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## FEDERAL MAGISTRATES COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v CHAMDALE PTY LTD* [2011] FMCA 1021

INDUSTRIAL LAW – Fair work – pecuniary penalties – breaches of award – underpayment of employees – agreed statement of facts – breaches admitted – grouping of contraventions – consideration of matters relevant to penalty.

*Fair Work Act 2009* (Cth), ss.545(2), 546(3)(a), 547(2), 557(1)  
*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, sch.16  
*Workplace Relations Act 1996*, ss. 178(6), 179A, 182(1), 185(1), 235(2), 356(a), 719(2), 719(6), 722, 841(a)

*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560  
*Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233  
*Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 RCR 216  
*Kelly v Fitzpatrick* (2007) 166 IR 14  
*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7  
*MoIver v Healey* [2008] FCA 425  
*Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383  
*Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	CHAMDALE PTY LTD
File Number:	MLG 886 of 2011
Judgment of:	Hartnett FM
Hearing date:	16 November 2011
Delivered at:	Melbourne
Delivered on:	23 December 2011

**REPRESENTATION**

Counsel for the Applicant: Mr Tracey

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the Respondent: Mr Seck

Solicitors for the Respondent: BI Legal

**THE COURT DECLARES THAT THE RESPONDENT  
CONTRAVENED:**

- (1) Clause 15.1 of the *SDA Hungry Jack's Victoria Award 2002* (SDA Award) and section 182(1) of the *Workplace Relations Act 1996* (WR Act) by failing to pay its adult full-time employees at least the specified weekly rates of pay or basic periodic rate of pay for ordinary hours worked;
- (2) Clause 10.3 of the SDA Award, section 182(1) of the WR Act and item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) by failing to pay its adult part-time employees at least the specified hourly rates of pay or basic periodic rate of pay for ordinary hours worked;
- (3) Clause 11.3 of the SDA Award, sections 182(1) and 185(1) of the WR Act, and item 5 of Schedule 16 of the Transitional Act by failing to pay its adult casual employees at least the loaded hourly rates of pay or at least the guaranteed casual loading for hours worked;
- (4) Clause 26.3 of the SDA Award by failing to pay its full-time and casual adult employees at least the specified overtime rates of pay for overtime hours worked;
- (5) Clause 10.4 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay its part-time adult employees at least the specified overtime rates of pay for overtime hours worked;
- (6) Clause 27.4 of the SDA Award by failing to pay its full-time and part-time adult employees at least the specified rates of pay for hours worked on a public holiday;
- (7) Clause 10.3 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay its part-time adult employees at least the specified rates of pay for hours worked on a public holiday;
- (8) Clause 11.3 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay its casual adult employees at least the specified rates of pay for hours worked on a public holiday;

- (9) Clauses 28.11 and 28.19 of the SDA Award by failing to pay its full-time and part-time adult employees at least the required amounts when those employees took a period of paid annual leave;
- (10) Clause 28.14 of the SDA Award and section 235(2) of the WR Act by failing to pay its full-time and part-time adult employees at least the required amounts for untaken accrued annual leave upon the termination of employment;
- (11) Clause 41.2 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay employees at least the weekly amounts required by way of payment for a laundry allowance;
- (12) Clause 16.1 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay its junior employees the applicable percentage amounts for hours worked by junior employees;
- (13) Clause 14.2.1 of the *National Training Wage Award 2000* (NTW Award), section 182(1) of the WR Act and item 5 of Schedule 16 of the Transitional Act by failing to pay trainee employees at least the specified hourly rates of pay for hours worked by part-time trainees;
- (14) Clause 5.2 of the *Retail Trade Industry Sector – Minimum Wage Order – Victoria 1997* (MWO), section 182(1) of the WR Act and item 5 of Schedule 16 of the Transitional Act by failing to pay at least the specified hourly rates of pay or basic periodic rate of pay in relation to hours worked by Gerard Hsley.

**THE COURT ORDERS THAT:**

- (15) Pursuant to section 178(6) of the WR Act (as it was before 27 March 2006), section 719(6) of the WR Act and section 545(2) of the *Fair Work Act 2009* (Cth) (FW Act), that by 1 January 2012 the Respondent is to pay to the individuals listed below, the amounts set out therein. If any of the individuals cannot be located, these amounts will be paid to the Collector of Public Monies.

Alrey, Amanda	\$1,561.19
Armstrong, Luke	\$604.82
Arthur, Zachary	\$9.80
Ashton, Emma	\$66.11
Beltran, Ingeld	\$1.66
Benbow, Krysten	\$285.15
Bennie, Scott	\$122.80
Bertus, Ashley	\$260.81
Bice, Ryan	\$1,252.45
Bowler, Stacey	\$1,000.00
Bowman, Michael	\$9.89
Brooks, Catherine	\$403.22
Brown, Andrea	\$565.52
Buck, Casey	\$211.71
Buck, Logan	\$2,227.26
Carter, Shannon	\$43.00
Chalker, Peter	\$284.47
Cherry, Casey	\$132.80
Clayton, Rebecca	\$1,094.79
Climas, Lauren	\$1,354.44
Cole, Sharlene	\$28.58
Concol, Jake	\$51.29
Costello, Casey	\$100.56
Cumick, Nicola	\$182.96
Cust, Breanne	\$0.17
Davies, Zoe	\$3.02
Davis, Chantelle	\$10.06
Dean, Jethro	\$33.33
Dennis, Leon	\$2,305.47
Dixon, Brett	\$659.86
Dolphin, Jayde	\$51.30
Doolan, David	\$937.90
Dragert, Stephen	\$798.06
Driscoll, Kara	\$1,016.09
Edwards, Tom	\$240.49
Elliot, David	\$34.64
Fabiane, Gabrielle	\$10.16
Fasolo, Elizabeth	\$70.53
Forder, Shannahan	\$89.15
Furtiere, Greg	\$288.92
Geary, Jacqui	\$305.39

Harris-Peter, Monica	\$0.44
Hay Amanda,	\$172.36
Hemming, Tiffany	\$550.56
Henderson, Crystal	\$847.53
Henderson, Prue	\$937.71
Hendry, Melanie	\$1,444.18
Hloks, Shanelle	\$29.52
Hicks-Hobgen, Meaghan	\$237.77
Hillman, Stephen	\$751.23
Hobson, Emma	\$37.69
Hoffman, Tayla	\$221.43
Holland, Larissa	\$29.83
Holland, Tamara	\$2,363.71
Howard, Michael	\$6.59
Hyett, Noni	\$2,010.80
Ilsley, Gerard	\$3,734.93
Jenkins, Sarah	\$17.04
Jinnette, Haydan	\$133.87
Jowett, Dion	\$82.24
Kean, Laura	\$2,600.30
Kelly, Lauren	\$1.99
Kelly, Renee	\$1,255.49
Kelly, Rozlyn	\$23.13
Ketterer, Brogan	\$285.04
King, Georgia	\$299.02
Konstantaras, Asimi	\$407.91
Lechmere, Matthew	\$3,366.43
Lefevre, Donna	\$277.13
Lenton, Maxene	\$25.41
Liddall, Thomas	\$64.13
Maoauley, Lauren	\$233.08
Manning, Daniel	\$553.92
Martion, Shasta	\$20.25
Matthews, Hannah	\$294.90
Matthews, Rikki	\$0.43
Mayer-McGowan, Brittany	\$116.71
McCabe, Amy	\$24.16
McCallum, Carlee	\$411.07
McCallum, Katherine	\$706.89
McClymont, Nahdia	\$69.67
McGhee, Warwick	\$5.22

Gladstone, Andrew	\$180.48
Godara, Vishvjeet	\$1,499.19
Goode, Tess	\$972.28
Gorrie, Samantha	\$402.45
Hamilton, Kharlie	\$306.47
Hanger-Snowdon, David	\$28.51
Hannam, Daniel	\$1,413.52
Murray, Zac	\$428.77
O'Donnell, Amy	\$66.88
Owens, Luke	\$164.54
Palge, Ipsen	\$4.10
Pearce, Jamie	\$17.19
Perno, James	\$2.55
Perry, Gewnda	\$4.85
Phegan, Almee	\$3.00
Pianta, Jan	\$8,218.72
Pilling, Chanelle	\$45.18
Pin, Mark	\$401.95
Popple, Melissa	\$311.51
Powley, Megan	\$205.67
Pritchard, Danielle	\$449.60
Quin, Helene	\$95.00
Rampling, Nicholas	\$879.18
Raven, Doreen	\$3,050.90
Ritchens, Hollie	\$71.33
Rusila, Kimberley	\$4.21
Sierak, Adam	\$624.39
Spencer-Gill, Elli	\$5.30
Sporn, Matthew	\$326.63
Steel, Cristal	\$574.35
Stewart, Nicole	\$53.37
Stirton, Lauren	\$5.15

McGrath-Hudson, Chloe	\$112.83
McKnight, Morgan	\$737.27
Mihall, Heidi	\$406.47
Mills, Rebecca	\$8.63
Moore, Justin	\$848.77
Mulgrew, Brett	\$31.38
Munam, Abdul	\$703.67
Stroet, Hannah	\$69.67
Stuchbery, Megan	\$139.29
Sundblom, Emma	\$3.54
Sutherland, Christopher	\$55.66
Teasdale, Alexandra	\$0.75
Threlfall, Melissa	\$0.17
Toohy, Allan	\$29.05
Towers, John	\$10.37
Tucker, Alyssa	\$276.40
Tucker, Rachael	\$255.19
Van Deurse, Katie	\$100.70
Waller, Meahan	\$57.63
Waterman, Sarah	\$155.10
Waugh, Brock	\$3,921.68
Weston, Amanda	\$26.66
White, Larissa	\$255.95
Wild, Ricky	\$5.37
Wilde, Miranda	\$76.42
William, Hope	\$24.46
Williams, Anthony	\$194.38
Williams, Mia	\$289.49
Wilson, Chloe	\$33.39
Wooster, Sam	\$146.81
Young, Crystal	\$59.82

- (16) Pursuant to section 179A of the WR Act (as it was before 27 March 2006), section 722 of the WR Act and section 547(2) of the FW Act the Respondent is to pay the listed individuals interest on the amounts set out above commencing on 15 August 2011.

- (17) Pursuant to section 356(a) of the WR Act (as it was before 27 March 2006), section 841(a) of the WR Act and section 546(3)(a) of the FW Act, the Respondent is to pay into the Consolidated Revenue Fund of the Commonwealth an aggregate penalty of \$46,200.
- (18) The payment of the penalty referred to in Order 17 above be made within 28 days of the date of this Order.

**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA AT  
MELBOURNE**

**MLG 886 of 2011**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**CHAMDALE PTY LTD (ACN 061 008 124)**  
Respondent

**REASONS FOR JUDGMENT**

1. Between July 2005 and December 2009 the Respondent, a registered proprietary company limited by shares which trades as Hungry Jack's in Bendigo in the State of Victoria was the employer of relevantly 180 employees. The Respondent was bound by the terms of the SDA Hungry Jack's Victoria Award 2002 (SDA Award) and the National Training Wage Award 2000 (NTW Award) in relation to the employment by it of employees classified as retail food employees within the meaning of the SDA Award. In addition, from 27 March 2006 to 30 June 2009 the Respondent was obliged to make specified payments to its employees pursuant to the SDA Award, the NTW Award and the *Workplace Relations Act 1996* (Cth) (WR Act). From 1 July 2009 the Respondent was obliged by the SDA Award, the NTW Award, the *Fair Work Act 2009* (Cth) (FW Act) and the *Fair Work (Transitional Provisions and Consequential Amendments) Act* to make such payments. Throughout the Respondent was bound by the terms of the *Retail Trade Industry Sector – Minimum Wage Order – Victoria 1997* (MWO) in relation to the employment by it of employees classified as retail trade employees within the meaning of the MWO.

2. The failure of the Respondent to comply with the provisions of the relevant and numerous industrial instruments that applied led to multiple breaches of such industrial instruments. A total of \$104,946.87 was underpaid to 180 employees during this period.
3. The Applicant seeks penalties be imposed at the low end of the relevant range in respect of what it says should be categorised as seven contraventions. The Respondent says that penalties should be imposed at the low end of the relevant range in respect of four contraventions.
4. I have determined for the reasons which follow that the Respondent should pay a penalty of 20% of the applicable maximum (being \$231,000) in respect of the seven categories of contraventions claimed by the Applicant.

### The facts

5. The application in this matter is in the form of an amended application dated 15 August 2011. The parties have now filed a statement of agreed facts (SOAF). The matters canvassed hereafter are taken from the SOAF, which is evidence in the proceeding. In addition, as evidence in the proceeding is an affidavit of Mr Tom Seboa, the director of the Respondent sworn 9 November 2011, I make findings as to liability in accordance with this evidence.
6. The Respondent entered into a franchise agreement with Hungry Jack's Pty Limited on 10 February 1994. Mr Tom Seboa is the sole director and shareholder of the Respondent but Chamdale Pty Ltd has always been run as a family business in Bendigo where Mr Seboa has lived since 1974. Mr Seboa has been a long-time employer of local people in the Bendigo area and he has employed staff from a diverse range of the population. Mr Seboa has always complied with the operating systems of Hungry Jack's Pty Ltd and has relied on its Head Office to provide him with support and guidance as to wage updates, price increases and industry information. From the start of the franchise Mr Seboa relied upon and continued so to do the information provided by Hungry Jack's Pty Ltd Head Office for his employees' rates of pay and always implemented such rates. However, some of those wage updates

did not inform him accurately or sufficiently and led to error in his calculation of wages to be paid and the manner of calculation.

7. The underpayments relating to the Retail Employees that occurred during the relevant period arose as a consequence of the Respondent not complying with the classification, grading structure of the SDA Award. Notwithstanding clause 11(6) of the Franchise Agreement, at all material times, the Respondent received information from Hungry Jacks about variations to the SDA Award and relied on such information to comply with the SDA Award.
8. Prior to a variation to the SDA Award in November 2004, clause 6 of the SDA Award provided that Retail Employees were classified according to their competency and training on the various stations. The Respondent classified its Retail Employees in accordance with this competency based grading structure, whereby an employee was only reclassified from grade I to a grade II upon the employee completing training in four stations plus completing training and certification on the following stations: boiler, drinks; fries; make-up boards; specialities; front counter and drive thru. Clause 6 of the SDA Award also provided that by the end of the first six months of employment, an employee must be tested for the next level. The Respondent did not test all employees at the end of the first six months of employment.
9. A variation to clause 6 of the SDA Award took place in November 2004 upon application by the Shop, Distributive and Allied Employees Association. The variation changed the classification structure to a time and competency based grading structure, whereby a Retail Employee is progressed from grade I to grade II upon being trained on four stations and upon completing six months service. Clause 6.3 of the SDA Award provides:

*"Retail food employee grade I shall mean an employee in the first six (6) months of employment being trained on 4 stations. At the completion of the first six (6) months of employment the employee will be designated as a retail food employee grade II."*
10. Until informed by the Workplace Ombudsman on 28 May 2009, the Respondent was unaware that the amendment had been made to clause 6 of the SDA Award and continued to mistakenly classify its Retail Employees in accordance with a competency based grading structure.

The underpayments relating to Retail Employees occurred as a result of the Respondent failing to properly progress and thereby classify the Retail Employees pursuant to the time based classification provisions of clause 6 of the SDA Award and the Australian Pay and Classification Scale.

11. Following a complaint received by the WO in February 2009, the WO (and the Office of the Fair Work Ombudsman (FWO)) discussed with Mr Seboa the issue that all the Respondent's employees appeared to be classified as grade I employees. During the discussion, Mr Seboa informed the WO of his belief that clause 6 of the SDA Award required the Respondent to classify its employees according to their competency and training on a certain number of stations. In particular, a grade I employee would be trained on four stations, and a grade II employee would have completed training on the four stations for grade I plus be certified as trained in additional stations. Mr Seboa advised that it was difficult to train the Respondent's employees on more than four stations because of their availability. He also said that many employees would only perform two to three shifts per week which logistically made it unfeasible for the additional training to occur. The FWO explained that the employees should progress to the next level after they have completed the required time served. Mr Seboa informed the FWO that he recognised the seriousness of the impact of the amended clause 6 and wanted to take advice on the matter.
12. On the basis of the explanation of clause 6 of the SDA Award provided by the FWO Mr Seboa indicated that some employees may be incorrectly classified. The FWO and Mr Seboa arranged to meet on 17 July 2009.
13. On 17 July 2009, Mr Seboa met with the FWO in relation to the Complaint. During this meeting, Mr Seboa advised the FWO that on his understanding of the original classification structure of the SDA Award, as employees did not make themselves available to perform enough shifts to be progressed through the grading levels, they would not be trained in more than four workstations. The FWO explained that the SDA Award provided that once employees have completed the period of time required they are to be progressed to the next level. The FWO provided Mr Seboa with the appropriate rates of pay derived

from the SDA Award. Mr Seboa advised the FWO that he would check the rates and report back to the FWO.

14. On 21 July 2009, Mr Seboa contacted the FWO and advised that he had spoken to the Hungry Jack's Melbourne Office and despite Hungry Jack's being unable to provide definitive advice on the variation to clause 6 of the SDA Award or its interpretation, Mr Seboa confirmed that employees should progress for time served and that training on the workstations was not relevant. Mr Seboa accepted the FWO interpretation of the amended clause 6 of the SDA Award and advised the FWO that the Respondent would immediately review its classification of its employees and make the required changes. The FWO advised Mr Seboa that the Respondent needed to start paying employees at the correct level immediately. The FWO requested evidence of the new classifications of employees and the details of back pay calculations.
15. On 23 July 2009, the FWO sent the Respondent a determination of contravention letter identifying the contraventions of the SDA Award. The contravention letter required the Respondent to rectify the contraventions, review its records and advise the FWO of the quantum of the underpayment and the method of calculation. The FWO requested a response by 7 August 2009 of the action taken to remedy the contraventions.
16. On 24 July 2009, the FWO contacted Mr Seboa in relation to the complaint and the contravention letter. The FWO advised that the Respondent would need to reclassify current employees and provide calculations of backpayments made to employees for the past 12 months. The FWO explained that the Respondent had been given 14 days to complete this assessment. The Respondent cooperated with the FWO directions and complied with its requests to reclassify current employees and amend their rates of pay accordingly.
17. Thereafter the process of determining which workers had been underpaid, how much and the time frame in which they would be repaid, was time consuming for all parties, complex and advanced in a cooperative environment. It was also apparent from the assessments relating to trainee employees of the Respondent that although there are 101 employees who have an underpayment of either wages or annual

leave, there are 39 employees who in fact, over the relevant period, received higher than the minimum award rates for trainees to a total of \$71,756.53. No reimbursement is sought from them.

18. As at 11 October 2011, the Respondent has written to 92 former employees who have been earmarked as being owed monies from the relevant period. As at 11 October 2011 a total of \$15,911.82 (gross) has been repaid to 30 employees. The Respondent is diligently continuing to ascertain the whereabouts of the remaining employees and, once they are located, obtain their bank details so that the relevant underpayment amounts can be transferred to the former employees. The Respondent is continuing on a weekly basis to make payments to those persons and intends to have repaid the total underpayment amount of \$104,946.87 by 1 January 2012.

## Penalty

19. The maximum penalty that may be imposed by the Court for each contravention by the Respondent is \$33,000 (as a body corporate).
20. I accept the Applicant's submissions on the approach to determining penalty. Those submissions are as follows:

*"(a) The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the SDA Award, NTW Award, WR Act, Transitional Act and MWO in relation to each employee, is a separate contravention.<sup>1</sup>*

*(b) Secondly, the Court needs to consider whether the breaches arising in the first step constitute a single course of conduct.<sup>2</sup>*

*(c) Thirdly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The Respondent should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate*

<sup>1</sup> *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).

<sup>2</sup> Sub-ss.719(2) of the WR Act, 557(1) of the FW Act.

*response to what the Respondent did.<sup>3</sup> This task is distinct from and in addition to the final application of the "totality principle",<sup>4</sup>*

*(d) Fourthly, the Court needs to consider 'the appropriate penalty for the single breach(es) and, if relevant, each group of contraventions, taking into account all of the relevant circumstances.*

*(e) 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.<sup>5</sup> The Court should apply an "instinctive synthesis" in making this assessment.<sup>6</sup> This is what is known as an application of "the totality principle"."*

21. The Court accepts the Applicant's submissions that the contraventions fall into seven groups (albeit their characterisation can fall into four groups):
- a) failure to pay at least the required weekly or hourly rates of pay, or basic periodic rate of pay for ordinary hours worked (clauses 15.1, 16.1 and 10.3 of the SDA Award, clause 14.2.1 of the NTW Award, clause 5.2 of the MWO, section 182(1) of the WR Act, item 5 and item 2(1) of Schedule 16 of the Transitional Act);
  - b) failure to pay casual employees at least the required loaded rates of pay or guaranteed casual loading (clause 11.3 of the SDA Award, sections 182(1) and 185(1) of the WR Act, item 5 of Schedule 16 of the Transitional Act);
  - c) failure to pay the required overtime rates of pay (clauses 26.3 and 10.4 of the SDA Award, item 2(1) of Schedule 16 of the Transitional Act);

<sup>3</sup> *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 571 [46] (Graham J).

<sup>4</sup> *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46] (Stone and Buchanan JJ).

<sup>5</sup> See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracy J); *Australian Ophthalmic Supplies*, supra at 567 [23] (Gray J), 576 [71] (Graham J) and 583 [102] (Buchanan J).

<sup>6</sup> *Australian Ophthalmic Supplies*, supra at 567-8 [27] (Gray J) and 572 [55] and 577 [78] (Graham J).

- d) failure to pay at least the required rates of pay for hours worked on a public holiday (clauses 27.4, 11.3 and 10.3 of the SDA Award, item 2(1) of Schedule 16 of the Transitional Act);
- e) failure to pay at least the required amounts to employees when taking a period of paid annual leave (clauses 28.11 and 28.19 of the SDA Award);
- f) failure to pay at least the required amounts for untaken accrued annual leave upon the termination of employment (clause 28.14 of the SDA Award and section 235(2) of the WR Act); and
- g) failure to pay at least the required weekly amounts of payment for a laundry allowance (clause 41.2 of the SDA Award and item 2(1) of Schedule 16 of the Transitional Act).

22. As to the above, I note there are 14 contraventions in all but which can be reduced to seven having regard to the common obligations the particular clauses impose. I accept the Applicant's proposition that there are seven separate courses of conduct here and not four as put by the Respondent. The failure to pay required rates of pay for distinct entitlements (for example, an entitlement to overtime as separate from an entitlement to casual loading) is not one overarching course of conduct and should not be grouped into one contravention.

23. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act was summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*,<sup>7</sup> 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;

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<sup>7</sup> [2007] FMCA 7 at [26]-[59].

- e) whether the breaches were properly distinct or arose out of the one course of conduct;
- f) the size of the business enterprise involved;
- g) whether or not the breaches were deliberate;
- h) whether senior management was involved in the breaches;
- i) whether the party committing the breach had exhibited contrition;
- j) whether the party committing the breach had taken corrective action;
- k) whether the party committing the breach had cooperated with the enforcement authorities;
- l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- m) the need for specific and general deterrence.

24. This summary was adopted by Tracey J in *Kelly v Fitzpatrick*.<sup>8</sup> Whilst 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.<sup>9</sup>

#### *Nature and extent of the conduct*

25. The contraventions identified by the Applicant's investigation relate to the employment by the Respondent of relevantly, 180 employees (the Employees) for the period from July 2005 to December 2009 (the relevant period). Each of the Employees with the exception of Gerard Ilsley (the Retail Employees) worked as retail employees preparing and selling fast food who were required to wear a uniform. Gerard Ilsley (Ilsley) worked as a gardener/cleaner/handyman for the

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<sup>8</sup> *Kelly*, supra at [14].

<sup>9</sup> *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, [11]; *Merringtons*, supra at 580 [91] (Buchanan J).

Respondent. The contraventions relating to the Employees as characterised by the Applicant I accept as:

- a) contraventions arising from the failure of the Respondent to correctly progress and classify Retail Employees in accordance with the SDA Award (the Classification contraventions);
- b) contraventions relating to the underpayment or non-payment of the required laundry allowance in accordance with the SDA Award (the laundry allowance contraventions);
- c) contraventions relating to the underpayment of wages to Ilsley (Ilsley contraventions);
- d) contraventions relating to the underpayment or non-payment of annual leave upon termination (annual leave contraventions).

*Classification contraventions*

26. As a result of the Respondent failing to properly progress the Retail Employees through the grades after the specified time served (regardless of competency) as required by the SDA Award, the rates of pay paid by the Respondent to the Retail Employees during the relevant period fell below the minimum rates required to be paid to the Retail Employees in accordance with the law.

*Laundry allowance contraventions*

27. The individual assessments set out in Attachment G to the SOAF show that on various occasions the Respondent underpaid or in some instances did not pay to the Retail Employees the required laundry allowance as provided by clause 41.2 of the SDA Award resulting in the laundry allowance contraventions. Seventy-one Retail Employees were at various times not paid any laundry allowance.

*Ilsley contraventions*

28. The assessment relating to Ilsley set out in Attachment G to the SOAF shows that Ilsley was generally consistently underpaid each week during the relevant period resulting in contraventions of the MWO and the underpayment of his wages to a total of \$3,734.93.

*Annual leave contraventions*

29. Further, as a result of the Respondent failing to accrue annual leave during the period of non school based traineeships, 48 employees were not paid annual leave entitlements upon termination of their employment or upon the completion of the traineeship. A further five employees were not paid the correct amount of annual leave upon termination of employment.

**Other relevant matters**

30. The total assessed underpayment in the 4.5 years is \$104,946.87. Twenty-nine employees were underpaid more than \$1,000 each, and the highest individual underpayment amount was \$8,218.72. Although some of the unpaid amounts have now been paid in full, the employees were deprived of the financial benefits which timely payment of the correct wages which were not large in any event, would have provided.<sup>10</sup> In particular, the part-time and casual employees would have been vulnerable and not versed in industrial relations bargaining.
31. Notwithstanding clause 11(6) of the Franchise Agreement which generally provides that Hungry Jack's shall not have any control over the terms and conditions of employment of the Respondent's employees, the Respondent relied solely on information received from time to time from Hungry Jack's in relation to the application of the SDA Award and rates of pay. Although the Respondent is a 'medium sized' employer currently employing 70 employees on a mostly part-time or casual basis, it was unsophisticated in industrial relations

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<sup>10</sup> See *Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233 at [47].

matters in the relevant period. Nevertheless as an employer, the Respondent was required to meet its lawful obligations.

32. There is no evidence as to any deliberate campaign on behalf of the Respondent to underpay employees. The Classification contraventions resulted from the Respondent continuing to mistakenly classify its Retail Employees in accordance with a competency based grading structure. This single error produced significant results.
33. The Applicant acknowledged the Respondent has taken significant corrective action and intends to have repaid the total underpayment amount of \$104,946.87 by 1 January 2012.
34. In relation to specific deterrence, the following factors are relevant:
  - a) the Respondent does not have any "priors" recorded against it for previous similar conduct. Indeed the Respondent has engaged in other advantageous conduct to his employees generally over some considerable time;
  - b) the Respondent has undertaken to fully rectify the entirety of the assessed underpayments and has been cooperative during the investigation and these proceedings. It deserves credit for the amount of time and effort it has put in to rectifying these matters and I find has shown remorse for what has occurred; and
  - c) the Respondent has addressed its systems failure by engaging a specialist industrial relations lawyer and addressing payroll issues including appointing a new payroll adviser, and is not likely to contravene again.
35. I accept however the Applicant's submission that general deterrence is an important factor in this case. There is a need to send a message to the community at large, and employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements.

## Conclusion

36. The facts of this case call for a penalty that is greater than nominal but in the low range. In my opinion, the appropriate penalty in this case is 20% of the applicable maximum in respect of each of the seven contraventions. This takes into account that nearly all of the contraventions arose out of the one particular circumstance and the mitigating conduct of the Respondent as described above. The Respondent's business has suffered as a consequence of these matters and its financial position deteriorated. The total penalty sum now payable by it is \$46,200. I do not think this outcome unjust or out of proportion in the circumstances of this case. I have accepted the Applicant's case as to the number of contraventions that should be held to be established.

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I certify that the preceding thirty-six (36) paragraphs are a true copy of the reasons for judgment of Hartnett FM

Associate:

Date: 23 December

