

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v FRANCIS

[2011] FMCA 1005

INDUSTRIAL LAW – Contravention of wage and termination entitlements of employees – civil penalty proceedings against director of employer company now in liquidation – failure of director to participate in proceedings – hearing proceeded on undefended basis – liability established and penalties totalling \$8,000 imposed – no mitigation arising from reliance on GEERS scheme.

Bankruptcy Act 1966 (Cth) Part X, s. 59(3), 189AA, 229, 230

Corporations Act 2001 (Cth)

Fair Work Act 2009 (Cth) ss. 44, 45, 90(2), 323, 539(1), 546(1), 546(3), 550, 557(1)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) Sch.16 Item 5

Workplace Relations Act 1996 (Cth) s 182

Federal Magistrates Court Rules 2001 (Cth) rr 13.02B(2)(d), 13.03C(2)

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39

Construction, Forestry, Mining and Energy Union v Williams (2009) 262 ALR 417

Cotis v Macpherson (2007) 169 IR 30, [2007] FMCA 2060

Fair Work Ombudsman v AM Retail Solutions & Anor (No.4) [2010] FMCA 525

Fair Work Ombudsman v Baruch [2011] FMCA 1007

Fair Work Ombudsman v McGrath & Anor [2010] FMCA 315

Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39

Kelly v Fitzpatrick (2007) 166 IR 14

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	ROBERT MICHAEL FRANCIS
File Number:	SYG1236 OF 2011
Judgment of:	Smith FM

Hearing date: 11 November 2011

Delivered at: Sydney

Delivered on: 19 December 2011

REPRESENTATION

Counsel for the Applicant: Ms L Madden

Solicitors for the Applicant: Fair Work Ombudsman

Counsel for the Respondent: No appearance by or on behalf of the respondent

ORDERS

- (1) A penalty of \$4,000 is imposed on the second respondent, Robert Michael Francis, under ss.546(1) and 550(1) of the *Fair Work Act 2009* (Cth) ('the Act') for his contraventions of Item 5 of Sch.16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), and of sections 45 and 323 of the Act, constituted by his involvement in the failure of Beaver Press Sales Pty Ltd to pay periodic wages to five employees in full, at any time, in relation to six pay periods occurring between November 2009 and March 2010.
- (2) A penalty of \$4,000 is imposed on the second respondent, Robert Michael Francis, under ss.546(1) and 550(1) of the Act for his contraventions of section 44 of the Act, constituted by his involvement in the failure of Beaver Press Sales Pty Ltd to pay the amounts payable to four of its employees for untaken paid annual leave upon termination of their employment.
- (3) The penalties payable under the above orders must be paid to the Commonwealth pursuant to s.546(3) of the Act.
- (4) These orders shall take effect on the twenty-eighth day after they are pronounced.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

SYG1236 of 2011

FAIR WORK OMBUDSMAN

Applicant

And

ROBERT MICHAEL FRANCIS

Respondent

REASONS FOR JUDGMENT

1. The Fair Work Ombudsman seeks the imposition of penalties on Mr Francis under s.546 of the *Fair Work Act 2009* (Cth), in relation to his involvement in three contraventions of the Act by Beaver Press Sales Pty Ltd, a printing company of which he was the sole director, secretary, and sole shareholder at relevant times. The company was placed into voluntary administration on 8 April 2010, and was placed into liquidation on 14 May 2010. However, the inability to proceed against the employer company, does not prevent the Court imposing penalties on a person who was a “*person involved*” in the contraventions in accordance with the tests set out in s.550.
2. The Fair Work Ombudsman seeks the imposition of three penalties in relation to contraventions of four ‘civil remedy provisions’, being those identified in items 1, 2, and 10 of the table to s.539(1) of the Fair Work Act and item 45 in the table to item 16 in Sch.16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). The contraventions, and their particulars, are set out in a statement of claim and written submissions. They can be summarised:

- i) Non-payment of any wages to five specified employees for pay periods of 11-17 November 2009, 20-26 January 2010, 3-9 March 2010, 10-16 March 2010, 17-23 March 2010, and 24-30 March 2010. This course of conduct involved, in relation to the first of these periods, contraventions of item 5 of Sch.16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) in its continuance of s.182 of the *Workplace Relations Act 1996* (Cth). In relation to the later periods, it involved contraventions of s.45 of the Fair Work Act, in relation to the an agreed rate which constituted a preserved Australian Pay and Classification Scale derived from the Graphic Arts – General Award 2000 as required under cl.A2.3 of the Graphic Arts, Printing and Publishing Award 2010.

Although repeated contraventions occurred in relation to several employees, the Fair Work Ombudsman accepts that these should be treated as one contravention pursuant to s.557(1) of the Fair Work Act and general sentencing principles in relation to ‘same course of conduct’ (see *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417 at [14]-[19], and *Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [39]-[42]). The statement of claim alleges that underpayments of statutory minimum amounts to the five employees totalled \$2,867.37 in relation to the November 2009 period, and that underpayment of amounts payable in relation to the five 2010 pay periods totalled \$26,122.63.

- ii) Failure to pay four of the same employees their untaken annual leave on termination of employment, in contravention of s.44 of the Fair Work Act in relation to a provision of the National Employment Standards contained in s.90(2) of the Fair Work Act. The statement of claim alleges that the total unpaid amount owing to them was \$26,155.21.
- iii) Contravention of s.323(1)(a) and (c) of the Fair Work Act, in relation to the obligations to pay wages “*in full*” and “*at*

least monthly", constituted by the non-payments during 2010 particularised as particularised in relation to the first contravention.

3. A finding of liability in relation each of the alleged contraventions carries a maximum penalty of \$6,600, in the case of a non-corporation respondent such as Mr Francis.

The course of the proceedings

4. The Fair Work Ombudsman's application was filed on 15 June 2011, and was supported by a statement of claim which detailed its allegations. It was preceded by a lengthy investigation by a workplace inspector, in which Mr Francis was made aware of employee complaints received by the Ombudsman, and given the fullest opportunity to participate in the investigation.
5. I am satisfied that Mr Francis was also given the fullest opportunity to defend the Court proceedings, and to explain his conduct and that of his company. However, he has chosen not to defend the proceedings, and not to appear at any of the listings nor at the hearing of which he was given notice.
6. The hearing on 11 November 2011 was set down by directions made on 29 July 2011, in which I noted Mr Francis' failure at that time to appear and defend the application, and directed that it proceed at the hearing on an undefended basis under *Federal Magistrates Court Rules 2001* (Cth) 13.03C(2) and 13.03B(2)(d). In those orders, and in subsequent directions made on 19 September 2011, and 7 October 2011, I allowed Mr Francis opportunities to apply for leave to defend the proceedings. However, he never filed a defence to the statement of claim, and never appeared before me, in person or by a legal representative, to explain his defaults or to contest any of the Ombudsman's case.
7. Mr Francis did not appear in person or by a representative at the first court date, although I was satisfied that he had been served. Prior to the next listing, a letter dated 25 July 2011 was received by the Court from a chartered accountant, which said that he had been appointed as a controlling trustee of the estates of Mr Francis and his wife under

Part X of the *Bankruptcy Act 1966* (Cth), and asserted that “*the above proceedings are now stayed pursuant to the powers of the court under s.189AA of the Act*”. However, in fact, no application by Mr Francis for a stay of proceedings was ever made, although I gave him an opportunity to make such an application. Moreover, no submission was ever made that I should not follow the judgment of Driver FM in *Cotis v Macpherson* (2007) 169 IR 30, [2007] FMCA 2060, which suggests that such a stay would not be granted, that no statutory stay could arise under s.59(3) of the Bankruptcy Act, and that no release could arise under ss.229 and 230 after the entry into of a Part X personal insolvency agreement, since proceedings under s.546 of the Fair Work Act are not characterised as seeking recovery of debts otherwise provable in bankruptcy.

8. At a later stage of the proceedings, Mr Francis filed on 31 August 2011 an application seeking “*leave to lodge a defence as a bankrupt*”, which was supported by a brief affidavit. The affidavit did not address the allegations of total non-payment of wages in periods since November 2009, but asserted that as a result of “*the burden of financial difficulties*” he “*had no choice*” but to reduce the hours of some staff. It said “*I cannot now afford a lawyer for a defence and pay witness fees for those staff that would gladly collaborate (sic) my version of events*”.
9. In later informal communications to the court, Mr Francis also claimed that his business failure and some of his non-attendances at court were caused by illness on the part of his wife and himself, but he never submitted relevantly supportive medical evidence, in particular, justifying his absences from all court listings. As I have noted above, Mr Francis failed to appear before me to support his interim application, failed to file a defence in accordance with my directions, and did not attend the hearing.
10. The consequence, as I shall indicate, is that he has presented no evidence in admissible form, nor made any submissions, which allows me to be satisfied that the contraventions did, in fact, occur in circumstances providing substantial mitigating considerations. He has presented no evidence to the Court as to the outcome of his

appointment of a controlling trustee under Part X, nor as to his current business, personal, or financial circumstances.

Liability

11. At the hearing on 11 November 2011, the Fair Work Ombudsman relied upon affidavits and a lengthy written submission which had been served on Mr Francis. The affidavits comprised that of the inspector, Mr Steenholdt, and of two of the affected employees.
12. Mr Steenholdt explained how, with little cooperation on the part of Mr Francis and his subordinates, employee records had ultimately been procured from the company liquidator. I am satisfied that these company's records support and prove all the allegations of contravention by the employer made in the statement of claim.
13. It is notable from the evidence collected by Mr Steenholdt, that Mr Francis's staff, under his directions, kept a running account of the total non-payment of wages for the pay periods particularised, which they called "*unprocessed electronic payments*". In effect, Mr Francis directed the stopping of these electronic wages transfers, which would otherwise have been given effect by his wages staff. That he saw this as an appropriate response to the approaching insolvency of his business during and after November 2010, and continuing until the end of March 2010, is confirmed by his conduct and statements which are described in the affidavits of the two employees and in statements from other employees taken by Mr Steenholdt.
14. The company records, the affidavits of employees, and other evidence tendered to me, also shows that Mr Francis managed the company and its financial affairs during these months, so as to make no provision for payment of wages arrears and accrued leave payments due to employees when their employment was terminated upon the appointment of the company administrator.
15. As to Mr Francis' involvement and attitude, one employee gave the following evidence, which I accept:

Meeting November 2009

24. *In or around late November 2009, there was a meeting at the Beaver Press factory between the staff who were working their shift at that time and Mr Francis. I also recall that Mr Francis' son, David Francis, was present at the meeting. David Francis was responsible for the digital printing side of the Beaver Press business. Mr Francis spoke to the group about the financial circumstances of the company and he said words to the following effect:*

“I know that pays are late for last week but the company is having some financial problems at the moment. We will try and make it up over the next few weeks. We also can't afford to pay the people on day shift their shift loading and people on night shift will have their loading reduced to 10%. We will also have to pay all overtime as single time. Don't worry, we'll by and make it up to you over the next few weeks but anyone who doesn't like it should look for another job.”

25. *During the meeting, someone, I can't remember who, said words to the following effect:*

He said: “When are we going to get paid our wages?”

In response, Mr Francis said words to the following effect:

Mr Francis said: “People owe me money. I'm waiting on cheques to come in. Once that's happened I'll pay a couple of people their wages a week until we're caught up. If you don't like that you can leave.”

26. *Immediately after the meeting referred to in paragraphs 24 and 25 above until the end of my employment at Beaver Press in April 2010, I did not receive any shift loading.*

27. *I did not receive any payment of wages for the periods set out at paragraph 48 below.*

28. *In or around mid-December 2009, approximately two weeks before Christmas, I approached Mr Francis in the car park of the Beaver Press factory to ask him when my wages that were owing to me would be paid. I recall having a conversation with Mr Francis in words to the following effect:*

I said: “What’s going on with the catch-tip pay for the wages that weren’t paid? I need to get my kids Christmas presents or they’re not going to have a Christmas morning.”

Mr Francis said: “Well I’m not getting any Christmas presents either you know. If you don’t like it, then leave.”

...

Meeting January 2010

33. *In or around mid-January 2010, Mr Francis held another meeting with the Beaver Press staff who were working at the time. I attended the meeting and recall that Mr Francis said words to the following effect:*

Mr Francis said: “We haven’t been able to pay you again because my finance company is holding the wages. I’ll do my best to catch up the wages over the next few weeks.”

Early March 2010

34. *In or around early March 2010, I calculated that I was owed four weeks’ wages. I attended work and decided that I was not going to perform any work that day because I was annoyed and frustrated that I had not been paid. I continued to come into the Beaver Press factory and clock on and off, but did not perform my work. On the third day that I refused to work, I met with my supervisor Lance and we had a conversation in words to the following effect:*

Lance said: “What would you like to happen if you’re not going to do any work?”

I said: “I’d like to be made redundant”.

Lance said: “I’ll speak to Francis and see what I can do.”

35. *At approximately 12,00pm on the same day referred to in paragraph 34 above, Lance and I had a conversation to the following effect:*

Lance said: "You're being made redundant. Your paperwork is nearly complete."

I said: "Will I be getting a cheque for all my entitlements?"

Lance said: "Why would you want a cheque? It's only going to bounce."

I said: "I am still an employee of this company and want a bank cheque for all my entitlements".

36. *Approximately one hour after the conversation referred to in paragraph 35 above, I approached Ms Elliot and we had a conversation in words to the following effect:*

I said: "Hi Skye, what is happening with my paperwork?"

Ms Elliot said: "You are no longer getting a redundancy. You are getting a written warning."

Annexed and marked "BF-2" is a copy of the warning letter that I received dated 10 March 2010.

37. *Upon receiving the warning letter annexed at BF-2, I saw that the last line stated:*

"If you wish to discuss this with Robert Francis, please make an appointment to meet with him this afternoon."

38. *I wanted to meet with Mr Francis to discuss the warning but he was not available. I instead approached David Francis and I recall having a conversation with David Francis in words to the following effect:*

I said: "Why was my redundancy turned into a warning letter?"

David said: "There was never any redundancy. Lance got it wrong and Lance does not speak for me or Robert."

39. *I understood from the conversation directly above that Mr Francis and David Francis were the people responsible for*

approving any redundancies and for terminating Beaver Press employees.

40. *After I was given the warning letter, I resumed carrying out my normal duties for Beaver Press. I thought that if I was fired for not improving my behaviour after receiving the warning letter that I would be in a worse position than I would be if I were made redundant or if the company went into liquidation.*

Late March 2010

41. *In or around late March 2010, Mr Francis came down from the office onto the factory floor and made a general announcement to the staff who were working in the factory at the time. Mr Francis said words to the following effect:*

Mr Francis said: “GEERS will cover your wages and entitlements so don’t worry about it. If anyone doesn’t like it they can find another job”.

42. *I did not know what GEERS stood for at this time.*

16. The other employee who made an affidavit said:

Meeting November 2009

32. *In or around late November 2009, there was a meeting at the factory between most of the employees employed by Beaver Press who were earning shift allowances and the owner of Beaver Press, Mr Francis. The meeting was held just before lunch, at 100pm. During this meeting, Mr Francis said words to the effect:*

‘The company is struggling financially. We are cancelling your shift allowances. We will talk about putting them back into place when times are better and business improves again.’

33. *In or around January 2010 I approached the Accounts Manager at Beaver Press, Skye Elliot, to ask her about why I was not being paid my wages. I remember having a conversation with Ms Elliot in words to the following effect:*

I said: “Are we going to get paid this week?”

Ms Elliot: "We may get paid although it might be late."

I said: "Okay."

Ms Elliot: "I will have to check the account to see if there is any money there for wages. It is up to Robert [Francis] to approve any transfer of money over into the account. Occasionally money comes across into the account but I don't know where he is getting it from."

...

Termination of employment

41. *On 8 April 2010, I attended work and was advised by Mr Francis that there was going to be an all-staff meeting at about 200pm with PKF Accountants in the managers' lunchroom at the Chippendale Beaver Press premises.*
42. *At approximately 2.00pm on 8 April 2010, I attended the all staff meeting with PKF Accountants. All staff who were working on that day attended. Mr Francis was also there.*
43. *During the meeting, I received an Employment Separation Certificate and a copy of a business card from a man from PKF Accountants. I saw from the business card that the man's name was James White. Annexed and marked "SW-3" is a copy of the Employment Separation Certificate that I was given on 8 April 2010.*
44. *During the all-staff meeting on 8 April 2010, I recall that Mr White said to the group words to the following effect:*

"Your employment with Beaver Press has been terminated because the company has gone into administration. The company has no funds so it cannot continue operating. You'll be able to apply to GEERS for your entitlements and we will send you some information about that shortly."
45. *I cannot remember whether I said anything in response to the words said by Mr White referred to in the paragraph directly above. Although I was aware the company was having financial difficulties, I was shocked that was being*

terminated because I had worked at the company for 21 years.

46. *I remember that a colleague of mine named Benson (I cannot remember his surname) then said to Mr Francis words to the effect:*

Benson: "Doesn't GEERS have a three month time limit on claims?"

Mr Francis: "I'm going to try and pay the week owing for November myself."

17. There is evidence that some of the employees did receive in September 2010 some ex-gratia payments from the Department of Education, Employment and Workplace Relations under the non-statutory "*General Employee Entitlements and Redundancy Scheme*" (GEERS), following the liquidation of the company. However, these did not cover non-payments of wages which were more than three months prior to the appointment of the administrator. It seems also that the company's records were deficient in relation to claims for unpaid shift allowances and some other claims.
18. I note that the Fair Work Ombudsman does not seek in the present proceedings any orders requiring Mr Francis to pay any amounts to either the Commonwealth in indemnification of its GEERS payments, nor to employees in relation to any shortfall in their recoveries under that scheme. Whether these would be recoverable from him under the *Corporations Act 2001* (Cth) is something which I do not need to decide.
19. After receiving the evidence in support of the Fair Work Ombudsman's statement of claim, and hearing his submissions on liability, I indicated that I was satisfied that Mr Francis' personal liability had been established under s.550 in relation to his company's contraventions summarised above. I briefly indicated my reasons, which were as follows.
20. I referred to principles of relational liability which are established by authorities on s.550 which, for example, were explained and applied by myself in *Fair Work Ombudsman v McGrath & Anor* [2010] FMCA 315, and *Fair Work Ombudsman v AM Retail Solutions & Anor (No.4)*

[2010] FMCA 525. In short, it is necessary for me to be satisfied that Mr Francis was *“an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention”*.

21. I indicated that, on the uncontradicted evidence now before me, I was so satisfied. Although it appeared that Beaver Press Sales Pty Ltd employed administrative and accounting staff to perform routine accounting, payroll and employee actions, they were at all relevant times under Mr Francis' direct management and supervision. In particular, it is clear from the evidence, that he knowingly gave directions for which he was responsible in all senses, which resulted in the non-payment of wages to the five employees, both at the times when they were due, and at all subsequent times before Mr Francis took his company into voluntary administration.
22. It is also clear from the evidence before me, that Mr Francis knowingly supervised and managed the company's financial affairs with the object of allowing the consequence upon an insolvency administration and liquidation of the company, that the company would have the financial capacity neither to pay the arrears of unpaid employees' wages nor to pay unpaid accrued leave entitlements upon termination of their employment.

Penalty

23. After explaining my above conclusions, I indicated that I would later publish my short reasons for being satisfied as to Mr Francis' liability for penalty, after proceeding with an immediate hearing on penalty. I adopted that course rather than further adjourning the matter, since no submission was made by or on behalf of Mr Francis that I should adjourn issues of penalty. I was satisfied that Mr Francis had been advised of his rights to appear and seek an adjournment in relation to issues of penalty, since the possibility of this course had been raised in the Ombudsman's written submissions which had been served on him. The Ombudsman's submissions also fully addressed the considerations relevant to penalty, in a manner which should – in my opinion – have fairly brought all these considerations to Mr Francis' attention. I concluded that, by absenting himself from the hearing, he had acquiesced in my adopting this course (cf. the same course taken by

Raphael FM in *Fair Work Ombudsman v Baruch* [2011] FMCA 1007 at [11]).

24. The Fair Work Ombudsman's written submissions on penalty addressed headings taken from the well-known list of sentencing considerations suggested in this area by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and summarised by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]. The list of considerations can guide, but is not a substitute for "*the unrestrained statutory discretion*" (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]). Ultimately, I must arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offence committed and also takes into account other sentencing considerations including deterrence (cf. Graham J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [54]). The matters which become determinative in each case differ with the particular circumstances, and recent judgments of the Full Court have emphasised the discretionary nature of the power to impose civil penalties for breach of industrial legislation, and have supported a mental process of 'instinctive synthesis' (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [27]).

25. The non-exhaustive list of considerations suggested in the above authorities is:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that relevant conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether or not the breaches were deliberate.*
- *Whether the respondent had exhibited contrition.*
- *Whether the respondent had taken corrective action.*

- *Whether the respondent had co-operated with the enforcement authority.*
- *The need for specific and general deterrence.*

26. I have sketched the circumstances of the contraventions above, and have attempted to weigh all the above considerations in so far as they can be assessed on the evidence presented to me.
27. In short, the contraventions concerning the non-payment of wages required by law occurred in relation to five employees for six pay periods occurring over five months. The non-payments were deliberate, as was a refusal to pay them in arrears, and Mr Francis admitted responsibility for these actions at all relevant times. His practice of non-payments was not implemented continuously, and wage payments appear to have been staggered, with the intent of saving the company necessary wages-expenses while seeking to benefit from the unpaid labor of some of its employees. I infer that Mr Francis had the intention of keep the company operating with an appearance of solvency to external creditors, notwithstanding that he was unable to pay employees' entitlement which deserved prompt and priority consideration.
28. The circumstance of the non-payments tends to suggest that Mr Francis, aided by the company's other managers and advisors, should have appreciated its insolvency much earlier. However, I am not considering Mr Francis' liability under corporations and insolvency legislation in relation to insolvent trading, and the evidence is insufficient for me to form judgments under that legislation. It is enough for me to conclude, by reference to the policy of the Fair Work Act and its predecessor legislation, that Mr Francis was responsible for knowing, serious, and repeated contraventions of the legislation in relation to its central obligation to pay wages and termination payments to employees promptly and fully when they fell due.
29. The financial consequences to the relevant employees of the breaches occurring between November 2009 and March 2010, are not precisely calculated in the evidence before me. I accept that Commonwealth funds have compensated some, perhaps most, of the losses of the employees. However, clearly the breaches were attended with

significant anxiety to the unpaid employees at the time they occurred, and they were forced to experience many months of uncertainty as to whether and how they might receive their entitlements. They have not been compensated for the delay in relation to the amounts they did receive.

30. These basic circumstances point to a substantial level of culpability on the part of Mr Francis as a person knowingly concerned in the course of conduct which provides the particulars of the contraventions of ss.44 and 323, concerning unpaid minimum wages. They also point to a similar level of culpability in relation to Mr Francis' knowing management of the company's finances over the same period, so that they made no provision for accrued unpaid wages nor accrued leave entitlements of employees.
31. There are some suggestions in the evidence that there *might* have been aggravating circumstances in relation to all of the contraventions. The evidence contains some suggestions that employees were dishonestly induced to provide their unpaid services to Mr Francis' company. There are also suggestions that Mr Francis might currently be associated with another printing business which has risen from the ashes of the insolvency of himself and Beaver Press Sales Pty Ltd. However, the evidence raising these suspicions is insufficient for me to make any adverse findings as to these matters, and I have put evidence raising these suspicions of aggravation out of mind when deciding penalty.
32. I have, however, not had the benefit of any evidence or submissions which persuade me to find any strongly mitigating circumstances attending the failure to pay the company employees either their minimum wage entitlements or their accrued leave entitlements. I am not satisfied that Mr Francis had any reasonable basis for directing the non-payment of employees. I am not satisfied that he has any acceptable excuse for conducting the financial affairs of his company so that they were unable to meet its statutory obligations to employees when they arose, or even in the course of insolvency administration.
33. Mr Francis has had the opportunity, which he has declined to take, to appear before me in person or through a representative to establish external causes for his contravening conduct. I do not penalise him for

his absence, but I am left with evidence which fails to satisfy me that the contraventions were the consequence of unavoidable misfortune, whether of a personal nature suffered by himself or his wife and family, or of a business nature arising from unforeseeable and unmanageable commercial events.

34. I am unpersuaded that the existence of a government assistance scheme for employees who lose significant entitlements upon the insolvency of their employers, provides any excuse for Mr Francis to have managed his company's financial affairs in knowing contravention of the Fair Work Act. I consider that it provides no excuse for his conduct shown in the evidence before me. Rather, I have concluded that his anticipatory reliance on the GEERS scheme *prima facie* reflects badly on the ethics of his management decisions, which resulted in the non-payment of his employees over the relevant period and the absence of adequate provision for employees upon insolvency. I do not consider that his, or his company's accountants or liquidators', referral of his unpaid employees to the Department administering the GEERS scheme amounts to 'corrective action' in mitigation of penalty.
35. I am unpersuaded that there is any substantial mitigating circumstance by way of expressions of contrition on the part of Mr Francis, or cooperation with investigating authorities – either prior to or during the pendency of the proceedings in the Court. He has, on the evidence before me, denied any personal responsibility and shown no remorse for the financial losses of his employees, and maintains an attitude of denial.
36. All the above matters support giving substantial weight to considerations of personal deterrence, to the extent that this can be achieved while keeping penalty proportionate to the maximum under the legislation. Similarly, the circumstances of these contraventions suggest that considerations of general deterrence of employers in the same circumstances as Mr Francis also point towards a substantial level of penalty.
37. Ultimately, I have decided that the circumstances do not call for the maximum levels of penalty, because there is no evidence that Mr Francis has in the past been found to have contravened the same or similar provisions of workplace legislation. I am also prepared to

assume that the contraventions did occur in a period of real business difficulty facing Mr Francis, which he would have preferred to have avoided.

38. Mr Francis has presented no evidence as to his current financial circumstances, so as to allow me to consider his ability to pay penalties. I am uninformed whether his creditors accepted a proposed personal insolvency agreement, what it provided, and what has been reported to creditors by his controlling trustee. This is an area of potential mitigation which I have therefore been unable to assess..
39. Taking into account all the circumstances surrounding each of the contraventions and all the evidence before me, I consider that an appropriate level of penalty for each contravention, considered in isolation, would be \$4,000.
40. However, it may be appropriate to reduce the resultant cumulative penalty, in accordance with principles both of 'same course of conduct' and 'totality'.
41. Taking into account the substantial overlap of particulars constituting all the contraventions involved in the non-payment of wages, I consider that they should, in the present circumstances, be regarded as 'one transaction' to be met by one substantial penalty to mark the gravity of the course of conduct shown by all the particulars of these contraventions (see *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [2]).
42. Once this approach is adopted in relation to the particulars of unpaid minimum periodic wages, and in view of the different nature of the failure to provide for the employees' accrued leave entitlements, I would not make any further reduction under the 'totality' principle. I do not consider that a total cumulative penalty of \$8,000 produces an excessive response to Mr Francis' overall culpability for the conduct constituting his involvement in the breaches established by the Fair Work Ombudsman (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [27] and [71]).
43. I accept the Fair Work Ombudsman's submission that the penalties should be paid to the Commonwealth, and that Mr Francis should be

allowed 28 days to pay them before they accrue interest and become enforceable.

I certify that the preceding forty-three (43) paragraphs are a true copy of the reasons for judgment of Smith FM.

Associate:



Date: 19 December 2011