FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v DRIVECAM PTY LTD ACN 007 138 972 AS TRUSTEE FOR S & S SOMERS TRUST T/A BORDER BARBER ABN 97 742 588 934 & Ors [2011] FMCA 600

INDUSTRIAL LAW – admitted contraventions of ss. 45, 351 and 536 of the *Fair Work Act 2009* (Cth) – whether pecuniary penalties should be awarded pursuant to s.546 of the *Fair Work Act 2009* (Cth) – whether the pecuniary penalties agreed upon by the parties are appropriate – appropriate amount of pecuniary penalties – whether the pecuniary penalties should be paid to the applicant pursuant to s.546(3) of the *Fair Work Act 2009* (Cth) – whether declarations of contraventions should be made by the Court – whether the Court should order that the first respondent pay compensation for economic loss to the employee over and above the underpayment – whether the Court should order that the first respondent give a written apology to the employee

Fair Work Act 2009 (Cth) ss.12; 42; 45; 335; 342; 351; 459; 529; 536; 539(2); 545; 546; 550; 687; 701
Crimes Act 1914 (Cth); s.4AA

Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560;
McDonald v R (1994) 48 FCR 555
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 453
Kelly v Fitzpatrick (2007) 166 IR 14
Mornington Inn Pty Ltd v Jordon 247 ALR 714
Forestry, Mining and Energy Union v Hamberger (2003) 127 FCR 309;
Hadgkiss v Sunland Construction (Qld) Pty Ltd [2006] FCA 1566
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) 2011 FCA 579
Markarian v R (2005) 228 CLR 357
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2) (2010) 199 IR 373
McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29
Finance Sector Union v Commonwealth Bank of Australia (2005) 224 ALR 467
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Telstra Corporation Ltd [2007] FCA 1607
Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd (2002) 121 IR 260

Attorney General (SA) v Tichy (1982) SASR 84
Construction, Forestry, Mining and Energy Union v Williams (2009) 191 IR 445
Construction, Forestry, Mining and Energy Union v Cahill (2010) 194 IR 461

Applicant:	FAIR WORK OMBUDSMAN
Respondents:	DRIVECAM PTY LTD ACN 007 138 972 AS TRUSTEE FOR S & S SOMERS TRUST T/A BORDER BARBER ABN 97 742 588 934 & ORS
File Number:	SYG 2806 of 2010
Judgment of:	EMMETT FM
Hearing date:	14 JUNE 2011, 21 JUNE 2011
Date of Last Submission:	21 JUNE 2011
Delivered at:	SYDNEY
Delivered on:	9 AUGUST 2011

REPRESENTATION

Counsel for the Applicant:	Ms Kate Eastman
Solicitors for the Applicant:	Ms Georgina Gowland (Bartier Perry)
Counsel for the Respondent:	Mr Eugene White
Solicitors for the Respondent:	Mr Charles Morgan (Nevin Lenne & Gross)

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 2806 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

DRIVECAM PTY LTD ACN 007 138 972 AS TRUSTEE FOR S & S SOMERS TRUST T/A BORDER BARBER ABN 97 742 588 934
First Respondent

STANISLAUS HENRICUS SOMERS
Second Respondent

SUSAN LYNETTE SOMERS
Third Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant in this proceeding:

    i) has been appointed by the Governor-General by written instrument to the office of the Fair Work Ombudsman, pursuant to s.687 of the *Fair Work Act 2009* (Cth) (**"the FW Act"**);

    ii) is a Fair Work Inspector pursuant to s.701 of the FW Act; and

    iii) has standing bring this proceeding pursuant to s.539 of the FW Act.

2. The first respondent was, at all relevant times, an employer within the meaning of ss. 12, 42, 335 and 529 of the FW Act and was carrying on a hairdressing business through 3 salons in Albury and Wodonga.

3. At all material times, the second respondent:

    i) was the sole director of the first respondent;

    ii) the company secretary of the first respondent;

    iii) involved in the day-to-day operation of the hairdressing businesses and responsible for the overall direction, management and supervision of the first respondent's operations ; and

    iv) responsible, with the third respondent, for determining Mr Eustace's terms and conditions of employment.

4. On 1 February 2010, the first respondent offered Mr Ross Eustace employment as a part time hairdresser at below award rates. From 4 February 2010 to 24 February 2010 the first respondent employed Mr Ross Eustace at below award rates.

5. The applicant seeks declarations that the first respondent contravened ss.45, 351 and 536 of the FW Act and that the second respondent was knowingly involved in each of the first respondent's contraventions within the meaning of s.550 of the FW Act.

6. The applicant also seeks orders pursuant to s.546 of the FW Act that the first and second respondents pay pecuniary penalties.

7. The contravening conduct of the first respondent is its engagement in adverse conduct by way of discrimination against Mr Ross Eustace for a physical disability as a prospective employee from 1 February 2010 to 2 February 2010 and as an employee from 4 February 2010 to 24 February 2010.

8. The applicant does not seek any penalty or declarations against the third respondent.

9. The first and second respondents pleaded to the contraventions the subject of the declarations.

Relevant law regarding admitted contraventions

10. Section 342 of the FW Act provides that an employer takes adverse action against an employee if the employer, relevantly, discriminates between the employee and other employees of the employer. Section 342 also provides that a prospective employer takes adverse action against a prospective employee if the prospective employer discriminates against the prospective employee in the terms or conditions in which the prospective employer offers to employ the prospective employee.

11. Section 351 of the FW Act has the result that an employer takes adverse action against an employee or a prospective employee in contravention of the FW Act if the employer does so due to, inter alia, the employee's or prospective employee's physical disability.

12. Section 536 of the FW Act obliges an employer to give a payslip to an employee within one working day of paying an amount to the employee in relation to the performance of work.

13. Sections 351 and 536 of the FW Act are civil remedy provisions.

14. Section 545 of the FW Act provides that this Court may make an order that the Court considers appropriate if the Court is satisfied that a person has contravened a civil remedy provision.

15. Section 546(1) of the FW Act provides that this Court may, on application, order a person to pay a pecuniary penalty that the Court considers appropriate if the Court is satisfied that the person has contravened a civil remedy provision.

16. Section 546(2) of the FW Act provides that a pecuniary penalty in respect of a contravention of s.351 or s.45 must not be more than 60 penalty units if the person is an individual as prescribed in the relevant item in column 4 of the table in s.539(2); or if the person is a body corporate, 300 penalty units as referred to in the relevant item in column 4 of the table to s.539(2) of the FW Act. The pecuniary penalty in respect of a contravention of s.536 must not be more than 30 penalty units for an individual, or if the person is a body corporate, 150 penalty units, as referred to in the relevant item in column 4 of the table to s.539(2).

17. Section 12 of the FW Act provides that a penalty unit has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act* defines a "penalty unit" to be $110.

18. In the circumstances, the maximum pecuniary penalty that may be imposed by the Court for each breach of the modern award and discrimination found proved is $33,000 in respect of the first respondent and $6,600 in respect of the second respondent. In respect of the contravention relating to the obligation to give pay slips to an employee, the maximum pecuniary penalty is $16,500 in respect of the first respondent and $3,300 in respect of the second respondent.

19. Section 550 of the FW Act provides that a person who is knowingly involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Contravention of modern award

20. Section 45 provides that a person must not contravene a term of a modern award and is also a civil remedy provision. The applicant seeks declarations in respect of contraventions of s.45 but no orders for the payment of a pecuniary penalty.

21. The relevant industrial instrument coverage and its application in the circumstances of the case was summarised by counsel for the applicant, Ms Eastman. Counsel for the respondents, Mr White, agreed with the correctness of the summary which is as follows:

> *"1. The Fair Work Act 2009 (Cth) provides that certain employees' terms and condition of employment will be provided by a modern award: see s 134 of the FW Act. The FW Act sets out the contents of a modern award and in particular guarantees a minimum wage: s 135 of the FW Act. The modern award together with the minimum National Employment Standards (ss.59–131 of Chapter 2, Part 2-2) and a national minimum wage order, provides a safety net for employees.*
>
> *2. The minimum rates of pay are set out in each of the modern awards.*
>
> *3. The modern awards apply to 'national system employees' in a particular industry or occupation. These are employees of*

'constitutional corporations' '. In addition, those covered include: in Victoria, the Australian Capital Territory and the Northern Territory—all other employment; in New South Wales, Queensland and South Australia—all other private sector employment (from 1 January 2010), and in Tasmania—all other private sector and local government employment (from 1 January 2010).

4. When the modern awards commenced on 1 January 2010, there were a range of transitional arrangements.

5. The relevant modern award was not intended to result in a reduction in the take-home pay of employees covered by such award.

6. In this matter, the relevant modern award is the Hair and Beauty Industry Award 2010 (Modern Award) which applied pursuant to ss 47(1), 48(1) and 49 of the Fair Work Act 2009 (Cth). The Award had effect from 1 January 2010.

7. The rates of pay in the Modern Award did not commence until the 1 July 2010. In February 2010, in the present matter, the applicable rates of pay were those in the Victorian Award (see paragraphs 11 – 14 below) and in New South Wales, the Federal Minimum Wage (FMW) under s 182 of the repealed Workplace Relations Act 1996 (Cth).

8. The First Respondent was bound by the relevant minimum wage in the relevant transitional minimum wage instrument and/or award-based transitional instrument for the classification concerned pursuant to Transitional Provisions in Schedule A of the Modern Award.

9. The First Respondent was and is in the "hair and beauty industry" as defined in clause 3 of the Modern Award.

10. Mr Eustace was classified as a Hair and Beauty Employee Level 3 under Schedule B of the Modern Award.

Work performed in Victoria

11. When Mr Eustace did work in Victoria, the calculation of his relevant minimum wage was derived from the Hairdressing and Beauty Services (Victoria) Award 2001 (AP806816) (Victorian Award).

12. The Victorian Award is instrument pursuant to Part 2 of Schedule 3 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (Transitional Act.

13. Prior to 1 January 2010, the First Respondent, by virtue of work performed by its employees, was bound to the Hairdressing and Beauty Services Victorian Common Rule Declaration 2005 (PR953356) (Victorian Pre-Reform Award)

14. Pursuant to the Victorian Pre-Reform Award, Mr Eustace was:

> *i) classified as a "hairdresser" under clause 4.8 of the Victorian Award by virtue of paragraph 7.*
>
> *ii) classified as a casual employee under clause 11.4.1 of the Victorian Award;*
>
> *iii) entitled to a minimum rate of $16.78 /hr pursuant to clause 15.1 of the Victorian Award and entitled to casual loading pursuant to clause 11.4.2 of:*
>
> > *1) 25% if working more than 20 hours per week (ie $20.98/hr); or*
> >
> > *2) 50% if working less than 13 hours per week (ie $25.17/hr).*

Work performed in New South Wales

15. With respect to rates of pay, when Mr Eustace did work in New South Wales, the relevant transitional minimum wage instruments was pursuant to Part 3, Division 3 of the Transitional Act.

16. During the period 1 July 2009 to 31 December 2009 was the transitional standard Federal Minimum Wage (Transitional FMW) provided for a minimum wage of $14.31 per hour.

17. The Transitional FMW preserved the standard Federal Minimum Wage (FMW) under s 182 of the repealed Workplace Relations Act 1996 (Cth) (WR Act) during the bridging period (ie from 1 July 2009 to 31 December 2009).

18. The FMW was adjusted to $14.31 per hour from the first full pay period on or after 1 October 2008 in accordance with s 196 of the WR Act.

19. The transitional default casual loading of 20%.

20. The hourly rate payable was $17.17 an hour for ordinary hours.

21. The transitional default casual loading continued the existence of the default casual loading of 20% under s 185 of the repealed WR Act during the bridging period (ie from 1 July 2009 to 31 December 2009)."

Facts in this case

22. On 3 June 2011, the parties filed an agreed statement of facts. I make findings in accordance with the agreed statement of facts as follows:

"1. The parties agree that the facts referred to in this agreement mean agreed facts as per section 191 of the Evidence Act 1995 (Cth).

*2. The applicant is the Fair Work Ombudsman appointed pursuant to section 701 of the Fair Work Act (Cth) (**FW Act**) and has standing pursuant to section 539 (Item 11) of the FW Act to apply for penalties and other remedies for contravention of "civil remedy provisions" (as defined under section 539 Item 11 of the FW Act).*

3. The first respondent is a corporation that operates hairdressing salons for men in three locations in Albury and Wodonga that are on the border of New South Wales and Victoria. It trades under the name Border Barber. One of the salons is in Victoria and two are in New South Wales.

4. During the period 1 February 2010 to 27 February 2010, the First Respondent employed about 6 employees as hairdressers with various amounts of experience.

5. The second respondent is the director and manager of the corporation. He has been the director and manager of the first respondent since its registration in January 1989.

6. The third respondent is the wife of the second respondent and at times provided administrative support to the first respondent with recruitment of employees and record keeping arrangements.

7. The first respondent was the employer of Mr Ross Graeme Eustace from 5 February 2010 to the 24 February 2010.

8. Mr Eustace was a casual employee. At the time of employment Mr Eustace was 34 years of age.

Agreed facts as to the offences

9. In 2004 Mr Eustace commenced studying hairdressing at the Canberra Institute of Technology and continued his studies until 2006. During this time he was working as an apprentice at a hair salon in Canberra.
10. In October 2006, Mr Eustace had a bike accident that resulted in permanent damage to the spinal cord. He spend the next 24 months recuperating from the injury and was unfit for work.

*11. Mr Eustace has a compressed spinal cord which is a permanent injury (**'the disability'**).The injury is a disability for the purpose of s 351 of the FW Act.*

12. In 2009, Mr Eustace returned to the hair salon in Canberra to complete the hours and competencies required for the hairdressing certificate. On 19 November 2009, he was signed off as a qualified hairdresser.

13. On 1 February 2010, Mr Eustace saw a job advertisement placed in the Albury Border Mail, a local newspaper for a hairdresser. The advertisement had been placed by the second respondent. (see advertisement attached) Later that day, Mr Eustace telephoned the number on the job advertisement and spoke with the second respondent. Shortly after, Mr Eustace attended the premises and gave the second respondent a copy of his resume.

14. On 2 February 2010, Mr Eustace returned to the salon at the second respondent's request. Mr Eustace had an interview with the second respondent. Mr Eustace told the second respondent that he had the disability and that he was registered with the Commonwealth Rehabilitation Services. The second respondent asked Mr Eustace to perform work cutting hair, which he did for about 20 minutes.

*15. On 2 February 2010, the third respondent telephoned the Fair Work Infoline and made inquiries about rates of pay for hairdressers under the Hair and Beauty Industry Award 2010 ("**Award**").*

16. The hourly rate payable to a qualified hairdresser in NSW pursuant to the Award was $17.17 ($14.31 plus 20% casual loading) and in Victoria $20.98 ($16.78 plus 25% casual loading) and $25.17 ($16.78 plus 50% casual loading) if working less than 13 hours a week.

17. Later that evening, the third respondent called Mr Eustace and asked him to come to the salon on 3 February 2010 for a further interview and work trial.

18. On 3 February 2010, Mr Eustace performed work for about 3 hours at the first respondent's salon and in the presence of the second respondent. Mr Eustace had a conversation with the second respondent who said that he would employ Mr Eustace for 15 hours per week at $10 an hour.

19. Later that evening, the third respondent telephoned Mr Eustace and asked him to commence work on 5 February 2010 at 9 am.

20. The first respondent did not pay Mr Eustace for work performed between 2 February 2010 and 3 February 2010.

21. The second respondent was aware from 2 February 2011 that Mr Eustace had a disability. At that time, the second respondent held a belief that Mr Eustace had a Certificate III but less than 1000 hours full-time training and very limited experience in barbering.

22. Mr Eustace performed work as a hairdresser at the first respondent's salons from 5 February 2010 to 24 February 2010.

23. On 17 February 2010, the second respondent provided to Mr Eustace a written contract of employment. It was a proposed term of the contract that Mr Eustace's rate of pay was $9.23 due to Mr Eustace's disability.

24. Several days later, Mr Eustace spoke to the second respondent about the job description and rate of pay.

25. On 24 February 2010, Mr Eustace sent an email to the second respondent seeking changes to the contract of employment, with respect to his job description.

26. On 25 February 2010, Mr Eustace received a revised written contract of employment that included a term stating that Mr Eustace would be employed as a trainee because of his 'medical condition' referring specifically to his disability.

27. Later that day, Mr Eustace attended the first respondent's salon and spoke to the second respondent. Mr Eustace told the second respondent that he did not accept the rate of pay and resigned.

28. The first and second respondent acknowledge Mr Eustace says that he would not have resigned if the first respondent paid him the applicable award rate.

29. The first respondent paid Mr Eustace $10 an hour for work performed between 5 February 2010 and 25 February 2010.

30. The second respondent knew that he was required to pay employees pursuant to the Award.

31. The second respondent knew that Mr Eustace was not paid as a qualified hairdresser pursuant to the Award.

32. Mr Eustace's disability was a reason for the first respondent paying Mr Eustace $10 an hour rather than the applicable award rate.

33. The first respondent's failure to pay the applicable award rate amounted to discrimination within the meaning of s 351(1) of the FW Act ***(discrimination contravention).***

34. The first respondent did not provide Mr Eustace with pay slips for this period.

35. The second respondent knew that the first respondent was required to provide Mr Eustace with pay slips.

36. The second respondent knew that Mr Eustace did not receive pay slips."

23. Various documents were tendered by the parties in support of the agreed facts and admitted into evidence.

24. Those documents are as follows:

i) A medical certificate dated 27 January 2010 stating that Mr Ross Eustace suffers from a compressed spinal cord; that he is fit for 15 hours of work per week from 2 February 2010 to 2 March 2010 inclusive. The medical certificate also states that he is attending Commonwealth Rehabilitation Services.

ii) The job advertisement seen by Mr Eustace on 1 February 2010 for a qualified, part time men's hairdresser and stating, inter alia, that "*above award wages apply*".

iii) A resume of Mr Eustace provided to the second respondent on 2 February 2010 stating that he has a Certificate III in Hairdressing and was employed in 2009 as a qualified hairdresser.

iv) A transcript of a conversation between the third respondent and the Fair Work Infoline on 2 February 2010 relating to enquiries by the third respondent about, inter alia, awards that would be applicable to Mr Eustace.

v) A contract of employment dated 17 February 2010 that stated as follows:

"Due to a medical condition (back), Ross (Mr Eustace) *is to commence his employment as a Trainee and on trainee wages, equivalent to year 2 apprentice wages. (currently $9.23) This is to be reassessed on a regular basis."*

vi) An email dated 24 February 2010 from Mr Eustace to the second respondent stating, inter alia, as follows:

"Our initial verbal agreement was that you would allow a period of one to two weeks to see if I were apt to the task.

The period mentioned has been reached and I had assumed after this period I would be paid award wages as per my qualification in my trade.

I am willing to work for the ward wage as I have adhered to our initial verbal agreement, agree with and have maintained you're (sic) "House Rules" to the utmost.

...

Therefore all I am asking is fairness on your behalf and to be paid as I am entitled, for the trade I have qualified for. I would like to be able to sign the agreement you have presented however I see no reason to regress myself financial or professionally as I have already completed all the Australian competencies through my previous experiences and institutional qualifications.

I hope we can continue to work together as I enjoy the work environment, staff, clients and you as an employer. "

vii) A further contract of employment dated 25 February 2010 with the following special conditions:

"Due to a medical condition (back), Ross is to commence his employment as a Trainee. This is to be reassessed on a weekly basis .Upon mutual agreement as to an acceptable level of both Ross's physical condition and his capability to perform his hairdressing duties to the standard required, his weekly wages will increase to the casual rate as set out in the Fair Work Australia award (MP000005)(Vic) the rate being $20.98 per hour, Monday to Friday and $25.17 per hour Saturday.

It is agreed that the casual rate is to commence on 25th February 2010. "

25. The respondents also read the affidavit of the second respondent, sworn on 3 June 2011. That affidavit was read without objection.

26. In the circumstances, I make the following further findings of fact:

i) The second respondent was born on 16 March 1955 and is a barber by trade. He is also the director of the first respondent.

ii) The first respondent was established approximately 23 years ago and approximately 5 years ago they began trading under the name of Border Barber, specialising in men's hairdressing.

iii) The first respondent's businesses operate in the Albury Wodonga area and have done so for the last 16 years.

Currently, the first respondent has three barber shops, one in Victoria and two in New South Wales.

iv) The second respondent is actively involved in the day to day operation and running of the company, including management of the business, accounting, employing staff, advertising and marketing, training at premises, weekly wages, quality control, creating rosters and cutting hair. The second respondent cuts hair for about 45 hours per week and attends to other necessities of the business out of hours.

v) Over the years, the first respondent has supported and sponsored many local schools, kindergartens, sports groups, charity groups and campaigns.

vi) The first respondent currently employs six staff, including the second and third respondents.

vii) The third respondent volunteers at a number of community groups, has worked as a life line counsellor and is currently volunteering in the visitor information centre. The third respondent works in the business, nearly as many hours as the second respondent.

viii) The respondents advertised in January 2010 for a men's hairdresser and received a number of expressions of interest, including from Mr Eustace.

ix) On 2 February 2010, Mr Eustace attended for an interview, during which his qualifications were discussed and a decision made to "try him out". At the interview, Mr Eustace told the second and third respondents about his injury and it was decided that he would be given a trial despite two factors which caused the second respondent concern. Those factors were the impact of Mr Eustace's injury on his capacity to do the work and the level of his skill.

x) The second and third respondents understood that Mr Eustace had a Certificate III in hairdressing but less than 1000 hours of full time training and very limited experience in barbering.

xi) Mr Eustace was offered casual employment in accordance with what the second and third respondents understood to be his preference.

xii) The rate of pay Mr Eustace was to receive was selected to accommodate the concerns of the second and third respondents about his capacity to do the work and his experience which was not in barbering for which he would need further training.

xiii) Subject to the satisfaction of the second and third respondents about his work capacity and his work capability, it was always the respondents' intention to pay Mr Eustace the higher Victorian rate for his employment in all the barber shops.

xiv) There are different rates of pay in Victoria and New South Wales. The difference in pay for casual employees ranges from about $3.80 to $8.00 per hour.

xv) The respondents have always paid their employees the higher Victorian rate whether they worked in Victoria or New South Wales.

xvi) After some period of time, Mr Eustace raised concerns about his rate of pay and shortly after 17 February 2010, the second and third respondents told him that they would change his rate of pay.

xvii) An increase to the higher Victorian rate of pay was to occur on 25 February 2010.

xviii) Mr Eustace resigned on 25 February 2010.

xix) The second respondent acknowledged that he was wrong to pay Mr Eustace a lower award rate and link it to his disability.

xx) The second respondent apologised for that conduct.

xxi) The second respondent acknowledged that he understands that it is important not to discriminate on the basis of

impairment. The second respondent stated that because of his understanding that the respondents agreed to the range of penalties sought by the agreed contentions.

Agreed contentions and issues

27. The parties provided to the Court the following agreed contentions in relation to matters relevant to penalty:

> *"1. The parties agree to submit to the Court at the penalty hearing that there should not be any penalties ordered in regard to the payslip and underpayment contraventions.*
>
> *2. The parties agree to submit to the Court at the penalty hearing that a penalty in the 30% range be considered as appropriate in all the circumstances in regard to the discrimination against prospective employee contravention against the First Respondent and the Second Respondent.*
>
> *3. The parties agree to submit to the Court at the penalty hearing that a penalty in the 30% range be considered as appropriate in all the circumstances in regard to the discrimination against an employee contravention for the First Respondent and the Second Respondent.*
>
> *4. The parties agree that $1320 will be paid to Mr Eustace within 28 days of the Court's orders as compensation for economic loss and consent to an order to that effect.*
>
> *5. The Respondents will give a written apology to Mr Eustace within 28 days of the Court's orders and consent to an order to that effect.*
>
> *6. The Applicant will not seek any penalty orders to be made against the Third Respondent and consent to an order to that effect"*

28. In the circumstances, the issues before the Court are as follows:

(i) The declarations, if any, to be made;

(ii) Whether any pecuniary penalty should be paid by the first respondent and/or the second respondent in respect of the admitted contraventions of the F W Act;

(iii) The amount of any such pecuniary penalty;

(iv) Whether the Court should order that the first respondent pay compensation for economic loss to Mr Eustace over and above the underpayment;

(v) Whether the Court should order that the first respondent give a written apology to Mr Eustace within 28 days of the Court's Orders;

(vi) Whether any pecuniary penalties should be paid to the applicant pursuant to s.546(3) of the FW Act.

29. In relation to those issues, the Court notes that the parties have agreed not to seek any penalty in respect of the failure to provide Mr Eustace with a payslip and the underpayment. The parties further agreed that the first respondent will pay $1320 to Mr Eustace within 28 days of the Court's Orders as compensation for economic loss and will give Mr Eustace a written apology within 28 days of the Court's Orders and would consent to an order to that effect.

The Applicant's submissions on penalty

30. The applicant sought pecuniary penalties in the order of 30% of the maximum penalty in respect of the admitted contraventions of s.351 by the first respondent and the second respondent's knowing involvement in those contraventions. I note that the parties agreed that 30% of the maximum penalty was the appropriate range for any pecuniary penalties.

31. Counsel for the applicant submitted that the total pecuniary penalty sought against the first and second respondents was in the order of $24,000, being 30% of the pecuniary penalty applicable to each of the first and second respondents for the breaches of s.351 of the FW Act in respect of the first respondent's conduct as an employer of an employee and as a prospective employer of a prospective employee and the second respondent's knowing involvement in the breaches.

32. The provisions of the FW Act relevant to this matter are found in Part 3–1. Part 3 of the FW Act came into effect from 1 July 2009. Section 336 of the FW Act provides that the objects of Part 3 are, inter alia, to provide protection from workplace discrimination and to provide effective relief for persons who have been discriminated against.

33. Counsel for the applicant submitted that discrimination for disability is a serious matter and that any pecuniary penalty should reflect that seriousness.

34. Section 45 of the FW Act provides that a person must not contravene a term of a modern award. The s.351 contraventions to which the respondents have pleaded are not contraventions for the purposes of s.45. In the circumstances, those contraventions are not subject to the consideration of s.557 of the FW Act which would otherwise allow for two or more contraventions of a civil remedy provision to be taken to constitute a single contravention.

35. However, notwithstanding s.557 of the FW Act, counsel for the applicant conceded that to the extent that two or more contraventions have common elements, they can be taken into account in considering the appropriate penalty in all the circumstances.

Respondents' submissions on penalty

36. In addition to the agreed contentions as to penalty, the respondents made the following submissions in mitigation:

(i) The respondents' willingness to employ Mr Eustace in an industry where standing is required and hands are the essential tools of trade and that injury to hands can occur or be aggravated;

(ii) The agreement to pay the higher rate of pay from 25 February 2010;

(iii) The basis of the respondents' conduct was not to consciously take advantage of Mr Eustace because of his disability but rather their concern that his disability might have impacted on his capacity to do the job required as well as their concerns about his level of training for the particular industry;

(iv) The first respondent was concerned to document the fact that Mr Eustace had a back problem as well as the need for him to undertake further training to acquaint himself with the cutting techniques of the first respondent and the operating procedures;

(v) The respondents attempted to accommodate Mr Eustace in relation to the hours that would suit his needs and desires;

(vi) The underpayment of wages was resolved with the assistance of the applicant and Mr Eustace was back-paid as soon as the calculations were provided to the respondents;

(vii) The respondents continued to offer Mr Eustace employment including on the higher Victorian rate, despite Mr Eustace experiencing a degree of pain in his back;

(viii) There was no malice behind the decisions made by the respondents. The respondents were willing to employ Mr Eustace on an ongoing basis at the higher rates even though the hours that he required meant that the financial incentives which would otherwise be available to the respondents through the Commonwealth Rehabilitation Service were not to be available;

(ix) The amount of any penalty would affect whether or not the respondents are able to continue running the business and employing their staff; and

(x)Both the second and third respondents have been deeply affected in their personal and community lives as a result of the proceedings and the publicity surrounding them.

37. I also note the submission of the respondents that whilst there is an agreement between the parties that a penalty in the range of 30% be paid, the Court may apply a lower penalty.

Findings in respect of contravening conduct

38. On the evidence before the Court, I am satisfied that the first respondent was not intending to discriminate against Mr Eustace by reason of his back injury. The evidence disclosed that Mr Eustace had made clear to the first respondent the existence of his injury. I infer that a reason for the disclosure would be the potential impact it may have on his ability to do the work. I accept the evidence of the second respondent that armed with that information, he sought to trial Mr Eustace both in respect of his ability to perform the work and his

competence. I also accept the second respondent's evidence that he was of the view that Mr Eustace had not completed the requisite 1000 hours that would have attracted the higher award rate.

39. As stated above, a transcript of the telephone conversation on 2 February 2010 between Stephen from the Fair Work Infoline and the third respondent was tendered. The conversation is remarkable for its lack of clarity as to the appropriate award applicable to Mr Eustace in the circumstance of his qualification and on the basis that he had completed less than 1000 hours of practical training and the capacity in which he was to be employed.

40. What is clear from that conversation is how profoundly unclear the information given to the third respondent by the Fair Work Infoline was on this occasion. The third respondent was making a genuine attempt to try and see whether there was an award that did cover Mr Eustace. Moreover, the information to the third respondent from the Infoline was that it may be that the appropriate hourly rate to Mr Eustace may have been as low as $9.53.

41. There is no evidence before me to explain why the first respondent referred to Mr Eustace's back condition in the contracts of 2 February 2010 and 25 February 2010.

42. The respondent concedes that the proper award rate at which Mr Eustace should have been paid for work performed in NSW was $17.17 ($14.31 plus 20% causal loading) and for work performed in Victoria was $20.98 ($16.78 plus 25% casual loading) or $25.17 ($16.78 plus 50% casual loading) if working less than 12 hours per week.

43. I accept the respondents' submission that they did not decide to pay Mr Eustace the lower rate in the contract dated 2 February 2010, with the intention of deliberately taking advantage of him. Indeed, from 25 February 2010, Mr Eustace was to be employed on a casual rate which involved him on some days being paid at least $8 per hour above the minimum that he could have been paid.

44. I am satisfied that the respondents did not intend to deliberately exploit Mr Eustace as occurred in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* 2011 FCA 579 ("***Kentwood***").

45. In *Kentwood*, the Court found that the employees were paid about a fifth of the statutory minimum remuneration entitlements throughout their employment. Three employees were not paid any money at all for the first three months of their employment and one employee for the first five months of his employment. These employees were sponsored visa workers who were denied any real opportunity to take time off work or to decline to work overtime. The employees all worked 10 to 11 hours per day for 6 to 7 days per week until the intervention of the Fair Work Ombudsman. None of the underpayments had been made at the date of the Court's orders. Further, there was evidence that some of the employees had been asked to sign sham records of hours worked to conceal the respondent's contraventions in relation to failure to pay overtime. Plainly, these employees were particularly vulnerable and were deliberately exploited by the employer. The underpayments totalled approximately $240,000.

46. The contravening conduct by the first respondent and the ancillary conduct of the second respondent in the case before this Court was neither flagrant nor deliberately discriminatory.

Relevant legal principles regarding penalty

47. Regard must be had as to whether the penalty overall is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper, having regard to the totality of the contravening conduct involved (see *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53 per Goldberg J; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 567 per Gray J; and 581-583 per Buchanan J ("***McAlary-Smith***"); *Mornington Inn Pty Ltd v Jordon* 247 ALR 714 at 727 ("***Mornington Inn***")).

48. In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd Ltd* (1997) 145 ALR 36 at [53] Goldberg J

referred to *McDonald v R* (1994) 48 FCR 555 where Spender J stated at 556 that the sentence for each offence should be "*properly calculated in relation to the offence for which it is imposed*". It is implicit in this statement that a sentencer, or penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved.

49. Goldberg J's approach has been followed regularly in the Federal Court (see *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 453 per Jessup J; *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] per Tracey J.)

50. In *McAlary–Smith*, Buchanan J referred to Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 where he adopted a list of factors as "potentially relevant and applicable". That list of factors is as follows:

> "• *The nature and extent of the conduct which led to the breaches.*
>
> • *The circumstances in which that 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 the breaches were properly distinct or arose out of the one course of conduct.*
>
> • *The size of the business enterprise involved.*
>
> • *Whether or not the breaches were deliberate.*
>
> • *Whether senior management was involved in the breaches.*
>
> • *Whether the party committing the breach had exhibited contrition.*
>
> • *Whether the party committing the breach had taken corrective action.*
>
> • *Whether the party committing the breach had cooperated with the enforcement authorities.*

> • *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
>
> • *The need for specific and general deterrence."*

51. Buchanan J noted that the reference to that list appeared in other authorities such as *Construction, Forestry, Mining and Energy Union v Hamberger* (2003) 127 FCR 309 at [51]; *Hadgkiss v Sunland Construction (Qld) Pty Ltd* [2006] FCA 1566 at [11].

52. Buchanan J in *McAlary-Smith* observed that check lists of this kind can be useful providing they do not become transformed into a *"rigid catalogue of matters for attention"*. Buchanan J noted that at the end of the day, the Court's task is 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 (see *McAlary-Smith* at 580 per Buchanan J.)

53. Further, in *Markarian v R* (2005) 228 CLR 357, Gleeson CJ and McHugh, Gummow, Kirby, Hayne and Callinan JJ at 372 observed the following in respect of the consideration to be given to maximum penalties in the context of sentencing in criminal law:

> *"It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for Hulme J here to look first to a maximum penalty, and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case". (Emphasis added).*

54. In *Kentwood*, McKerrachar J applied a four step approach to determining the appropriate penalty as follows:

1. Each contravention of each separate obligation is a separate contravention and it is necessary to identify the maximum penalty for each separate contravention.

2. It is necessary then to consider an appropriate penalty to impose with respect to each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case.

3. To the extent that two or more contraventions have common elements, this may be taken into account when considering the appropriate penalty for each contravention. The respondents should not be penalised more than once for the same conduct and the penalties imposed should be an appropriate response to the respondents' actions.

4. Having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, a final review of the aggregate penalty is necessary to determine whether it is an appropriate response to the conduct which led to the contraventions.

55. The overriding principle is to ensure that the sentence is proportionate to the gravity of the contravening conduct (*Attorney General (SA) v Tichy* (1982) SASR 84 at 92-93).

56. As Barker J stated in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 2)* (2010) 199 IR 373 at [6]:

> *"The purpose to be served by the imposition of penalties is at least threefold:*
>
> > *(1) Punishment, which must be proportionate to the offence and in accordance with prevailing standards;*
> >
> > *(2) Deterrence, both personal (assessing the risk of re-offending) and general (a deterrent to others who might be likely to offend); and*
> >
> > *(3) Rehabilitation."*

57. In considering whether the contraventions arose from the one course of conduct, even if embodying multiple breaches, the Court can have regard to whether there is an interrelationship between the legal and

factual elements of the contraventions (see *Construction, Forestry, Mining and Energy Union* v *Williams* (2009) 191 IR 445 at 454). As Moore J stated in *Construction, Forestry, Mining and Energy Union* v *Cahill* (2010) 194 IR 461 at 465 (***"Cahill"***):

> *"Rather, it is a question answered by evaluating the differences and similarities in the Acts to determine whether, ultimately, they are or are not a manifestation of singular criminality."*

58. However, bare identity of motive for commission of separate offences will seldom be sufficient to establish the same criminality in separate and distinct offending acts (see *Cahill* at 473 per Middleton and Gordon JJ)

The appropriate penalty

59. As stated above, the applicant seeks a pecuniary penalty against the first and second respondents in the order of 30% of the maximum penalty in respect of each of the admitted contraventions of s.351 of the FW Act by the first and second respondents which added together total $24,000.

60. However, despite the seriousness of the contraventions in *Kentwood*, the Court found that a penalty of 80% of the maximum sought by the Fair Work Ombudsman would be unduly harsh. Regard was had by the Federal Court to the particular vulnerability of the employees and the fact than no voluntary payments or underpayments had been rectified by the respondents. Ultimately, the Federal Court imposed a penalty of less than 40% of the maximum.

61. In referring to the penalties awarded in *Kentwood*, I do have regard to the authorities which warn against comparing the present case with other cases for the purposes of determining the amount of penalty (see *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373 at [11] per Barker J and upheld by the Full Court on appeal in *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29).

62. The task of the Court where the parties have agreed upon a penalty was explained by Jessup J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [129] as below:

> *"In* Mobil Oil, *the Full Court considered* NW Frozen Foods Pty Ltd v ACCC *(1996) 71 FCR 285, and extracted therefrom a number of propositions ([2004] ATPR 41–993 at [53]), one of which was that set out in para [6] of the reasons of the trial Judge in the present matter, namely:*
>
> > 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 is, in the Court's view, 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 within the permissible range.
>
> *Neither in* NW Frozen Foods *nor in* Mobil Oil *did the Full Court expand on the meaning of the phrase "permissible range". I consider that the phrase refers to a range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor* ***manifestly excessive.***" (Emphasis added)

63. I note that, in the case before this Court, the applicant has appropriately not sought any penalty against the respondents for the under payments to Mr Eustace for the period between 2 February 2010 and 25 February 2010 in circumstances where the underpayment was rectified by the respondents upon information from the applicant.

64. Contraventions of adverse action by discrimination for physical disability are serious offences. However, the seriousness of the particular conduct that is found to constitute the contraventions should be determined by reference to the most serious conduct imaginable that would attract the maximum penalty and having determine where the conduct the subject of these contraventions lies on that scale, having taken into account all the circumstances of the contraventions, determine the appropriate overall penalty.

65. The evidence before the Court is that at no time was Mr Eustace's physical disability the only reason that the respondents determined to

pay him less than the award demanded. Plainly, Mr Eustace's physical disability should have been no part of the respondents' decision to offer him the job at less than the award and to pay him less than the award and less than the first respondent paid his other employees.

66. I accept that there was no such intention both in light of the evidence of the first respondent and the terms of the contracts of 2 February 2010 and 25 February 2010. The 25 February 2010 contract also had the same reference to Mr Eustace's disability, yet provided for a payment of above the award rates.

67. The respondents have conceded that their conduct was discriminatory and the Court, in the circumstances, in light of the agreed facts, should not look behind that concession.

68. However, I am satisfied that the first and second respondent's offending conduct arose from the one decision of the second respondent to employ Mr Eustace. That decision resulted in the offer of employment to Mr Eustace at $10 per hour and Mr Eustace's acceptance of that offer.

69. The total underpayment to Mr Eustace of $599 was rectified on 5 October 2010 by the respondents after they were contacted by the applicant.

70. There is no evidence before this Court that any of the respondents have previously engaged in similar conduct or have ever been found to have contravened Workplace Relations legislation. Accordingly, the respondents are entitled to have these contraventions considered as first offences.

71. It is common ground that the first respondent is a small business which employs approximately six employees including the second and third respondents.

72. The applicant concedes that the respondents provided assistance during their investigation and admitted to the offending conduct.

73. The second respondent also has agreed to provide a written apology to Mr Eustace as a further demonstration of contrition.

74. I accept the submission of counsel for the applicant that one of the principle objects of the FW Act is the provision of productive workplaces that promote social inclusion and the elimination of discrimination. I accept that the substantial penalties set by the legislator for breach of such entitlements reinforce the importance placed on compliance with minimum standards such as the provision of workplaces without discrimination.

75. However, in my view the discrimination engaged in by the respondents in this case is at the very low end of discriminatory conduct. As stated above, I accept that the conduct of the respondents was not flagrant and was not motivated by an intention to deliberately exploit Mr Eustace's disability.

76. Below are a number mitigating factors taken into account by the Court in assessing penalty. They include:

i) The respondents' early plea;

ii) The rectification of the underpayment;

iii) The short period of 23 days in which the conduct continued;

iv) The offering to Mr Eustace of a contract of employment at above award rates 23 days after the commencement of his employment;

v) The lack of intention to exploit Mr Eustace by reason of his physical disability;

vi) The attempt by the third respondent to inform herself as to the appropriate award rate for Mr Eustace and the unclear information provided by the Fair Work Infoline in response to that request;

vii) The information to the third respondent from the Infoline was that it may be that the appropriate hourly rate to Mr Eustace may have been as low as $9.53;

viii) The concern expressed by the second respondent in his affidavit, dated 3 June 2010, that Mr Eustace's back

problem may have impacted on his capacity to do the job required;

ix) The respondents did not consciously take advantage of Mr Eustace because of his disability;

x) The respondents sought to accommodate Mr Eustace in relation to the hours which suited his needs and desires for work;

xi) The first respondents agreement to provide Mr Eustace with an apology and to consent to an order of the Court to do so;

xii) The respondents' agreement to make a payment of $1320 said to be to compensate Mr Eustace for his economic loss and to consent to such an order.

77. I have regard to the fact that the respondents are first time contraveners. I am satisfied that they are unlikely to contravene again. As stated above, they have cooperated with the applicant and not resisted the application. This conduct is evidence of remorse and contrition (see *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 453). As stated above, the circumstances of the contravention are at the very low end of seriousness.

78. I am satisfied that this is not a matter in respect of which pecuniary penalties are necessary to provide specific deterrence to the respondents in light of the mitigating factors referred to above.

79. In relation to general deterrence, I note that it has been recognised as a significant factor in determining the applicable penalty (see *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at [60] and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing And Allied Services Union of Australia v Telstra Corporation Ltd* [2007] FCA 1607 at [18]).

80. However, the legislative purpose will not always be furthered by imposing a penalty to reflect general deterrence and the Court must have specific regard to the conduct in question. The need for general deterrence in this case should be significantly reduced in light of the considerations referred to above which have led me to find that the

conduct engaged in by the respondents is at the very low end of discriminatory conduct. In this regard, the lack of deliberateness or flagrancy of the respondents is a significant factor but is itself not determinative (see *Textile, Clothing and Footwear Union of Australia v Givoni Pty Ltd* (2002) 121 IR 260 at [75]).

81. I also have regard to the principle that a discount on penalties should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability has indicated an acceptance of wrongdoing and a suitable and credible expression of regret is made and a willingness to facilitate the course of justice has also been made (see *Mornington Inn* per Stone and Buchanan JJ). This is such a case.

82. The respondents' plea was accompanied by an agreement to be subject to an order of an apology as well as an agreement to pay an amount of $1320 as compensation for economic loss in circumstances where the respondents had agreed to continue to employ Mr Eustace at above award rates.

83. I also have regard as a mitigating factor to the respondents' belief that Mr Eustace had not completed 1000 hours of training. The applicant concedes the respondents held that belief.

84. Further, I accept that the information given to the third respondent by the Infoline was that it may be that the appropriate hourly rate to Mr Eustace may have been as low as $9.53.

85. I also have regard to the fact that there are other contraventions to which the applicant has pleaded, namely the underpayment to Mr Eustace and the failure to provide him with payslips. However, again those are at the very low end of contraventions of that type and it is proper that the applicant not seek a pecuniary penalty in respect of that conduct having regard to the mitigating factors referred to above. However, I do have regard to the fact that those further agreed contraventions in considering the appropriate overall penalty in respect of the offending conduct of the first and second respondents.

86. The contravening conduct was no more than 23 days and was remedied by the first respondent before the applicant's resignation on the 23rd day. The respondents offered to continue to employ Mr Eustace at above award rates. There is no evidence before me to explain why Mr Eustace resigned. Further, the only evidence before the Court is that Mr Eustace enjoyed the work environment, staff, clients and the respondents as his employer (see Mr Eustace's email dated 24 February 2010 referred to above).

87. I also have regard to the circumstances which led to the contraventions which arose from the decision of the second respondent to offer to employ Mr Eustace at $10 per hour and Mr Eustace's acceptance of that offer. That decision resulted in the offering to employ Mr Eustace at $10 per hour and his subsequent employment at $10 per hour. Whilst s.557 prevents this Court from finding a single contravention where the contraventions are committed by the same person and the contraventions arose out of a course of conduct by that person, counsel for the applicant conceded that it was appropriate for the Court to take account of those common elements in considering an appropriate penalty.

88. It is common ground that the first respondent's business is a small family business owned and operated by the second and third respondents.

89. The maximum penalty that is applicable to the first respondent in respect of the s.351 contraventions that arise from s.342(1) Item (1)(d) and s.342(1) Item (2)(b) of the FW Act is $33,000 in respect of each contravention.

90. The maximum penalty that is applicable to the second respondent in respect of his knowing involvement in the s.351 contraventions by the first respondent that arise from s.342(1) Item (1)(d) and s.342(1) Item (2)(b) of the FW Act is $6,600 in respect of each contravention.

91. As stated above, I note that the submission of the respondents that whilst there is an agreement between the parties that a penalty in the range of 30% be paid, the Court may apply a lower penalty.

92. Having regard to all the circumstances of this case as referred to above in these reasons, the penalties sought by the applicant against the first and second respondents totalling $24,000 are not within the permissible range and, in my view, are manifestly excessive.

93. I do not accept that 30% is the appropriate position on the scale of seriousness for the conduct of any of the respondents, individually or cumulatively having regard to all the circumstances in which the contraventions occurred.

94. Having regard to where these contraventions by the first respondent and ancillary conduct of the second respondent stand on the range of seriousness, the penalties should be no more than 5% of the maximum penalties applicable to these contraventions.

95. None of the parties made any submission as to the penalty that should be attributed to each s.351 contravention by the first respondent having regard to their relative seriousness. In the circumstances, I shall divide the overall penalty equally to the contraventions admitted by the first respondent. For the same reasons, it is appropriate to divide the overall penalty equally in respect of the ancillary conduct of the second respondent.

96. In the circumstances, the appropriate penalty in respect of each of the s.351 contraventions of the first respondent is $1500. The appropriate penalty in respect of the second respondent's knowing involvement in each of the first respondent's contraventions is $300.

97. In considering the appropriate total overall penalties that should be paid by the first respondent and the second respondent, I have had regard to the totality principle (see *Mornington Inn; McAlary-Smith; Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36).

98. In all the circumstances, I am satisfied that an overall penalty of $3,000 has proper regard to the totality principle of an appropriate overall penalty in all the circumstances of this case.

99. For the same reasons, I find that the appropriate total overall penalty in respect of the second respondent is $600 for his knowing involvement in the s.351 contraventions of the first respondent.

100. In making these findings, I have also had regard to the need to sustain public confidence in the statutory regime. However, I am satisfied that these needs are met by the imposition of the proposed penalties in the context of the respondents' early plea and co-operation, agreement to pay compensation to Mr Eustace and to issue an apology to Mr Eustace.

Conclusion

101. I find that the first respondent contravened s.351 of the FW Act by engaging in adverse conduct by way of discrimination against Mr Eustace for a physical disability as a prospective employee from 1 February 2010 to 3 February 2010 and should pay a penalty of $1,500 pursuant to s.546 of the FW Act.

102. I find that the first respondent contravened s.351 of the FW Act by engaging in adverse conduct of discrimination of Mr Eustace as employee by reason of his physical disability from 4 February 2010 to 24 February 2010 and should pay a penalty of $1,500 pursuant to s.546 of the FW Act.

103. I find that the first respondent contravened s.45 of the FW Act by failing to pay the hourly prescribed rate to Mr Eustace pursuant to the Hair and Beauty Industry Award 2010 for the period 4 February 2010 to 24 February 2010.

104. I find that the first respondent contravened s.536 of the FW Act by failing to issue payslips to Mr Eustace within 1 day of payment of his wage between 4 February 2010 and 24 February 2010.

105. I find that the second respondent was knowingly involved in the s.351 breach by the first respondent by engaging in adverse conduct by way of discrimination against Mr Eustace for a physical disability as a prospective employee from 1 February 2010 to 3 February 2010 pursuant to s.550(2) of the FW Act and should pay a penalty of $300 pursuant to s.546 of the FW Act.

106. I find that the second respondent was knowingly involved in the s.351 breach by the first respondent by engaging in adverse conduct by way of discrimination against Mr Eustace for a physical disability as an employee from 4 February 2010 to 24 February 2010 pursuant to

s.550(2) of the FW Act and should pay a penalty of $300 pursuant to s.546 of the FW Act.

107. I note that penalties are sought against the first and second respondent only in respect of the s.351 contraventions of the first respondent and the knowing involvement of the second respondent in those contraventions.

108. I am satisfied that the pecuniary penalties referred to above should be paid to the applicant in accordance with s.546(3) of the FW Act as agreed by the parties.

109. The respondents did not challenge whether declarations should be made and in fact agreed to declarations of the nature referred to above. In those circumstances and the need for general deterrence of conduct of this nature, even though at the very low end of the scale of seriousness, the declarations sought by the applicant and agreed to by the respondents in respect of the admitted contraventions should be made. In addition to those contraventions in respect of which the applicant sought penalties, the applicant also sought declarations in respect of the first respondent's contravention of s.45 of the FW Act and the second respondent's knowing involvement in that contravention.

110. I note the agreement of the parties that the first respondent pay additional compensation to Mr Eustace for alleged economic loss suffered by him as a result of the contraventions pursuant to s.545 of the FW Act in the amount of $1320 within 28 days of the Orders of the Court and to consent to such an Order.

111. However, I note that there is not any evidence before this Court of any economic loss suffered by Mr Eustace. I asked counsel for the applicant, Ms Eastman, if there was any such evidence. Ms Eastman responded only that Mr Eustace had lost his job. There was no response when I put to Ms Eastman that Mr Eustace had chosen to resign. In the circumstances, on the evidence before the Court, I am satisfied that it was open to Mr Eustace to continue to be employed at the rate provided for in the contract of 25 February 2010, had he chosen to do so. However, the Court should not go behind the parties' agreement that the respondents pay Mr Eustace $1320 by way of compensation.

112. In light of the findings of this Court that the conduct engaged in by the respondents in respect of the contraventions found to be proved is at the very low end of the type of conduct contemplated by the FW Act and the complete lack of any evidence of economic loss, it is not my view that the Court should order that the respondent pay compensation pursuant to s.545 of the FW Act to Mr Eustace. In my view, the Court should do no more than note the agreement between the parties that the first respondent pay Mr Eustace an amount of $1320 within 28 days.

113. I also note the agreement between the parties that the first respondent will issue an apology to Mr Eustace in respect of the contraventions found to be proved against the first and second respondents within 28 days of the Orders of the Court.

114. I note the parties' agreement that there should be no orders in relation to the third respondent and no order as to costs.

115. Again, for completion, I note that no orders or declarations are sought against the third respondent. I also note the agreement of the parties that no orders be sought in relation to the third respondent and that there otherwise be no orders as to costs.

I certify that the preceding one hundred and fifteen (115) paragraphs are a true copy of the reasons for judgment of Emmett FM

Deputy Associate: 

Date: 9 August 2011