters are resolved by the preparation of an Agreed Statements of Facts, and agreements either as to penalty or as to the range within which the penalty should be set. The manner in which the Court deals with such matters has recently been articulated by Tracey J in *Alfred v the CFMEU* [2011] FCA 556 at [67-68]:

"[67] The approach of the Court to proposals of this kind is now well established. It was propounded by the Full Court in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 and was summarised by Kenny J in *White v Construction, Forestry, Mining and Energy Union* [2011] FCA 192 at [5] as follows:

"(a) it is the responsibility of the Court to determine the appropriate penalty;

(b) determining the amount of penalty is not an exact science;

(c) within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another;

(d) there is public interest in promoting settlement of litigation, particularly where it is likely to be lengthy;

(e) the view of the regulator, as a specialist body, is a relevant, but not determinative, consideration;

(f) in determining whether the proposed penalty is appropriate, the Court examines all of the circumstances of the case; and

(g) where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement. The question is whether that figure, in the Court's view, is appropriate in the circumstances of the case. In answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if it is within the permissible range."

[68] A penalty will be within the permissible range if it is neither manifestly inadequate nor manifestly excessive: see *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [129] (per Jessup J)."

At [69] and [70], His Honour set out his understanding of the law in relation to the considerations which a court should have in determining a penalty:

"[69] In *Kelly v Fitzpatrick* (2007) 166 IR 14 I identified a non-exhaustive range of considerations which are of potential relevance in determining a penalty for contraventions of civil penalty provisions of Chapters 5 and 6 of the BCII Act. These considerations were derived from a number of decisions of the Court under other legislation. They have been found to be relevant to the fixing of penalties under the BCII Act: see *Stuart v Construction, Forestry, Mining and Energy Union* (2010) 185 FCR 308 at 331-2 (per Besanko and Gordon JJ). These considerations are not, of course, to be applied rigidly regardless of the circumstances of a particular case. They may, however, provide helpful guidance. In the end, however, it is the responsibility of the Court "to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations": *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417 at [29], citing with approval *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [91] (per Buchanan J).

[70] The following factors, in my view, have relevance in the circumstances of the present proceeding:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that relevant conduct took place.
- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether or not the breaches were deliberate.
- Whether the respondent had exhibited contrition.
- Whether the respondent had taken corrective action.
- Whether the respondent had co-operated with the enforcement authority.
- The need for specific and general deterrence."

9. I have had regard to those matters set out in [70] of His Honour's decision. The nature and extent of the conduct consists of a lengthy period of underpayment to persons who would appear to have had

difficulties in themselves understanding their rights. I say this because, although there were originally some complaints from employees, it was found later that a much larger number of employees had been underpaid. The conduct rehearsed in the Agreed Statement of Facts took place in circumstances where I am prepared to accept that the Second Respondent had responsibilities possibly too large for her to manage with her knowledge of English and the Australian workplace relations system. However, this was something that was made plain to her in 2008/09, and yet she still continued to underpay her employees. The loss and damage sustained by each of the employees was not that great, but it was probably significant to them, as they were being paid less than the minimum wage.

10. It is clear from the documents annexed to the Agreed Statement of Facts, and from the views expressed earlier in these Reasons for Judgment, that there was similar previous conduct by the Respondents. To the extent that previous conduct refers to conduct prior to today or to the commencement of the proceedings, it should be noted that the Respondents underpaid people before matters were brought to their attention in 2008/09 and afterwards. After the Respondents were informed of the existence of minimum wages and the requirement to pay them, any breaches must have been deliberate. They may not have been made with the intention of harming the employees, but the fact is that the company and its manager knew that there was a standard which had be kept to and did not keep to it.

11. I am prepared to accept that both Respondents have exhibited contrition, and I'm particularly sure of this being the case in respect of the Second Respondent. The acceptance of responsibility by Japanese companies and those in control of them for blameworthy actions is something that is regularly witnessed on our television screens; it is perhaps one of the most attractive features of the Japanese characteristic. I have no reason to doubt that the parties here have accepted their responsibilities and shown contrition. The First Respondent took corrective action by making up the underpayments speedily. I'm not quite so sanguine about other corrective action. It has been suggested that the company has now made it clear to the Second Respondent that she should make inquiries of the Fair Work

Ombudsman when she employs new staff, but I would expect something more than that.

12. I would rather hope to have seen some documentation indicating a clear understanding of the minimum wage provisions that exist in the states of Australia in which this company operates, and some system by which these would have been kept up to date. I'm satisfied that the Respondents have both cooperated with the enforcement authority. As Ms Airey says in her helpful submissions, the Respondents have both:

a) agreed to admit the breaches;

b) employed solicitors and counsel to appear on their behalf; and

c) assisted the Applicant to calculate the correct amount underpaid.

13. In regard to the need for specific deterrence, I think it is important that it is made clear to the Respondents that this is not the type of breach readily condoned by the authorities. This is particularly the case because it would appear that all of this company's employees are Japanese nationals, who may well not speak very much English, and who have, therefore, little ability to argue for themselves in relation to their wages or conditions. There is also a need for general deterrence insofar as the public must be confident that underpayment of minimum wages is something that will be taken seriously by the Courts so that it should not become a commonplace practice.

14. I have taken these matters into consideration. I note that although there was a complaint made and resolved in 2008/09, there have been no previous prosecutions of either Respondent. I note that the parties have agreed that the range in which any penalty should be imposed is that of the low to medium part of the range, and that in respect of:

a) the First Respondent, each of the offences has a maximum penalty of $33,000; and

b) the Second Respondent, a maximum penalty of $6,600.

I note the remarks already extracted that a penalty will be within the permissible range if it is neither manifestly inadequate nor manifestly

excessive: *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 565 per Jessup J; [2007] FCAFC 65 at [129] (per Jessup J).

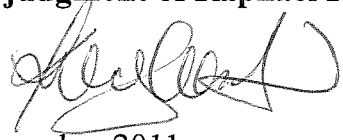
15. In my view, the fact that previous underpayments were advised to the Respondents and, although fixed, the Respondents continued to underpay other employees and did not make up the underpayments of employees not notified, tells against a penalty in the low range. On the other hand, the mitigating factors, which I have discussed in particular in relation to the Second Respondent, do not suggest that the penalty should be any higher than the mid-range. In my view, the appropriate penalty against the First Respondent for its breach of:

a) section 182(1) of the *WR Act* should be $13,000; and

b) section 185(2) of the *WR Act* should be $10,000.

In respect of the Second Respondent, I believe that her penalty for breach of section 182(1) of the *WR Act* should be $2,500. The penalty imposed upon the First Respondent shall be paid within two months, and the penalty imposed upon the Second Respondent shall be paid within three months. Both penalties shall be payable to the Commonwealth of Australia.

I certify that the preceding fifteen (15) paragraphs are a true copy of the reasons for judgment of Raphael FM

Associate: 

Date: 11 November 2011