FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN V GARFIELD BERRY FARM PTY LTD & ANOR [2012] FMCA 103

INDUSTRIAL – penalty hearing – gross underpayments over a substantial period of time – failure to comply with notices to produce records – cavalier attitude to authorities – first respondent in liquidation – second respondent bankrupt

Corporations Act 2001, s.471B
Fair Work Act 2009, ss. 539(2), 546(1), 546(3)(c), 557(1)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, sch. 18 cl.13(1)
Workplace Relations Act 1996, ss.719(1), 719(4)(a), 841(b)

Community & Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228, [2001] FCA 1364
Fair Work Ombudsman v Garfield Berry Farm Pty Ltd and Another [2011] FMCA 885
Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant (2007) 163 IR 14, [2007] FMCA 9;
Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216; (1992) 42 IR 255
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Ponzio v B & P Caelli Constructions Pty Ltd & Others (2007) 158 FCR 543, 162 IR 444, [2007] FCAFC 65
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	GARFIELD BERRY FARM PTY LTD
Second Respondent:	MARIA DOHERTY
File number:	MLG 739 of 2011
Judgment of:	Riley FM

Hearing date:	15 February 2012
Date of last submission:	15 February 2012
Delivered at:	Melbourne
Delivered on:	24 February 2012

REPRESENTATION

Advocate for the Applicant:	Phoebe Nicholas
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the First Respondent:	No appearance
Solicitors for the First Respondent:	No appearance
Counsel for the Second Respondent:	No appearance
Solicitors for the Second Respondent:	No appearance

ORDERS

(1) Pursuant to s.719(1) of the *Workplace Relations Act 1996* (repealed) and s.546(1) of the *Fair Work Act 2009*, the second respondent pay an aggregate penalty of $11,550 in respect of the contraventions referred to in declarations 2(a), 2(b) and 2(c) made on 9 November 2011.

(2) Pursuant to s.841(b) of the *Workplace Relations Act 1996* (repealed) and s.546(3)(c) of the *Fair Work Act 2009*, the second respondent pay the said penalty to Davin McKay within 60 days by bank cheque drawn in favour of Davin McKay and forwarded to the applicant.

(3) The parties have liberty to apply in relation to the implementation of these orders.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 739 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

GARFIELD BERRY FARM PTY LTD
First Respondent

And

MARIA DOHERTY
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application for the imposition of penalties on the second respondent for contraventions by her of the *Workplace Relations Act 1996* (Cth) (**WR Act**), the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No.1) Award 2003* and the *Fair Work Act 2009* (Cth) (**FW Act**).

2. On 9 November 2011, orders and declarations were made as follows:

> **UPON ADMISSIONS** that are taken to have been made consequent upon non-compliance with orders of the court

THE COURT ORDERS THAT:

(1) Judgment be entered for the applicant pursuant to Rule 13.03B(2)(c) of the *Federal Magistrates Court Rules 2001.*

(2) By 16 November 2011, the first respondent pay to Davin McKay $31,040.50, plus interest of $1,250.12.

(3) The matter be adjourned to 15 February 2012 at 9:30 am for further hearing with respect to the applicant's claim for penalties to be imposed on the respondents.

(4) Payment referred to in order 2 hereof be forwarded to the applicant in the form of bank cheque made out to Davin McKay.

AND THE COURT DECLARES THAT:

(1) The first respondent contravened:

a. section 182(1) of the *Workplace Relations Act 1996* (**WR Act**) by failing to pay to Davin McKay the basic periodic rate of pay prescribed under the Australian Pay and Classification Scale (**APCS**) derived from the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No.1) Award 2003* (**the Award**) for all hours of work.

b. section 185(2) of the WR Act by failing to pay to Davin McKay the basic periodic rate of pay plus a casual loading of 25% prescribed under the APCS derived from the Award for all hours of work.

c. clause 35.2 of the Award by failing to pay to Davin McKay the additional annual leave amount in lieu of annual leave prescribed under the APCS for all hours of work, namely 1/12 of the basic periodic rate of pay.

d. section 712(3) of the *Fair Work Act 2009* (**FW Act**) on two occasions by failing to comply with the terms of notices to produce served on 10 November 2010 and 20 November 2010.

(2) The second respondent:

a. was involved in the first respondent's contraventions specified in declaration 1 hereof within the meaning of section 728(1) of the WR Act and section 550(1) of the FW Act;

b. contravened the provisions specified in declaration 1 hereof; and

c. contravened section 712(3) of the FW Act by failing to comply with the terms of a notice to produce served on her on 26 November 2010.

3. The reasons for those orders were provided in *Fair Work Ombudsman v Garfield Berry Farm Pty Ltd and Another* [2011] FMCA 885. Those reasons also address the consequences of the applicant's bankruptcy.

4. On 21 November 2011, the Federal Court made orders for the winding up of first respondent and the appointment of a liquidator. The applicant accepts that the proceedings are stayed pursuant to s.471B of the *Corporations Act 2001* as against the first respondent, and does not seek leave to continue the proceedings against the first respondent. Consequently, the proceedings now only concern the second respondent.

5. The second respondent did not attend court on 15 February 2012 for the hearing of the penalty application. I am satisfied by the affidavit affirmed by Phoebe Joan Nicholas on 14 February 2012 that the second respondent was properly served with:

   a) the orders of 9 November 2011, which fixed the penalty hearing for 15 February 2012;

   b) the applicant's written submissions on penalty filed on 9 February 2012;

   c) the affidavit affirmed by Anica Winterburn on 28 October 2011;

   d) the affidavits affirmed by Phoebe Joan Nicholas on 3 November 2011, 7 November 2011 and 3 February 2012;

   e) the affidavit affirmed by Roger Detering on 17 January 2012; and

   f) the affidavit affirmed by Nicole Welsh on 27 January 2012.

6. In the circumstances of this case, I consider that it is appropriate to proceed with the penalty application, notwithstanding the applicant's absence from the hearing.

Legislative provisions

7. The *Workplace Relations Act 1996* ("WR Act") has been repealed. Nevertheless, contraventions of that Act that occurred before 1 July 2009 may still be pursued pursuant to clause 13(1) of Schedule 18 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

8. Section 719(2) of the WR Act and s.557(1) of the *Fair Work Act 2009* ("FW Act") provide that multiple contraventions of a provision are taken to constitute a single contravention where the contraventions were committed by one person and arose out of a course of conduct followed by that person.

9. Section 719(4)(a) of the WR Act and s.539(2) of the FW Act provide that the maximum penalty that may be imposed by the court for each contravention committed by a natural person is 60 penalty units. A

penalty unit is currently $110. Therefore, the maximum penalty that may be imposed by the court in respect of each contravention is $6,600.

Contraventions

10. The applicant conceded that the continuous failure to pay Davin McKay the correct basic periodic rate of pay, the correct casual loading and the correct annual leave amount in lieu of annual leave should each be treated as a single contravention. That amounts to three contraventions. That was the approach taken on 9 November 2011 to those three issues.

11. In addition, on 9 November 2011, the court found that the second respondent, by reason of her involvement in the first respondent's contraventions, had herself committed a further two contraventions consisting of a failure to comply with a notice to produce addressed to the first respondent. However, the applicant concedes that those two contraventions should be treated as one for penalty purposes. I accept that the applicant's concessions on these matters are appropriate.

12. Finally, the court found on 9 November 2011 that the second respondent had committed a further contravention by failing to comply with a notice to produce addressed to her personally.

13. The net effect is that there are five relevant contraventions. That means that the maximum possible penalty for the second respondent is $33,000.

Relevant factors in determining penalty

14. A convenient checklist of the factors that the court might consider in determining penalty include the matters that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. That list is as follows:

    (a) The nature and extent of the conduct which led to the breaches.

(b) The circumstances in which that conduct took place.

(c) The nature and extent of any loss or damage sustained as a result of the breaches.

(d) Whether there had been similar previous conduct by the respondent.

(e) Whether the breaches were properly distinct or arose out of the one course of conduct.

(f) The size of the business enterprise involved.

(g) Whether or not the breaches were deliberate.

(h) Whether senior management was involved in the breaches.

(i) Whether the party committing the breach had exhibited contrition.

(j) Whether the party committing the breach had taken corrective action.

(k) Whether the party committing the breach had cooperated with the enforcement authorities;

(l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and

(m) The need for specific and general deterrence.

Consideration of the various factors

The nature and extent of the conduct which led to the breaches

15. As noted in the reasons for decision in *Fair Work Ombudsman v Garfield Berry Farm Pty Ltd and Another* [2011] FMCA 885, the first respondent was the employer of Mr McKay. The second respondent was the director of the first respondent and, at the time of Mr McKay's employment, was responsible for the overall direction, management and supervision of the first respondent's operations. The second respondent was involved in the employment of employees of the first respondent and was responsible for, or involved in, setting and

adjusting pay rates, wages and conditions for employees and the making of payments to employees.

16. Mr McKay was employed between about 5 December 2006 and about 12 June 2009 on a casual basis, as an adult retail worker, performing duties including customer service, sales, packing shelves, cleaning and maintaining the retail area. He was paid $10.79 per hour gross from his commencement until 7 January 2007, $11.27 per hour gross from 8 January 2007 until 4 November 2007 and $12.76 per hour gross from 5 November 2007 until the end of his employment.

17. *The Shop, Distributive and Allied Employees' Association – Victoria Shops Interim (Roping-in No.1) Award 2003* ("the Award"), which applied to Mr McKay, required him to be paid considerably more. It required him to be paid $20.20 per hour from 1 December 2006 until 30 September 2007, then $20.38 per hour from 1 October 2007 until 30 September 2008, and then $21.14 from 1 October 2008 until the end of his employment.

18. Two notices were served on the first respondent and one notice was served on the second respondent seeking the production of records or documents. No documents were produced by either respondent within the specified periods. Only one document, a pay report comprising five pages in total, was subsequently produced to the applicant.

19. The underpayment of Mr McKay went on for about two and a half years. He was paid a little over half the correct award rates. He was underpaid at least $31,000. The underpayment may have been a good deal more. Mr McKay claimed to have worked weekends, and thus to have been entitled to weekend rates. However, the applicant was unable to verify this claim due to the respondents' failure to produce the required records. Consequently, the applicant has calculated the underpayment on the basis of ordinary time only.

20. On any view, Mr McKay was grossly underpaid for a prolonged period. The underpayment contraventions involved the breach of three distinct obligations, namely, the obligation to pay the correct basic periodic rate of pay, the obligation to pay the correct casual loading and the obligation to pay an annual leave amount in lieu of annual leave. I accept the applicant's submission that these obligations:

a) are basic and important conditions and entitlements under workplace relations legislation;

b) provide a safety net for low income and vulnerable workers; and

c) provide an even playing field for all employers with regard to employment costs.

21. The contraventions involving the failures to produce records constitute a breach of clear and compulsory statutory obligations, of which the respondent was given notice. These contraventions have had a serious impact on the proper calculation of Mr McKay's entitlements.

The circumstances in which that conduct took place

22. The contraventions took place in the context of the respondents conducting a small business, which the second respondent managed.

The nature and extent of any loss or damage sustained as a result of the breaches

23. As stated above, the failure to pay Mr McKay the correct wages meant that he was paid a little more than half his entitlements, as calculated by the applicant. Because of the respondents' failure to produce relevant documents, the applicant has been unable to verify Mr McKay's claim to have worked weekends. It is possible that the loss or damage is more than the $31,000 underpayment calculated by the applicant.

24. The material before the court indicates that the liquidator of the first respondent considers it unlikely that the first respondent will be able to pay Mr McKay the amount specified in the orders made on 9 November 2011. The second respondent is bankrupt. Any penalty she is ordered to pay will not be provable in her bankruptcy. However, there must be some doubt about whether the second respondent will be able to pay any substantial penalty in the near future. Consequently, it may be that the loss and damage suffered by Mr McKay will not be able to be significantly remedied.

Whether there had been similar previous conduct by the respondent

25. The applicant was not aware of any previous court proceedings regarding breaches of workplace laws by the respondents.

26. However, the material before the court indicates that a number of complaints were made to the applicant about the first respondent in 2005 and 2006. The applicant investigated these complaints and in doing so had dealings with the second respondent. More particularly, the applicant alerted the second respondent to the existence of the award that applied to Mr McKay, reminded her of her obligation to meet statutory requirements and was advised of the consequences of non-compliance.

Whether the breaches were properly distinct or arose out of the one course of conduct

27. The second respondent's failure to cause the first respondent to comply with its obligation to produce records was clearly distinct from the second respondent's failure to comply with her obligation to produce records. There were separate notices and separate addressees. The contraventions relating to notices were clearly distinct from the contraventions relating to underpayments.

28. On one view, the decision to pay Mr McKay a flat and extremely low hourly rate could be regarded as a single course of conduct. However, that is to see the situation only from the second respondent's point of view and not from the industrial umpire's point of view. For a very long time in this country, industrial instruments have provided for wages to be calculated by reference to a variety of entitlements, including whether the hours worked were ordinary time, whether the employee was a casual and whether the employee had taken annual leave to which he or she was entitled. Each of those entitlements gives rise to a separate and distinct obligation on the part of the employer. A failure to comply with any of them exposes an employer to the risk of penalty. It would be fundamentally at odds with our system of workplace entitlements to treat a breach of several obligations as if it were a breach of only one.

29. Or, as Gray J said in *Gibbs v The Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 233:

> *If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another.*

30. In my view, the five contraventions described above are properly distinct and should be treated as such for present purposes.

The size of the business enterprise involved

31. It appears from the material that the respondents' business was quite small and did not have a dedicated human resources section. However, as Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [28]:

> *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13]*.

32. Similarly, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412, the Court said at [27]:

> *Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size and such a factor should be of limited relevance to the Court's considerations of penalty.*

Whether or not the breaches were deliberate

33. As discussed above, prior to Mr McKay commencing employment with the first respondent, the second respondent had been alerted to the relevant obligations. During discussions with the applicant's officers,

the second respondent said that Mr McKay had the mental capacity of a 13 year old and was not worth $17 or $18 an hour. That is, the second respondent seems to have been under the misapprehension that she was able to pay Mr McKay as little as she believed his time was worth, rather than the legally required minimums. In these circumstances, I conclude that the underpayment of Mr McKay was deliberate.

Whether senior management was involved in the breaches

34. It is clear from the material before the court that the second respondent was formally the director of the first respondent and was in fact its directing mind and will. That is, senior management was instrumental in the breaches.

Whether the party committing the breach had exhibited contrition

35. There is no indication before the court that the second respondent has apologised for her actions, or shown any regret or remorse. There is no indication that she has sought to make up the shortfall in Mr McKay's wages.

36. The second respondent did participate in an interview with officers of the applicant. However, she was not entirely cooperative. In particular, material before the court shows that the second respondent:

    a) failed to respond in a timely fashion, or at all, to contact made by letter, email or phone by the applicant;

    b) failed to comply with multiple requests for the provision of documentation, both by way of notices to produce and other requests by inspectors in writing and in person;

    c) displayed an uncooperative attitude to Fair Work Inspectors, particularly in regard to the location of documents and the structure of the business;

    d) gave vague and evasive answers in the interview and in her other contact with Fair Work Inspectors;

e) told Fair Work Inspectors, in effect, that she was giving their investigation a low level of priority;

f) failed completely to admit to any fault;

g) attempted to distance herself from responsibility for the contraventions by asserting, falsely, that she was not at the business and did not have access to relevant information at relevant times; and

h) failed to participate in these proceedings.

37. It is customary to substantially discount the otherwise applicable penalty where a person has made an early admission of wrongdoing, has indicated a willingness to facilitate the course of justice or has shown genuine contrition. There is nothing to suggest that any of those circumstances apply in this case so as to warrant such a discount.

Whether the party committing the breach had taken corrective action

38. Neither the first nor the second respondent has taken any corrective action in this case.

Whether the party committing the breach had cooperated with the enforcement authorities

39. As discussed above, the second respondent has not cooperated with the authorities to any substantial extent.

The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements

40. It is axiomatic that employers must meet their obligations to pay minimum rates of pay and maintain proper records. Any penalty for non-compliance must reflect the importance of those obligations.

The need for specific and general deterrence

41. In relation to specific deterrence, the second respondent is presently bankrupt and, it seems, unemployed. She is about 40 years old. It is unlikely that she will be in a position to breach the obligations on employers in the near future. However, it is quite possible that the second respondent will go into business again within a few years.

42. In the present case, there has been no acceptance of fault, no remorse and no attempt to rectify the underpayment. Consequently, there is a need for the penalty to provide some measure of specific deterrence.

43. As to general deterrence, I note the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, 162 IR 444, [2007] FCAFC 65 at [93]:

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1972) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217.*

44. Similarly, in *Community & Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228 at 230, Finkelstein J said:

> *… even if there be no need for specific deterrence, there will be occasions when general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct[.]*

45. I also note the decision of this court in *Flattery v The Italian Eatery t/as Zeffirelli's Pizza Restaurant* [2007] FMCA 9 at [66]; (2007) 163 IR 14, that:

> *… a clear message needs to be sent to both the [employer] and the industry in general that underpayment of wages will not be tolerated.*

46. The applicant submitted that general deterrence was an important consideration in the present case to publicly denounce the blatant and persistent contraventions conduct perpetrated by the second respondent. The applicant submitted that such contraventions are prevalent, often go undetected and tend to undermine the system of workplace laws, which are designed to protect employees and to provide an even playing field for employers in similar industries.

Other factors

47. I do not consider that there are any other relevant factors to take into consideration in the present case.

The amount of the penalty

48. The applicant submitted that the objective seriousness of the second respondent's conduct warranted a penalty in the range of 60% to 80% of the maximum, which in this case is $33,000. The applicant submitted that there was no proper basis on which to give a discount for contrition, cooperation or rectification.

49. However, the applicant submitted that, because of the applicant's financial circumstances and, in particular, her bankruptcy, a penalty in that range would probably be crushing. Consequently, the applicant sought a penalty in the range of 25% to 50% of the maximum.

50. I consider that a penalty of 70% of the maximum would be appropriate for each of the contraventions. The contraventions in this case are bad, but they are not the worst imaginable. Having said that, the authorities had alerted the second respondent to her obligations a short time before the relevant contraventions. The underpayments were severe. Mr McKay was paid a little over half of his minimum, known entitlements. The underpayments continued for a prolonged period of about two and a half years. The second respondent has shown no contrition and little cooperation, and has made no attempt to rectify her wrongdoing. The second respondent displayed a cavalier attitude to the officers of the

applicant and her obligation to comply with their request for relevant records. She expressly stated that their lawful requirements were a low priority for her. It is appropriate that the penalty reflects both general and specific deterrence. The result would be a penalty of $23,100.

51. However, I accept the applicant's submission that, in accordance with the totality principle, the court must not impose an aggregate penalty that would be crushing. The second respondent appears to be in a parlous financial position. She is bankrupt. Any penalty she is ordered to pay would not be provable in bankruptcy. I consider that a total penalty of 35% of the maximum would be appropriate in all of the circumstances of this case. That is, there will be a penalty of $11,550. It seems to me to be appropriate to give a stay of 60 days.

Payment of the penalty

52. The applicant submitted that it would be appropriate in this case to take the somewhat unusual course of ordering the penalty to be paid to Mr McKay rather than paid into Consolidated Revenue. That course is permitted by s.841(b) of the WR Act, and s.546(3)(c) of the FW Act.

53. The applicant noted that the first respondent is most unlikely to pay Mr McKay the amount of the underpayment. The liquidator of the first respondent has advised that the first respondent has debts of almost $3 million and no realisable assets. Consequently, there is a negligible prospect of Mr McKay receiving a windfall.

54. The applicant further submitted that the only way that Mr McKay could realistically recover any of the very large amount he is owed is if the penalty were made payable to him.

55. I accept these submissions. There will be orders accordingly.

I certify that the preceding fifty-five (55) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate:

Date: 24 February 2012