# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v GAVIN FRANCIS SHEEHAN T/AS GREENVALE ROSE FARM* *[2012] FMCA 344*

INDUSTRIAL LAW – Application for civil penalty – breaches of the WR Act and FW Act – underpayments – breaches in relation to – records – overtime – annual leave – payslips – breaches admitted – considerations as to penalty.

*Workplace Relations Act 1996* (Cth) s.719, 841
*Workplace Relations Regulations 2006 (Cth)* 19.4, 19.5, 19.9, 19.12, 19.13, 19.20
*Fair Work Act 2009* (Cth) ss.535, 536, 539, 546, 547, 557
*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth)
*Fair Work Regulations 2009* (Cth) 3.34, 3.36, 3.37, 3.40
*Crimes Act 1914* (Cth) s.4AA

*Kelly v Fitzpatrick* (2007) 166 IR 14
*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7
*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8
*Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599
*Ponzio v B & P Caelli Construction Pty Ltd* (2007) 158 FCR 543
*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70
*Cotis v Macpherson* (2007) 169 IR 310
*Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412
*Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231
*Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38
*McIver v Healey* [2008] FCA 425
*Gibbs v Mayor Councillors and Citizens of City of Altona* (1992) 37 FCR 216
*Fair Work Ombudsman v TAJ Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258
*Lynch v Buckley Sawmills Pty Ltd* (1985) 3 FCR 503
*Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd* (1994) 127 ALR 673.

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| Applicant: | FAIR WORK OMBUDSMAN |
| Respondent: | GAVIN FRANCIS SHEEHAN T/AS GREENVALE ROSE FARM |

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|---|---|
| File Number: | MLG 896 of 2011 |
| Judgment of: | O'Sullivan FM |
| Hearing date: | 24 April 2012 |
| Date of Last Submission: | 24 April 2012 |
| Delivered at: | Melbourne |
| Delivered on: | 24 April 2012 |

**REPRESENTATION**

| | |
|---|---|
| Counsel for the Applicant: | Ms Sweet |
| Solicitors for the Applicant: | Office of the Fair Work Ombudsman |
| Counsel for the Respondent: | Mr Low |
| Solicitors for the Respondent: | Effron & Associates |

**ORDERS:**

**THE COURT DECLARES THAT:**

1. The respondent has contravened:
    a. Clause 15.2 of the *Shops, Distributive & Allied Employees Association – Retail Victorian Shops Award 2000* ("the Transitional Award");
    b. Clause 29.2.1 of the Transitional Award;
    c. Clause 15.2 of the award based transitional instrument derived from the Transitional Award ("AWTI");
    d. Clause 12 of the AWTI;
    e. Subclause 32.4.12(b) of the AWTI;
    f. Sub-regulation 19.4(1) of the *Workplace Relations Regulations 2006* ("WR Regulations");
    g. Sub-regulation 19.5(1) of the WR Regulations;
    h. Sub-regulation 19.9(1) of the WR Regulations;
    i. Sub-regulation 19.12(1) of the WR Regulations;
    j. Sub-regulation 19.13(1) of the WR Regulations;
    k. Sub-regulation 19.20(1) of WR Regulations;
    l. Sub-regulation 19.20(3) of the WR Regulations;
    m. Sub-regulation 19.21(1)(a) of the WR Regulations;
    n. Sub-regulation 19.21(1)(b) of the WR Regulations;
    o. Sub-regulation 19.2(1)(c) of the WR Regulations;
    p. Sub-regulation 19.2(1)(k) of the WR Regulations;
    q. Sub-section 535(2) of the *Fair Work Act 2009* ("FW Act");
    r. Sub-section 536(1) of the FW Act;
    s. Regulation 3.34 of the *Fair Work Regulations 2009* ("FW Regulations");
    t. Regulation 3.36(1) of the FW Regulations;
    u. Regulation 3.37(1) of the FW Regulations; and
    v. Regulation 3.40 of the FW Regulations;

**THE COURT ORDERS THAT:**

2. The Respondent pay to the Commonwealth the following penalties:
    a. $2640 for failure to pay the correct minimum weekly rate of pay;
    b. $2640 for failure to pay the penalty rates for overtime worked;
    c. $2640 for withholding of monies on notice in lieu of payment upon termination;
    d. $1320 for failure to make and keep sufficient employee records;
    e. $400 for failure to make and keep any employee records;
    f. $440 for failure to issue payslips with sufficient detail;
    g. $320 for failure to issue any payslips; and
    h. $440 for failure to keep employee records in a state that allows a workplace inspector to assess employee entitlements.
3. The aggregate penalty in order 1 above be paid within six months of the date of judgment pursuant to a payment plan with equal installments to be paid monthly with the first payment to be made on 25 May 2012.
4. The respondent pay to Ryan Brown the sum of $17,062.24 on or before 27 April 2012 ("the underpayment").
5. The respondent pay to Ryan Brown the lump sum of $1,219.95 by way of interest on the underpayment.
6. The applicant have liberty to apply on seven days notice in the event that order 4 is not complied with.

**AND THE COURT NOTES THAT:**

7. Order (4) of the orders made on 10 November 2011 required the respondent to remedy the underpayment by 27 April 2012 and the respondent will use his best endeavors to do so.

**FEDERAL MAGISTRATES**
**COURT OF AUSTRALIA**
**AT MELBOURNE**

## MLG 896 of 2011

**FAIR WORK OMBUDSMAN**
Applicant

And

**GAVIN FRANCIS SHEEHAN T/AS GREENVALE ROSE FARM**
Respondent

# REASONS FOR JUDGMENT

## (Revised from transcript)

## Introduction

1. In these proceedings the Fair Work Ombudsman ("the applicant") seeks a series of orders against Gavin Francis Sheehan ("the respondent") pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ("the WR Act") and s.546 of the *Fair Work Act 2009* (Cth) ("the FW Act").

2. The proceedings were commenced in 2011 against the respondent. The applicant alleged the respondent had contravened the WR Act and the FW Act, underpaid an employee and breached the provisions of the WR Act and the FW Act.

3. The application was filed on 28 June 2011. There were orders made on 15 July 2011 by consent for the filing of a defence and the matter was

adjourned to 10 November 2011. After this the respondent filed a response denying the allegations and the parties attended a mediation.

4. On 10 November 2011 and following the mediation the parties requested the matter be set down for a hearing on penalty only. The parties indicated the applicant needed to file an amended statement of claim and as a result of the mediation it was expected there would be admissions made in relation to liability.

5. The Court was asked to set a date in the first quarter of 2012 for a penalty hearing. Accordingly on 10 November 2011 orders were made by consent setting the matter down for a penalty hearing on 24 April 2012.

6. The matter was listed for a mention on 10 February 2012 at the applicant's request to deal with concerns about compliance with the timetable for the filing of material for the penalty hearing.

7. On that occasion certain procedural orders were made and the matter was adjourned for a telephone mention. On 17 February 2012 following that telephone mention, the following orders were made:

> *"1. …*
>
> *2. The parties file and serve any Statement of Agreed Facts by not later then 4.00 pm on 2 March 2012.*
>
> *3. The applicant file and serve submissions and evidence upon which it intends to rely in respect of penalty by not later than 4.00 pm on 23 March 2012.*
>
> *4. The respondent file and serve submissions and evidence upon which it intends to rely in respect of penalty by not later than 4.00 pm on 13 April 2012.*
>
> *5. The matter remains listed for a penalty hearing on 24 April 2012 at the Federal Magistrates Court of Australia at Melbourne commencing at 10.00 am.*
>
> *AND THE COURT NOTES:*
>
> *A. The documents referred to in orders 2, 3 and 4 herein shall be emailed in word format to: copies to be sent to the Associate to Federal Magistrate O'Sullivan at associate.fmo'sullivan@fmc.gov.au."*

8. Since then the parties have filed a statement of agreed facts on 2 March 2012 ("S.O.A.F") which is Annexure A to these reasons. The applicant filed submissions on 23 March 2012 and the respondent filed submissions on 18 April 2012. The applicant filed submissions in reply on 20 April 2012.

9. In the S.O.A.F the respondent made admissions regarding contraventions of the WR Act and FW Act.[1]

10. At the penalty hearing on 24 April 2012 Counsel for the applicant (Ms Sweet) and the respondent (Mr Low) relied on:

    a) folder of agreed documents tendered – exhibit A1;

    b) the application filed 28 June 2011 – exhibit A2;

    c) the amended statement of claim filed 16 November 2011 – exhibit A3;

    d) the S.O.A.F - exhibit A4;

    e) the affidavit of Alexander Charles Roy filed 23 March 2012 exhibit A5;

    f) the applicant's submissions filed 23 March 2012- exhibit A6;

    g) the respondent's submissions filed 18 April 2012 – exhibit R1; and

    h) the applicant's submissions in reply filed 20 April 2012 – exhibit A7.

11. The issue(s) that remains to be determined is the appropriate penalty that should be imposed for the admitted contraventions on the respondent and what consequential orders should be made. The parties told the Court that in the event the Court imposed a penalty, there was agreement it be paid pursuant to a payment plan within 6 months.

[1] see para 1-2 S.O.A.F filed 2 March 2012

## Background

12. The following is drawn from the S.O.A.F. filed by the parties and summarises the events in 2007 until 2009 which led to the admitted contraventions of the WR Act and FW Act by the respondent.

13. The respondent owns and operates a rose farm and retail business trading as Greenvale Rose Farm at Atwood in Victoria.

14. The respondent employed Mr Ryan Brown in October 2007 as an apprentice. Mr Brown was engaged with the assistance of Jobs Plus a disability service provider. At that time Mr Brown was 20 years of age. During the course of his employment with the respondent Mr Brown performed duties including watering, setting up drip systems, fertilising, spraying, mowing, weeding, trawling, mulching and re-potting roses.

15. Mr Brown worked for the respondent on a full time basis until he resigned on or around October 2009. By this time Mr Brown had completed his apprenticeship.

16. In March 2010 Mr Brown made a complaint to the applicant in relation to alleged underpayments arising from his employment with the respondent.

17. The applicant commenced an investigation into those allegations and ultimately commenced these proceedings in June 2011.

## The legal framework

18. These proceedings concern contraventions of the WR Act and the FW Act.

19. On 1 July 2009 the WR Act was repealed by the provisions of the FW Act. In respect of breaches occurring prior to 1 July 2009, s.11 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("T&C Act") provides that the WR Act continues to apply on or after 1 July 2009 in relation to conduct that occurred before that date.

20. The applicant (the Fair Work Ombudsman) is a "Fair Work Inspector" pursuant to s.701 of the FW Act.

21. A Fair Work Inspector may bring proceedings relating to conduct that occurred before the repeal of the WR Act pursuant to sub item 13(1) of Part 3 to Schedule 18 of the T&C Act.

22. Section 719(1) of the WR Act and s.546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

23. Subsection 719(2) of the WR Act and s.557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

24. Section 719(4) 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.

25. At the commencement of Mr Brown's employment with the respondent the *Shop, Distributive and Allied Employee Association Retail – Victorian Shops Award 2000* ("the Award") governed his terms and conditions of employment.

26. The Award applied to the employee's employment with the respondent as pursuant to Schedule 6 of the WR Act and whilst it had been a common rule award in Victoria before this date, it became a transitional award for the purposes of the WR Act on and from 27 March 2006. At the time of the commencement of Mr Brown's employment the Award, albeit in the form of a transitional award, applied to his employment by the respondent.

27. During this period, and pursuant to both the Award and the applicable provisions of the *Workplace Relations Regulations 2006,* the respondent was required to observe requirements in relation to wages,

overtime, annual leave, superannuation, recording same and issuing payslips.

28. On and from 1 July 2009 the Award became an award based transitional instrument ("the AWTI") pursuant to the relevant provisions of the T&C Act, and the FW Act and along with the other provisions of that legislation continued to apply to Mr Brown's employment with the respondent.

29. Under the FW Act, the AWTI, and the *Fair Work Regulations* 2009 the respondent was required to comply with provisions in relation to wages, payment of wages and accrued annual leave on termination along with the applicable provisions concerning overtime, leave, superannuation, recording same and issuing payslips.

## Approach to penalty proceedings

30. The factors relevant to the imposition of a penalty under the WR Act were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, [26]-[59], 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."*

31. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion.

32. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (2007) 166 IR 14 said at [9]:

> *"9. Checklists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court 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…"*

## Admitted contraventions

33. As noted above the parties filed a S.O.A.F on 2 March 2012.

34. The respondent now admits:

> *1. … to contravening the following provisions in respect to Ryan Brown (the Employee):*
>
> *a. clause 15.2 of the Shop, Distributive and Allied Employee Association Retail – Victorian Shops Award 2000 [AT796250CRV] in relation to wages (the Transitional Award);*
>
> *b. clause 29.2.1 of the Transitional Award in relation to overtime;*

c. *clause 15.2 of the award based transitional instrument derived form the Transitional Award (AWTI) in relation to wages;*

d. *clause 12 of the AWTI in relation to retention of pay on termination;*

e. *clause 32.4.12(b) of the AWTI in relation to accrued annual leave payable on termination;*

f. *sub-regulation 19.4(1) of the Workplace Relations Regulations 2006 (Cth) (WR Regulations), in relation to employee records;*

g. *sub-regulation 19.5(1) of the WR Regulations, in relation to the condition of the employee record;*

h. *sub-regulation 19.9 (1) of the WR Regulations, in relation to recording overtime;*

i. *sub-regulation 19.12(1) of the WR Regulations, in relation to recording leave;*

j. *sub-regulation 19.13(1) of the WR Regulations, in relation to recording superannuation;*

k. *sub-regulation 19.20(1) of the WR Regulations, in relation to payslips;*

l. *sub-regulation 19.20(3) of the WR Regulations, in relation to the content of payslips, relying on sub-regulations 19.21(1)a, 19.21(1)(b), 19.21(1)(c) and 19.21(1)(k) of the WR Regulations;*

m. *subsection 535(2) of the Fair Work Act (FW Act) in relation to employee record;*

n. *subsection 536(1) of the FW Act, in relation to payslips;*

o. *regulation 3.34 of the Fair Work Regulations 2009 (Cth) (FW Regulations). In relation to overtime;*

p. *sub-regulation 3.36(1) of the FW Regulations, in relation to leave;*

q. *sub-regulation 3.37(1)of the FW Regulations, in relation to superannuation; and*

*r. regulation 3.40 of the FW Regulations, in relation to a termination record.*[2]

35. The respondent also admits that the abovementioned contraventions resulted in an underpayment to the employee of $17,062.24.[3]

## Considerations

36. The parties agreed the relevant considerations when fixing penalties in this case include:

a) the nature and extent of the offending conduct;

b) the circumstances in which the conduct took place;

c) the nature and extent of any loss or damage;

d) any similar previous conduct;

e) whether the breaches were properly distinct or arose out of one course of conduct;

f) the size of the respondents undertaking;

g) the deliberateness of the breach;

h) the involvement of senior management;

i) the respondents contrition, corrective action and cooperation with the enforcement authorities;

j) ensuring compliance with minimum standards;

k) deterrence.

### The nature and extent of the offending conduct

37. The S.O.A.F set out the background to and nature of the offending conduct (eg. the background and contraventions).[4]

[2] see para 1 of S.O.A.F
[3] see para 2 of S.O.A.F
[4] see paras 3-87 of S.O.A.F

38. The parties agree that, by reason of the respondent's contraventions employee was underpaid $17,062.24.[5] This amount for a person in the position of the employee would have been considerable. For the duration of his employment, the employee was paid by the respondent at a weekly rate of pay below that to which he was entitled.[6] The respondent was obliged to pay the employee overtime. In 2007 the respondent paid the employee on the basis of the same weekly rate of pay, regardless of the hours actually worked.[7]

39. The employee resigned his employment with the respondent without notice. As an apprentice he was not required to provide his employer with notice of termination of employment.[8] Upon termination, the respondent made payment to the employee of an amount in reference to the employee's accrued annual leave entitlements (albeit at the incorrect weekly rate of pay), but only after deducting one week's pay in lieu of notice.[9]

40. Between 2007 and 2008 from 22 October 2007 until 2 May 2008, the respondent issued the employee with payslips which contained insufficient information compared to the statutory requirements. From about mid 2008, the respondent ceased issuing payslips.[10]

41. The respondent failed to make or keep any employee records until 4 July 2008. From 4 July 2008 to 26 October 2009, the respondent did keep a record in relation to the employee. However, those records were deficient.[11]

42. In submissions filed 23 March 2012 the applicant contended:

> *"The contraventions took place over the course of approximately two years from October 2007 to October 2009.[12] As is evident from the terms of the S.O.A.F, the contraventions were multifarious and wide-ranging, relating to the basic weekly rate of pay, penalty rates, payment of accrued annual leave upon*

[5] S.O.A.F. [2], [19] to [20], [71]
[6] S.O.A.F. [19] to [20]
[7] S.O.A.F. [23] to [25]
[8] S.O.A.F. [35]
[9] S.O.A.F. [36] to [37], [41].
[10] S.O.A.F. [51], [58], [66] to [68]
[11] S.O.A.F. [51], [63] to [65], [69]
[12] Paragraph 11 of the S.O.A.F.

*termination, unlawful retention of pay in lieu of notice upon termination, record keeping and payslip obligations.*

*The contraventions represent a failure to meet the purpose and objectives of the relevant legislation: to provide a safety net which ensures adequate minimum entitlements to employees, particularly those who are vulnerable or in low income roles. Contravention of these fundamental entitlements undermines the workplace relations regime as a whole and displays a disregard for the Respondent's statutory obligations to pay minimum entitlements, to create appropriate employment records and to issue payslips.*

…

*The Respondent admitted that he did not seek to verify the correct rates of pay for the Employee upon commencement, instead relying on the fact that he had previously paid employees with similar experience approximately the same rates of pay;*[13]

*The Respondent admitted that he did not record the taking of personal leave by the Employee or provide payslips to the Employee.*[14] *The Respondent's conduct in this case is aggravated by this failure to keep the required time and wage records and provide the Employee with payslips. This prevented the Applicant from ascertaining the full extent of the underpayments and may have prejudiced the ability of the Applicant to ascertain the full amount potentially owed to the Employee, in particular concerning payment of penalty rates for overtime worked; and*

*the Respondent gave the following justification for failing to provide the Employee with payslips:*

…

*The Respondent has had the benefit of the underpayment over a significant period. Further, despite his admissions of wrongdoing in this regard, the Respondent has not rectified the underpayment at the date of filing these submissions."*[15]

43. The respondent made no specific submissions on this factor. The failure to meet minimum entitlements under the WR Act and FW Act is a fundamental breach of the objects of that legislation. In the circumstances

[13] Page 26 of S.O.A.F-1

[14] Pages 34 and 35 respectively of S.O.A.F-1.

[15] See paras 38-41 of applicant's submissions

where these contraventions are accompanied by others involving the failure to keep appropriate records, this is an aggravating factor.

44. Whilst there has been a good deal of change in the legislation governing these sorts of matters in the last number of years the Court finds the nature and extent of the conduct in relation to the admitted contraventions displays a disregard for its statutory obligations by the respondent. It is not to point to seek to deflect blame to others for the contraventions by claiming reliance on advice provided by them.

## The circumstances in which the conduct took place

45. The applicant in submissions said in relation to this factor:

> *"The Employee was vulnerable by reason of his age and the fact that he was an apprentice and further was wholly reliant on the minimum terms and conditions offered by the respective industrial instruments. These characteristics of the Employee were known to the Respondent at all material times.*
>
> *At all relevant times, the Respondent operated a rose propagation business as a sole trader, in Atwood, Victoria."*[16]

46. In submissions the respondent's position was:

> *"7. Throughout the years of operating the Business, the Respondent has predominantly been operating it by himself. However, since 2006, the Respondent began hiring part-time / casual / apprentice to help him operate the Business and provide employment and apprenticeship opportunities for young people including people with disabilities.*
>
> *8. It was in the circumstances as stated in paragraph 7 above that the Respondent, through the assistance of Jobs Plus, a disability service provider, hired Ryan Brown, an intellectually disabled 20 year old client of Jobs Plus, the Employee, from 22 October 2007 until 26 October 2009, to help him to complete his horticulture apprenticeship working on the Respondent's farm watering, setting up drip systems, fertilising, spraying, mowing, weeding, trellising, mulching and re-potting roses.*

[16] See para 42-43 of applicants submissions filed 23 March 2012

9. *Prior to offering Ryan the opportunity to complete his apprenticeship Ryan had previously commenced an apprenticeship in horticultural, parks and gardens certificate III at Caulfield Grammar. The Respondent offered Ryan the opportunity to complete his apprenticeship in the horticultural, parks and gardens certificate III and specified his duties to include farm watering, setting up drip systems, fertilising, spraying, mowing, weeding, trellising, mulching and re-potting roses and in the presence of Ryan's mother offered to match the apprenticeship salary payments he was receiving at his previous place of employment which offer was accepted.*

10. *By reason of his education level and knowledge, the Respondent had often relied upon the advice of others in relation to matters of workplace laws and requirements such as:. Victorian Apprenticeship Board, Commonwealth Rehabilitation Services and Jobs Plus. The Respondent acknowledges that he was told to put down "the retail trade sector" and in fact did so. Nevertheless, the Respondent understood the retail trade sector to apply to any industry in the State of Victoria that mainly engaged in the resale of new or used goods to final consumers for personal or household consumption or in certain of their activities. The Respondent was of the view that he was not reselling new or used goods to final consumers for personal or household consumption and was of the view that Retail Trade Sector award did not cover Ryan's duties."*

47. Notwithstanding the submissions made on his behalf, the conduct, which the respondent admits, in relation to the contraventions occurred over an extended period in circumstances where it is possible to infer that the employee was vulnerable and has not received his minimum entitlements.

## The nature and extent of any loss or damage

48. The applicants submissions on this factor were:

> *"During the Period of Employment, the Respondent underpaid the Employee **$17,062.24**. This amount represents a significant amount of money for an apprentice employee who is reliant on the minimum wage. For example:*

*from 25 November 2007 to 30 September 2008, the Employee was underpaid his weekly rate of pay entitlement by $149.40, representing an underpayment of 33% of his weekly entitlement;*

*from 1 October 2008 to 23 November 2008, the Employee was underpaid his weekly rate of pay entitlement by $166.20, representing an underpayment of 35% of his weekly entitlement;*

*from 23 November 2008 to 21 December 2008, the Employee was underpaid his weekly rate of pay entitlement by $241.50, representing an underpayment of 45% of his weekly entitlement; and*

*from 1 January 2009 to 26 October 2009, the Employee was underpaid his weekly rate of pay entitlement by $159.50, representing an underpayment of 30% of his weekly entitlement.*[17]

*As noted above, the Respondent has not yet rectified the underpayment."*[18]

49. The respondent made no specific submission on this factor. The applicant's submissions on this factor clearly essayed the nature of extent of the loss or damage occasioned by the respondents conduct. The Court notes the respondent through his Counsel indicating he would use his best endeavours to remedy the underpayment by 27 April 2012. Given the background this is less than satisfactory.

## Any similar previous conduct

50. There is no evidence of any previous findings of contraventions of Commonwealth workplace laws by the respondent.

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

51. The parties agreed the respondent should have and has the benefit of s.719(2) of the WR Act and s.557(1) of the FW Act in relation to repeated breaches.[19]

[17] see generally S.O.A.F [19] to [22].

[18] see para 44-45 of applicant's submissions

[19] see paras 33-34 of applicant's submissions filed 23 March 2012

52. The Applicant has accepted that some of the contraventions can be treated as one single contravention due to their commonality. Section 719(2) of the *Workplace Relations Act* provides:

> *"(2) Subject to subsection (3), where:*
>
> *(a) 2 or more breaches of an applicable provision are committed by the same person; and*
>
> *(b) the breaches arose out of a course of conduct by the person;*
>
> *the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.*
>
> *(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision."*

53. Similarly s.557 of the FW Act provides:

> *"(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:*
>
> *(a) the contraventions are committed by the same person; and*
>
> *(b) the contraventions arose out of a course of conduct by the person."*

54. These provisions ensure that the respondent is not penalised more than once for the same conduct.

55. The applicant's submissions and position before the Court acknowledged there were common elements involved in the contraventions. In submissions the applicant contended:

> *"The Applicant therefore submits that, when having regard to the Contraventions, the following contraventions should be grouped and treated as a course of conduct constituting a single contravention:*

*(a) failure to pay the Employee the correct minimum weekly rate of pay: clause 15.2 of the Transitional Award; clause 15.2 of the ATWI; sub-clause 32.4.12(b) of the AWTI;*

*(b) failure to make or keep sufficient records in relation to the Employee: in contravention of 19.4(1) of the WR Regulations, with respect to prescribed content specified at sub-regulation 19.9(1) (overtime), sub-regulation 19.12(1) (leave), sub-regulation 19.13(1) (superannuation), and in contravention of sub-section 535(2) of the FW Act with respect to prescribed content specified at regulation 3.34 of the FW Regulations (overtime), regulation 3.36 (leave), regulation 3.37 (superannuation), and regulation 3.40 (termination); and*

*(c) failure to issue payslips with sufficient detail to the Employee: in contravention of sub-regulations 19.20(1) and 19.20(3), with respect to content prescribed at sub-regulations 19.20(1)(a) (name of employer), (b) name of employee), (c) date of payment; and (k) (superannuation).*

*If these groupings are accepted by the Court, then the Applicant submits that the maximum penalty to be imposed upon the Respondent is* ***$29,700*** *comprised of the following penalties:*

*(a) failure to pay the Employee the correct minimum weekly rate of pay ($6,600);*

*(b) failure to pay the Employee penalty rates for overtime worked ($6,600);*

*(c) withholding of monies as notice in lieu of payment upon termination ($6,600);*

*(d) failure to make and keep sufficient employee records ($3,300);*

*(e) failure to make and keep any employee records ($1,100);*

*(f) failure to issue payslips with sufficient detail to the Employee ($1,100);*

*(g) failure to issue any payslips to the Employee ($3,300); and*

*(h) failure to keep records in a state that allows an inspector to assess the Employee's entitlements ($1,100).*[20]

[20] see paras 33-34 of applicants submissions

56. However these submissions did note:

> *"The [S.O.A.F] illustrates that the Respondent's conduct extends beyond a single course of conduct. This is not a matter where the one decision of the Respondent gave rise to the entire underpayment: there are a number of decisions by the Respondent, made at different points, in relation to the payment of the Employee's entitlements, which gave rise to the underpayment.*
>
> …
>
> *Further, the Respondent's conduct with respect to record keeping and payslips involved a number of courses of conduct, as he failed initially to make any employee records, then decided to make or maintain records with insufficient detail. Similarly, the Respondent initially issued payslips to the Employee with insufficient detail, then decided to cease issuing payslips entirely. The Applicant accepts that the penalty in relation to some of these contraventions may be appropriately grouped; however, no significant discount should be afforded to the Respondent for this, due to the persistent nature of the contravening conduct."*[21]

57. I accept the respondent is entitled to the benefit of s.719(2) of the WR Act and s557(1) of the FW Act in respect of multiple breaches of the same term of the relevant industrial instrument and the WR Act and FW Act and accompanying regulations and will take that into account in determining the appropriate penalty.

## The size of the respondents undertaking

58. The applicant's submissions on this issue were:

> *"The Respondent is a sole trader and is solely responsible for the setting of terms and conditions of employment of the Employee.*[22] *However, the small size of the business and lack of dedicated human resources personnel is not a particularly relevant matter on the question of penalty. An employer's obligation to adhere to industrial instruments and pay minimum entitlements arises regardless of their size and financial position. No reduction on penalty should be afforded to the Respondent because of this.*[23]

[21] see paras 47-49 applicants submissions
[22] Paragraph 9(j) of the S.O.A.F
[23] See *Cotis v MacPherson* (2007) 169 IR 30 at [16] (Driver FM) and *Kelly*, supra at [28].

*In* Kelly, *Tracy J stated 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.'*

*The Respondent has provided evidence of its financial position to the Applicant.*[24] *These records show that the Respondent's business was in an overall negative financial trading position for at least the period January 2009 to June 2011.*

*Based on the financial records provided, it is open for the Court to treat this as a factor in mitigation of any penalties to be imposed on the Respondent. However, the Applicant submits that the weight the Court gives this factor must be balanced against the weight attributed to the objective seriousness and recklessness of the contravening conduct, and the need to impose a sufficiently meaningful and deterrent penalty."*[25]

59. In submissions the respondent's position was:

> *"5. The Respondent is and was at all material times a sole trader owning and operating a rose propagation business (the* ***"Business****") at Atwood, Victoria, trading under the name 'Greenvale Rose Farm' since 2004.*
>
> *6. The Respondent is not a sophisticated person in matters of the law, and is only knowledgeable in matters in relation to the Business.*
>
> …
>
> *18. As it is, the Respondent is already struggling to pay the amount of $17,062.24 agreed to be paid to the Employee for underpayment. Notwithstanding his financial difficulties, the Respondent is taking all steps necessary to ensure that he complies with the Court Order of 10 November 2011 to pay the Employee by no later than 10.00am on 27 April 2012. At the date of making these submissions, the Respondent has*

[24] Paragraph 96 and Annexure "S.O.A.F-2" of the S.O.A.F and paragraph 14 and Annexure ACR-4 (**ACR-4**) of the Roy Affidavit.

[25] see para 50-53 of applicant's submissions

*not failed to pay the Employee as submitted by the Applicant.*

19. *Further, the Respondent's Business was and still is in an overall negative financial trading position.*

20. *The Respondent's contraventions of the workplace laws and requirements were not to take advantage of those who are vulnerable or in low income roles such as the Employee. Neither were those contraventions a display of disregard of the workplace laws and requirements.*

21. *The Respondent's contraventions, at best, displayed his naivety in relying on others and an honest mistake on his part.*

22. *As acknowledged by the Applicant in paragraph 54 of the Applicant's submissions, there is no evidence before the Court to suggest that the Respondent deliberately sought to underpay the Employee."*[26]

60. Whilst it is accepted the respondent has a small business an employer's obligation to adhere to industrial instruments and pay minimum entitlements arises regardless of their size and financial position.

61. The applicant accepts the respondent was in a poor financial position.[27] There is evidence before the Court of the respondent's financial position in the last financial year. There needs to be evidence of the respondent's actual and current financial position for that matter to be considered as a mitigating factor. In any event any claimed incapacity should not prevent the Court from imposing penalties that are otherwise appropriate.[28]

62. The size of the respondent's business does not absolve him of legal responsibility to comply with the law in relation to the employment of his employees. (see *Workplace Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 and *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27] to [29])

[26] see para 5-22 of respondents submissions filed 18 April 2012
[27] see items 33-42 of Exhibit A1 filed 24 April 2012
[28] see *Lynch v Buckley Sawmills Pty Ltd* (1985) 3 FCR 503 at 508 and *Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd* (1994) 127 ALR 673 at 688

## The deliberateness of the breach

63. In relation to this factor the applicant submitted:

> *"There is no evidence before the Court to suggest that the Respondent deliberately sought to underpay the Employee. The Respondent was put on notice regarding its obligations under the Transitional Award and AWTI when he was first contacted by the Office of the Applicant on or around 23 April 2010, which was after the Employee has ceased to be employed by the Respondent.*
>
> *However, the Applicant submits that the Respondent was reckless in the manner in which it determined the Employee's terms and conditions of employment.*
>
> …
>
> *By the Respondent's own admissions, around the time he engaged the Employee he was on notice from Jobs Plus that there may be an alternative industrial instrument applicable to the Employee's employment. The Respondent failed to consider any alternative industrial instruments, and instead chose to apply terms and conditions of employment that did not satisfy the Employee's minimum entitlements under the Transitional Award and the AWTI. The Respondent's actions are further compounded by the fact that he relied on previous rates of pay he had paid previous employees, and on the Employee's advice of his previous rate of pay with another employer and remunerated the Employee accordingly.*[29]
>
> *It is the Applicant's submission that the Respondent was reckless as to the Employee's terms and conditions of employment in that he failed to take appropriate steps, as any responsible employer would, to ascertain the correct industrial instrument once he was put on notice that there were other industrial instruments which could apply to the Employee's employment. In our view, this is a factor in aggravation of any penalties to be imposed upon the Respondent."*[30]

64. The respondent's submissions emphasised the contraventions were not deliberate. Whilst the respondent may not have deliberately sought to deprive the employee of his lawful entitlements the contraventions do evidence a disregard by the respondent for his statutory obligations.

[29] Refer to paragraph 40(a) to (b) of applicant's submissions

[30] see paras 54-57 of applicant's submissions

I note what the respondent said in submissions on that issue[31] but ignorance is no excuse. Whilst the Court notes what the respondent through his Counsel this day said in relation to the underpayment the applicant remains concerned the delay in remedying this gives rise to an adverse inference against the respondent.

## The involvement of senior management

65. The applicant's submission on this issue was:

> *"The Respondent is a sole trader and there is no evidence before the Court that the Contraventions were attributable to any other person or agent. As such, the parties submit that this factor should be treated as neutral."*[32]

66. Not surprisingly given the agreed facts the parties in submissions acknowledged there was no evidence to suggest that the respondent wasn't responsible for the employment of the employee. However I bear in mind what was said in the respondent's submissions relevant to this factor. In particular I note the submission that the respondent was not a particularly *"sophisticated person in matters of law"*.

## The respondent's contrition, corrective action and cooperation with the enforcement authorities

67. This is an important factor. In submissions the applicant addressed this factor as follows:

> *"The Respondent was first notified of the complaint lodged with the Applicant by the Employee on 23 April 2010.*[33]
>
> *The Respondent has, in part, and somewhat reluctantly, co-operated with Fair Work Inspector Adam Doe (**FWI Doe**) and Fair Work Inspector Nancy Melito (**FWI Melito**) during the investigation of the complaint by ultimately providing some documents in response to requests by the FWI Doe,*[34] *Elizabeth Priest, a solicitor employed by the Applicant,*[35] *and a second*

[31] see paras 18-22 of submissions filed 18 April 2012
[32] see para 58 of applicant's submissions
[33] Paragraph 73 of the S.O.A.F.
[34] Paragraph 74 of the S.O.A.F
[35] See Roy Affidavit generally.

*notice to produce issued by the Applicant.*[36] *The Respondent also participated in a recorded interview to assist the Applicant during its investigation.*[37]

*The Respondent has made admissions as to liability.*[38] *This approach avoided the need for contested litigation on liability and allowed the matter to proceed to a hearing on the issue of penalties to be imposed on the Respondent. These actions have reduced the costs incurred by both parties, and spared the Court's resources that would otherwise have been required had the matter proceeded to a contested hearing on liability.*

*The Rectification Sum has not been paid to the Employee, although, the Respondent has previously consented to the orders of the Court being made, obliging him to pay the Rectification Amount to the Employee by no later than 27 April 2012.*[39]

*The Respondent has produced records relating to his compliance with industrial laws and instruments. Initially, this record consisted of a single pay slip issue to an employee,*[40] *although further payslips have subsequently been provided.*[41] *A further request for documents regarding current compliance with industrial laws and instruments has been sent by the Applicant, and, at the date of filing these submissions, has not been responded to.*[42] *The evidence shows that action is being taken by the Respondent to ensure that he is currently complying with his obligations in respect to current employees, especially in relation to his record keeping and payslip obligations. However, the Applicant is not in a position to make fulsome submissions on this point, due to lack of information. If the Respondent provides further evidence to the Applicant prior to the hearing on 24 April 2012, the Applicant will consider making further submissions concerning the Respondent's current compliance, should there be a proper basis for doing so.*

*The matters in mitigation described above should be balanced against the following:*

*the Payment has not been rectified;*

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[36] The Respondent did not respond to an initial notice to produce (**NTP**) issued on 23 July 2010 but did respond to a second NTP served on 31 August 2010 which was in similar terms to the first NTP.

[37] Paragraph 86 of the S.O.A.F.

[38] Paragraph 1 of the S.O.A.F.

[39] Paragraph 95 of the S.O.A.F.

[40] Paragraph 98 of the S.O.A.F, S.O.A.F.-3.

[41] Paragraph 14 of Roy Affidavit and ACR-4

[42] Paragraph 15 of Roy Affidavit.

*the Respondent filed a defence that contained a number of irregularities and inconsistencies in the evidence previously given by the Respondent to the Applicant in the course of its investigation and the Respondent's own documentation;*[43]

*the failure by the Respondent to respond to the correspondence of 10 August 2011 which sought to mutually resolve a number of issues in dispute arising from the pleadings.*[44] *The lack of engagement by the Respondent meant that both parties were put to additional expenses both in terms of time and money in order to attempt to formally resolve the dispute via the Notice to Admit filed by the Applicant on 20 September 2011 and the Notice to Dispute filed by the Respondent on 3 October 2011;*

*the Applicant has attempted on numerous occasions since 18 November 2011 to obtain better and further records as to the Respondent's financial position and current compliance with all relevant industrial laws and instruments to allow the parties to reach an agreed position on penalties to be imposed on the Respondent. These attempts involved numerous letters to the Respondent's representative*[45] *and telephone conversations with the Respondent's representative. In several of the conversations, the Respondent's representative communicated that it had not received instructions from the Respondent.*[46] *Ultimately it took until 6 March 2012 for the Respondent to respond in any substantive manner to such requests;*[47] *and*

*the Respondent's failure to engage in any meaningful way with the Applicant between 18 November 2011 and late February 2012 resulted in the parties not being able to comply with the orders of the Court made 10 November 2011, which required the filing of an Agreed Statement of Facts and joint submissions on penalty by 3 February and 2 March 2012 respectively, and consequently led to two additional directions hearings that would otherwise not have been required.*

*The Applicant notes that where a respondent has generally been co-operative and has made early admissions regarding his contravening conduct, it is appropriate for the Court to allow a discount of penalty in the vicinity of 25 to 30%.*[48] *…*

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[43] Paragraph 3 and annexure ACR-1 (**ACR-1**) of the Roy Affidavit.

[44] Paragraphs 3 to 6 of the Roy Affidavit.

[45] Paragraphs 99 to 103 of the S.O.A.F.

[46] Paragraphs 11 to 13 of the Roy Affidavit.

[47] Paragraph 14 of the Roy Affidavit.

[48] *Mornington Inn* at [75] per Stone and Buchanan JJ.

*The Applicant concedes that the Respondent has offered some co-operation and shown some contrition at various intervals during the investigation and these proceedings. However, the Respondent has also failed to pay the Rectification Sum, and caused unnecessary delay and expense in the proceeding. In all the circumstances, the Applicant submits that the Respondent has demonstrated a lack of any sincere acceptance of his wrongdoing and a disregard for the administration of justice in this case such that the Respondent should be afforded a limited discount in penalty for co-operation with the Applicant during the course of its investigation and the current proceedings."*[49]

68. In submissions the respondent's position was:

> *"23. The Respondent has come to terms and accepted his mistake and has admitted liability to the contraventions. Apart from accepting his mistake and learning from it, the Respondent's admission of liability have saved the Court's time, costs and resources, and has allow for this matter to proceed only on the issue of penalty in the interest of the administration of justice.*
>
> *24. Apart from accepting and admitting to his mistakes, it is abundantly clear that the Respondent has taken, and will continue to take, steps to ensure that he is in compliance with the workplace laws and requirements as submitted above in paragraphs 12, 13 and 14.*
>
> *25. Further, the Respondent has shown contrition by acknowledging and accepting liability for his contraventions as submitted in paragraphs 15, 16 and 23 above."*[50]

69. I accept there has been co-operation by the respondent and admissions of the contraventions. However I note as was referred to in submissions in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 Stone and Buchannan JJ stated:

> *"76. As Branson J has pointed out (see* Alfred v Walter Construction Group Limited *[2005] FCA 497) the rationale for providing a discount for an early plea of guilty in a criminal case does not apply neatly to a case, such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in* Cameron, *that*

[49] *Mornington Inn* at [74] to [76]
[50] see para 23-25 of submissions filed 18 April 2012

> ***a discount should not be available simply just 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: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice." (emphasis added)***

70. In the circumstances I note the underpayment remains outstanding. I accept the respondent is entitled to a discount but it should not be the maximum available given the factors referred to above.

## Ensuring compliance with minimum standards

71. The objects of both the *WR Act* and the *FW Act* are important in this context. Section 3 of the *WR Act* provides:

> *"3 Objects*
>
> *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> *…*
>
> *(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:*
>
> *(i) employee entitlements; and*
>
> *(ii) the rights and obligations of employers and employees, and their organisations*

72. Similarly, the objects of the *FW Act include:*

> *[Objects of this Act]*
>
> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *…*

*(b) ensuing a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the the National Employment Standards, modern awards and national minimum wage orders; and*

*…"*

73. As the parties acknowledged this is also an important factor in this case. In submissions the relevance of this factor was summarised by the applicant as follows:

> *"This is an important consideration in the present case. One of the principal objects of the WR Act and the FW Act has been the maintenance of an effective safety net of employer obligations and effective enforcement mechanisms.*
>
> *The importance of this 'safety net' is reflected not only in the magnitude of the maximum penalties imposed in respect of any breach of an applicable provision, but also in the legislature's increase of those maximum penalties in August 2004*[51] *whereby the maximum penalty for individuals increased from $2,000 to $6,600 and the maximum penalty for bodies corporate increased from $10,000 to $33,000."*[52]

74. The importance of the maintenance and enforcement of minimum standards means this factor looms large in this case. I note that contrary to the applicant's submissions the penalties under the WR Act were increased and the necessary amendments made by the *Workplace Relations Amendment (Codifying Contempt Offences) Act* 2004 (not the *Workplace Relations Amendment (Work Choices) Act* 2005) the relevant provisions of which came into operation on 10 August 2004. As was acknowledged in submissions for the purposes of these proceedings this factor does tell in favour of a penalty towards the midrange.

## Deterrence

75. There is also the important issue of deterrence, both specific and general in this case. In relation to the latter I note that Riethmuller FM

[51] *Workplace Relations Amendment (Work Choices) Act 2005 No.153, 2005 (increasing penalties also renumbering s.178 to s.719).* (sic)

[52] See paras 69-70 of applicant's submissions

said in *Fair Work Ombudsman v TAJ Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258* at paragraph 67 that:

> *"67. Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated."*

76. The applicant submitted in relation to this factor:

> *"Both general and specific deterrence are important in the present case.*
>
> *General deterrence is an important factor in circumstances where an employer has failed to comply with the minimum obligations with regards to its employees. The law should mark its disapproval of the conduct in question and set a penalty which serves as a warning to others.*[53]
>
> *The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in* Ponzio, *[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 *(1979) 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.'*

[53] *Kelly*, supra at [28], and the cases cited therein. See also *Ponzio v B & P Caelli Constructions Pty Ltd & Others* (2007) 158 FCR 543 at 559-60 [92] (Lander J) (**Ponzio**).

*There is a need to send a message to the community at large, and small employers particularly, that the correct entitlements of employees must be paid, and appropriate records must be kept. Steps must be taken by employers (of all sizes) to ascertain and comply with their minimum obligations. Compliance should not be seen as the bastion of the large employer with human resources staff and advisory staff (accountants, consultants, lawyers) behind them.*

*As for specific deterrence, the Respondent should be left in no doubt that failing to comply with minimum obligations or make or keep sufficient and appropriate records concerning the employment of its employees which can ultimately conceal non-compliance are unacceptable in the Australian community and will not be tolerated by the Courts.*

*The Respondent continues to operate his business and as at 6 March 2012 employed at least three employees. The Respondent has provided copies of payslips issued to the three current employees*[54] *as evidence of current compliance with the FW Act, FW Regulations and the Nursery Award 2010 (the* ***Nursery Award****) which the Applicant is satisfied from 1 January 2010 covers the Respondent. These records show that the Respondent has made significant changes in its approach towards record keeping and payslips. However, the payslips of one employee, Ms Formosa, indicate that she earns $75.00 for 15 hours work per week, which appears to be paid on the basis of a supported wage agreement made under Schedule D of the Nursery Award. The Respondent has, as at the date of these submissions, failed to provide any evidence of a supported wage agreement made in relation to Ms Formosa, notwithstanding a request by the Applicant to do so.*[55]

*Whilst the Applicant is not in a position to make submissions as to the Respondent's compliance on this point, it is open to the Court to impose a penalty on the Respondent that places an emphasis on the need for specific deterrence."*[56]

77. In light of the applicant's position on specific deterrence I accept the applicant's submission that there is a need for general deterrence and to send a message to the community, and in particular to small employers, that employers must take steps to ensure correct employee entitlements are paid and statutory requirements in relation to payslips and

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54 ACR-4

55 Paragraph 15 and annexure ACR-5 of the Roy Affidavit

56 See paras 71-77 of applicant's submissions

employee records are observed. As Tracey J stated in *Kelly v Fitzpatrick* [2007] FCA 1080 (at paragraph [28]):

> *[28] The respondents have expressed contrition and have put in place mechanisms which are designed to ensure that there will be no repetition of the breaches which have led to the present proceeding. Specific deterrence does not, therefore, loom large as a consideration in determining penalty. It does not follow that the need for general deterrence may be disregarded. As Finkelstein J said in* CPSU v Telstra Corporation Limited (2001) *108 IR 228 at 231:* ***"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 to act as a warning to others not to engage in similar conduct…" 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] (emphasis added)*

78. Having regard to the need for specific and general deterrence in this case, and without imposing a crushing penalty, there is the need to deter the sort of conduct involved in this case.

## Conclusion

79. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM summarised the approach the Court should follow in these sorts of proceedings at paragraphs 22 to 26 as follows:

> *"22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate obligation found in the AFPCS, the NAPSA is a separate*

*contravention of a term of an applicable provision for the purposes of s.719.*[57]

*23. However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*

*24. Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.*[58] *This task is distinct from and in addition to the final application of the "totality principle".*[59]

*25. Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*

*26. Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.*[60] *The Court should apply an "instinctive synthesis" in making this assessment.*[61] *This is what is known as an application of the "totality principle".*

80. The applicant in submissions contended that:

*79. Any consideration of the relevant factors in this case calls for a penalty that is greater than nominal. A penalty at the high end of the mid range is called for in all of the circumstances* ***50*** *to* ***70%*** *of the maximum penalty taking into account the grouping set out in these submissions. Accordingly, the Applicant submits that the Court should impose a maximum penalty of between* ***$14,850*** *and* ***$20,790****.*

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57 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

58 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (*Merringtons*).

59 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (*Mornington Inn*).

60 see *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (*Kelly*); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

61 M*erringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

> *80. The Applicant is satisfied that the Respondent is currently in a poor financial position, and submits that the Court should apply the totality principle to take account of this to ensure any penalties imposed are not crushing or oppressive. In this respect, a 10 to 20% discount may be appropriate.*

81. The respondent in submissions contended that:

> *26. Taking into consideration all of the above mitigating factors, the Respondent humbly submits to this Court that any imposition of a penalty over and above the obligation to pay the Employee its underpayments due pursuant to the Shops Award would cause extreme financial hardship and impact ongoing viability of the Business.*

82. In submissions in reply the applicants submissions contained "*amended recommendations as to penalty*" which was:

> *13. The Applicant recommends a small further reduction in the recommended penalty range, in recognition of the fact that the Respondent is now paying his current employees their minimum entitlements under the FW Act and the Modern Award, and is meeting some of his record keeping and payslip obligations under the FW Act and FW Regulations.*
>
> *14. However, the Applicant considers that, in light of its concerns about lack of corrective action regarding record keeping and the need for specific deterrence, only a nominal further reduction in penalty should be afforded to the Respondent.*
>
> *15. In all of the circumstances, the FWO recommends a penalty range of between $13,365 and $19,305* ***(Recommended Range)****, being 45 to 65% of the maximum penalty recommended in the Submissions. This is a further reduction of 5% of the range initially recommended by the Applicant.*[62]

83. Having regard to the matters set out above, the admitted contraventions are serious. The respondent underpaid a vulnerable employee engaged as an apprentice, as compared to his entitlements under the WR Act and the FW Act and failed to keep appropriate records and issue payslips. Balancing the factors set out above, in my view, penalties for each of the breaches by the respondent should be assessed at a mid range.

[62] see paragraph 79 of the applicant's submissions

84. However, taking into account amongst other things the co-operation of the respondent, and the resolution of the matter by way of penalty hearing and in all the circumstances of the case there could be a further discount of 20% for this and the application of the totality principle.

85. Given this and in light of the position and submissions of each of the parties I consider that the individual penalties for the contravening conduct engaged in by the respondent should be:

a. failure to pay correct minimum rate - $2640.00

b. failure to pay penalty rate for overtime - $2640.00

c. withholding monies as notice in lieu - $2640.00

d. failure to make and keep sufficient employee records - $1320.00

e. failure to make and keep any employee records - $440.00

f. failure to issue payslips with sufficient detail - $440.00

g. failure to issue any payslips to the employee - $320.00

h. failure to keep proper records - $440.00

86. This results in a total penalty of $11,880 or 40% of the maximum for the above mentioned contraventions would have been $29,700.

87. There will be orders as agreed requiring the respondent to pay the penalty mentioned into the Consolidated Revenue Fund in accordance with the agreed payment plan.

88. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[63] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[64] and

[63] see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd* (No.2) (1999) 94 IR 231

[64] see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8

- notes the parties have filed the S.O.A.F; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is appropriate;

there will be orders as set out at the beginning of these reasons for decision.

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**I certify that the preceding eighty-eight (88) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM**

Date: 24 April 2012

**Attachment A**

# AGREED STATEMENT OF FACTS

**Summary of contraventions**

1. On the basis of the facts set out below, the Respondent employer admits to contravening the following provisions in respect of Ryan Brown (the **Employee**):

   (a) clause 15.2 of the *Shop, Distributive and Allied Employee Association Retail – Victorian Shops Award 2000* [AT796250CRV] in relation to wages (the **Transitional Award**);

   (b) clause 29.2.1 of the Transitional Award in relation to overtime;

   (c) clause 15.2 of the award based transitional instrument derived from the Transitional Award (**AWTI**) in relation to wages;

   (d) clause 12 of the AWTI in relation to retention of pay on termination;

   (e) clause 32.4.12(b) of the AWTI in relation to accrued annual leave payable on termination;

   (f) sub-regulation 19.4(1) of the *Workplace Relations Regulations 2006* (Cth) (**WR Regulations**) in relation to employee records;

   (g) sub-regulation 19.5(1) of the WR Regulations, in relation to the condition of the employee record;

   (h) sub-regulation 19.9(1) of the WR Regulations, in relation to recording overtime;

   (i) sub-regulation 19.12(1) of the WR Regulations, in relation to recording leave;

   (j) sub-regulation 19.13(1) of the WR Regulations, in relation to recording superannuation;

   (k) sub-regulation 19.20(1) of the WR Regulations, in relation to payslips;

(l) sub-regulation 19.20(3) of the WR Regulations, in relation to the content of payslips, relying on sub-regulations 19.21(1)(a), 19.21(1)(b), 19.21(1)(c) and 19.21(1)(k) of the WR Regulations;

(m) subsection 535(2) of the of the *Fair Work Act 2009* (Cth) (**FW Act**), in relation to employee record;

(n) subsection 536(1) of the FW Act, in relation to payslips;

(o) regulation 3.34 of the *Fair Work Regulations 2009* (Cth) (**FW Regulations**), in relation to overtime;

(p) sub-regulation 3.36(1) of the FW Regulations, in relation to leave;

(q) sub-regulation 3.37(1) of the FW Regulations, in relation to superannuation; and

(r) regulation 3.40 of the FW Regulations, in relation to a termination record,

(collectively, the **Contraventions**)

2. The Respondent admits that the Contraventions resulted in an underpayment to the Employee totalling $17,062.24 (as set out in paragraphs 12, 17, 33 and 34 of the Amended Statement of Claim, the **ASOC**, and its Annexures).

## AGREED FACTS

### THE PARTIES

### The Applicant

3. The Applicant is and was at all relevant times:

(a) a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument on 1 July 2009, pursuant to sub-section 687(1) of the FW Act; and

(b) a Fair Work Inspector by force of section 701 of the FW Act;

(c) a person capable of bringing these proceedings:

(i) in relation to conduct that occurred up to 30 June 2009 by virtue of sub-item 13(1) of Schedule 18 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (**Transitional Act**) and items 3 (in relation to a term of the Transitional Award) and 5 (in relation to an order of the Australian Industrial Relations Commission) of sub-section 718(1) of the WR Act and sub-regulation 14.3(2) of the WR Regulations; and

(ii) in relation to conduct that occurred on or after 1 July 2009 pursuant to section 539(2) of the FW Act.

4. An application that could have been made by a workplace inspector for the purposes of the application of the WR Act to conduct that occurred before 1 July 2009 (the **WR Act repeal day**) may be made, on or after the WR Act repeal day, by a Fair Work Inspector: sub-item 13(1) of Schedule 18 of the Transitional Act.

5. The WR Act continues to apply, on and after the WR Act repeal day, in relation to conduct that occurred prior to the WR Act repeal day: sub-item 11(1) of Schedule 2 of the Transitional Act.

6. Unless a contrary intention appears, a reference to the WR Act, or to a provision or provisions of the WR Act, includes a reference to regulation made for the purposes of the WR Act, or for the purposes of the provision or provisions of the WR Act: under item 3(2) of Schedule 2 of the Transitional Act.

7. Part 5-2 of the FW Act (which considers the establishment, functions and powers of the Fair Work Ombudsman and Fair Work Inspectors) (**Part 5-2**) applies as if:

(a) a reference in Part 5-2 to a fair work instrument included a reference to a WR Act instrument (such as the Transitional Award) for conduct occurring before the WR Act repeal day: item 2(2) of Schedule 3 and items 13(2)(a) of Schedule 18 of the Transitional Act;

(b) a reference in Part 5-2 to a fair work instrument included a reference to a transitional instrument for conduct occurring on or after the WR Act repeal day: item 2(2) of Schedule 3 and items 14(a) of Schedule 18 of the Transitional Act;

(c) a reference in Part 5-2 to "this Act" in the FW Act included a reference to:

(i) the WR Act as in force from time to time in relation to conduct occurring before the WR Act repeal day: item 13(2)(c) of Schedule 18 of the Transitional Act;

(ii) the WR Act as it continues to apply in relation to conduct occurring on or after the WR Act repeal day because of the Transitional Act: item 14(b) of Schedule 18 of the Transitional Act; and

(iii) the Transitional Act in relation to conduct that occurs on or after the WR Act repeal day: item 14(c) of Schedule 18 of the Transitional Act,

(d) a reference in Part 5-2 to a civil remedy provision in that part were a reference to a civil remedy provision or a civil remedy penalty provision within the meaning of the WR Act as in force from time to time for conduct occurring before the WR Act repeal day: item 13(2)(b) of Schedule 18 of the Transitional Act.

8. Part 4-1 of the FW Act (in relation to civil remedies) applies as if item 2 of Schedule 16 of the Transitional Act (compliance with transitional instruments such as the AWTI) was a provision of the FW Act: pursuant to sub-item 16(1) of Schedule 16 of the Transitional Act.

**The Respondent**

9. The Respondent is and was at all material times:

(a) the owner of a rose propagation and retail business trading under the name "Greenvale Rose Farm";

(b) a sole trader;

(c) a person registered as carrying on a business named "Greenvale Rose Farm" in Victoria (ABN 89 715 451 128) (the **Business**);

(d) was in the business of propagating roses and then selling those roses from a point of sale on a property located at 520 Mickleham Road, Atwood in the State of Victoria (the **Principal Place of Business**);

(e) a seller of roses to customers that included:

(i) the general public; and

(ii) gardeners at cemeteries, parks and gardens,

(f) until 30 June 2009, an employer within the meaning of section 858 of the *Workplace Relations Act 1996* (Cth);

(g) on and from 1 July 2009, a national system employer within the meaning of sub-section 30D(1)(a) of the *Fair Work Act 2009* (Cth);

(h) the employer of the Employee from about 22 October 2007 to about 26 October 2009; and

(i) solely responsible for the setting of the terms and conditions of employment of the Employee.

**The Employee**

10. At all material times the Respondent employed the Employee to work at the Business on a full-time basis as an apprentice.

11. The Employee commenced employment on about 22 October 2007 and continued to be employed until he resigned on about 26 October 2009 (the **Period of Employment**).

12. On or around 22 October 2007, the Employee was enrolled in a Certificate III in Horticulture (Parks and Gardens) at the North Melbourne Institute of TAFE (the **Apprenticeship**) and had completed 11 months of the Apprenticeship.

13. The Employee completed the Apprenticeship in 2009, during the Period of Employment.

14. The Employee was enrolled in the Apprenticeship to enable him to become a qualified tradesperson at the completion of the Apprenticeship. During his

Apprenticeship, the Employee was taught skills including controlling plant pests, diseases and disorders, establishing turf and controlling weeds.

15. The Employer employed the Employee to perform, for the majority of his time at work, skills similar to those taught in the Apprenticeship, such as watering, setting up drip systems, fertilising, spraying, mowing, weeding, trellising, mulching and re-potting roses.

16. The Employee used the skills he learnt from undertaking the Apprenticeship as part of his Employment.

**The Applicable Industrial Instruments**

17. On and from about 22 October 2007 until 30 June 2009 (the **WR Act Period of Employment**), the Employee's employment was governed by the Transitional Award.

18. On and from 1 July 2009 until about 26 October 2009 (the **FW Act Period of Employment**), the Employee's employment was governed by the AWTI.

**THE CONTRAVENTIONS**

**The Underpayment Contraventions**

19. For the duration of the WR Act Period of Employment and the FW Act Period of Employment, the Respondent was required to pay the Employee the following weekly rates of pay:

(a) from about 22 October 2007 to 24 October 2007, as a pre-apprentice – $261.50;

(b) from 25 October 2007 to 24 November 2007, as a first year apprentice in his final month: – $319.60;

(c) from 25 November 2007 to 30 September 2008, as a second year apprentice: - $450.40;

(d) from 1 October to 2008 to 23 November 2008, as a second year apprentice: - $467.20; and

(e) from 24 November 2008 to about 26 October 2009, as a third year apprentice: - $542.50: clause 15.2 of the Transitional Award and the AWTI respectively and the particulars to paragraph 9 of the ASOC,

(collectively, the **Payment Obligations**).

20. For the duration of the Period of Employment the Respondent paid the Employee the following weekly rates of pay:

(a) from about 22 October 2007 to 31 December 2008 - $301.00; and

(b) from 1 January 2009 to about 26 October 2009 - $383.00.

21. For the duration of the WR Act Period of Employment and the FW Act period of Employment, the Respondent contravened clause 15.2 of the Transitional Award and the AWTI respectively by paying the Employee the weekly rates of pay set out in paragraph 20 herein (collectively, the **Underpayment Contraventions**).

22. The Underpayment Contraventions resulted in the Employee being underpaid $15,827.28 (as shown in Annexure A to the ASOC).

**The Overtime Contraventions**

23. For the duration of the WR Act Period of Employment, the Respondent was required by clause 29.2.1 of the Transitional Award to pay the Employee overtime calculated at time and half for the first three hours and double time thereafter for work between 7.00 am and 9.00 pm in excess of 38 hours per week (the **Overtime Obligation**).

24. For the duration of the WR Act Period of Employment, the Respondent paid the Employee in accordance with the weekly rates set out in paragraph 20 herein regardless of the hours actually worked by Employee in the relevant week.

25. The Employee worked 40 hours per week in the week ending:

(a) 26 October 2007 (as shown on envelope payslip provided by the Employer to the Employee dated 31 October 2007); and

(b) 2 November 2007 (as shown on the envelope payslip provided by the Employer to the Employee dated 7 November 2007).

26. The Respondent contravened clause 29.2.1 when it paid the Employee the weekly rates set out in paragraph 20 herein regardless of the hours actually worked by Employee in that week as set out in paragraph 25 herein (collectively, the **Overtime Contraventions**).

27. The Overtime Contraventions resulted in the Employee being underpaid $50.46 (as shown in Annexure B to the ASOC).

**The Annual Leave and Payment in Lieu of Notice Contraventions**

Annual Leave Entitlements

28. On about 26 October 2009, the Employee resigned from his employment with the Respondent without notice (the **Termination**).

29. For the duration of the WR Act Period of Employment and the FW Act Period of Employment, by clauses 32.4 of the Transitional Award and the AWTI respectively, the Employee was entitled to accrue four weeks (152 hours) of annual leave on ordinary pay at the end of each year of employment.

30. Over the Period of Employment, the Employee accrued eight weeks of annual leave (304 hours) pursuant to clause 32.4.1 and 32.4.2 of the Transitional Award and the AWTI.

31. By sub-clause 32.4.12(b) of the AWTI, upon termination if the Employee was entitled to annual leave and had not taken that annual leave, he was entitled to be paid for any remaining part of his annual leave at the rate of his ordinary pay for the period of that remaining part.

32. Over the Period of Employment, the Employee took the following periods of annual leave:

    (a) five days (or 38 hours) over a one week period on or around 15 August 2008; and

    (b) ten days (or 76 hours) over a two week period on or around 25 December 2008,

    totalling three weeks (or 114 hours).

33. By reason of the matters set out at paragraphs 29 to 32 herein, upon Termination the Employee:

    (a) had five weeks (or 190 hours) of untaken annual leave;

    (b) his ordinary rate of pay was $542.50 per week; and

(c) was therefore entitled to be paid $2712.50 (the **Annual Leave Obligation**).

Retention of Payment in Lieu of Notice Entitlement

34. A full-time or regular part-time employee is entitled to two weeks' notice in relation to a termination at the initiative of an employer where an employee has a continuous period of service of one year but less than three years (**Employee's Notice Period**): clause 12.1.1 of the AWTI. Conversely, an employer is entitled to the same period of notice as the Employee's Notice Period in relation to a termination at the initiative of an employee (**Employer's Notice Period**): clause 12.2.1 of the AWTI. An employer is entitled to withhold monies equal to the Employer's Notice Period in the event an employee fails to provide the employer with the Employee's Notice Period: clause 12.2.2 of the AWTI.

35. However, under sub-clause 12.1.1(b) of the AWTI, the Employee's Notice Period and the Employer's Notice Period do not apply in relation to apprentices. Accordingly, while the Employee did not provide the Employer with the Employee's Notice Period on Termination, the Respondent was not entitled to withhold any monies equal to such period.

Contraventions

36. Upon Termination, the Respondent paid the Employee $1,750.00 (the **Termination Payment**) and made a hand written record entitled "Holiday Pay" which included calculations of the Employee's entitlements upon Termination (the **Respondent's Termination Note**).

37. According to the Respondent's Termination Note, the Termination Payment was calculated on the following basis:

(a) payment of annual leave entitlements upon termination of $1910.00 (referred to in the Termination Notice as "Holiday Pay Due");

(b) payment of an ex-gratia payment of $222.00 (referred to in the Termination Notice as "Overpaid");

(c) deduction of one weeks' pay in lieu of notice of $382.00.

38. By acting as admitted in paragraph 37(c), the Employer has contravened clause 12 of the AWTI (the **Notice Contravention**).

39. The Notice Contravention resulted in the Employee being underpaid $382.00.

40. In addition, by acting as admitted in paragraph 37(a) herein and failing to pay the Employee for all of his five weeks of accrued annual leave, the Employer has also contravened clause 32.4.12(b) of the AWTI (the **Annual Leave Contravention**) (see paragraphs 29 to 33 above).

41. The Annual Leave Contravention resulted in the Employee being underpaid $802.50 (as shown in Annexure C to the ASOC), calculated on the following basis:

    (a) The Employee was entitled to $2712.50 in annual leave entitlements, by reason of the matters admitted at paragraph 33(c) herein.

    (b) The Respondent's Termination Note shows that the Respondent calculated the Employee's annual leave entitlement upon termination as being $1910.00, on the basis that upon termination the Employee's weekly rate of pay was $382.00 and the Employee had five weeks' (or 190 hours) annual leave accrued.

**The Record Keeping and Payslip Contraventions**

The WR Act Record Keeping and Payslip Obligations

42. Under sub-regulation 19.4(1) of Division 2 of Part 9 of the WR Regulations (**Division 2**), the Respondent was required to make, or cause to be made, a record in accordance with Divisions 3 (**Division 3**) and 4 of Part 19 of the WR Regulations relating to Employee.

43. Division 3 prescribes the content of the record which the Respondent was required to make, or cause to be made under sub-regulation 19.4(1). Relevantly, under Division 3 the record must:

    (a) be in a condition that allows a workplace inspector to determine the Employee's entitlements and whether the Employee is receiving those entitlements pursuant to sub-regulation 19.5(1).

(b) include the number of hours the Employee worked as overtime and when the Employee started and ceased such overtime[65], pursuant to sub-regulation 19.9(1) ;

(c) include details of the accrual of the Employee's leave, any leave taken by the Employee and the balance of the Employee's entitlement to that leave from time to time, pursuant to sub-regulation 19.12(1); and

(d) include, in relation to superannuation:

(i) the amount of the contribution made by the Respondent on behalf of the Employee;

(ii) the period over which the contribution was made;

(iii) the dates on which the contribution was made;

(iv) the name of any fund to which the contributions were made; and

(v) the basis on which the Employer became liable to make contributions including the keeping of any election by the Employee as to the fund to which contributions are to be made and the date of any relevant elections,

pursuant to sub-regulation 19.13(1).

44. Under sub-regulation 19.20(1) of Division 6 (**Division 6**) of Part 19 of the WR Regulations, the Respondent was required to issue to the Employee a written payslip relating to each payment made by the Respondent of an amount to the Employee as remuneration.

45. Under sub-regulation 19.20(3) of Division 6, the payslip must include the following details prescribed by sub-regulation 19.21 of Division 6:

(a) the name of the Respondent pursuant to sub-regulation 19.21(1)(a);

(b) the name of the Employee pursuant to sub-regulation 19.21(1)(b);

(c) the date on which the payment to which the payslip relates was made pursuant to sub-regulation 19.21(1)(c); and

[65] Refer to paragraphs 23 to 27 herein for details of overtime worked by the Employee during his employment with the Respondent.

(d) if the Respondent is required to make superannuation contributions on behalf of the Employee, the amount of each contribution the Employer has made for the benefit of the Employee and the name of the fund to which the contribution was made or the amount of contributions the Respondent is liable to make for that period and the name of the fund to which the contributions will be made pursuant to sub-regulation 19.21(k).

46. The obligations referred to in paragraphs 42 to 45 herein applied to the Respondent in relation to its employment of the Employee in respect of the WR Act Period of Employment.

The FW Act Record Keeping and Payslip Obligations

47. Under sub-section 535(1) of the FW Act, the Respondent was required to make and keep for a period of seven years records in relation to the Employee of a kind prescribed by the FW Regulations. Under sub-section 535(2) of the FW Act, the records must:

(a) if a form is prescribed by the regulations – be in that form; and

(b) include any information prescribed by the regulations.

48. Under sub-division 1 of Division 3 of Part 3-6 of the FW Regulations, the Respondent was required to make and keep a record of the Employee that:

(a) includes the number of overtime hours worked by the Employee during each day and when the Employee started and ceased to work such overtime, pursuant to sub-regulation 3.34;

(b) includes any leave the Employee took and the balance of the Employee's entitlements to that leave from time to time, pursuant to sub-regulation 3.36(1);

(c) includes, in relation to superannuation:

(i) the amount of the contributions made by the Respondent on behalf of the Employee;

(ii) the period over which the contribution was made;

(iii) the dates on which the contribution was made;

(iv) the name of any fund to which the contributions were made; and

(v) the basis on which the Employer became liable to make contributions including the keeping of any election by the Employee as to the fund to which contributions are to be made and the date of any relevant elections,

pursuant to sub-regulation 3.37(1);

(d) includes, in relation to the termination of the Employee's employment:

(i) whether the termination was by consent, notice, summarily or some other manner; and

(ii) who acted to terminate the employment,

pursuant to regulation 3.40 of the FW Regulations.

49. Under sub-section 536(1) of the FW Act, the Respondent was required to give the Employee a payslip within one day of paying an amount to the Employee in relation to the performance of work.

50. The obligations referred to in paragraphs 47, 48 & 49 herein applied to the Respondent in relation to its employment of the Employee in respect of the FW Act Period of Employment.

Employer Records

51. From about 4 July 2008 to about 26 October 2009, the Respondent maintained a record relating to the employment of the Employee (the **Employer Record**). The Employer Record recorded:

(a) the name of the Employee;

(b) the gross and net amounts due to the Employee as wages;

(c) the amount of tax withheld by the Respondent relating to the Employee's wages ;

(d) the cheque number relating to the cheque used to pay the Employee's wages; and

(e) some details of annual leave taken by the Employee during his employment with the Respondent from which the type and duration of such leave could be inferred.

52. The Employer Record was provided to the Applicant by the Respondent on 3 September 2010.

Termination Records

53. The Respondent's Termination Note (refer to paragraph 36 herein) recorded:

(a) details of the Employee's annual leave entitlements, including the accrual and balance of such leave, the type and duration of such leave taken, the dates on which such leave was taken and the amount of annual leave payable upon termination;

(b) calculation of payment in lieu of notice to the Employee withheld by the Respondent; and

(c) the net amount paid to the Employee upon termination.

54. The Respondent provided the Respondent's Termination Note to the Applicant on 3 September 2010.[66]

55. On about 14 November 2009 the Respondent made and provided to the Employee a record in relation to the termination of the Employee's employment (the **Employee's Termination Note**).

56. The Employee's Termination Note relevantly recorded the following information:

(a) the name of the Employee and the Employee's superannuation fund;

(b) the amount of the superannuation contribution made; and

(c) the period for which the contributions were made.

57. The Employee's Termination Note was provided to the Applicant by the Employee on or about 12 March 2010.

Payslips

[66] Refer to paragraph 36 herein

58. From about 22 October 2007 to about 2 May 2008, the Respondent provided to the Employee at least 23 payslips in relation to work performed by the Employee (collectively, the **Payslips**). Some of the Payslips recorded:

(a) the name of the Employee;

(b) the date on which the payment of wages was made to the Employee;

(c) the period to which the payment of wages relates;

(d) the amount of hours worked by the Employee during that period;

(e) the hourly rate of pay;

(f) the gross and net amounts due to the Employee as wages for that period;

(g) the amount of tax withheld by the Respondent relating to the Employee's wages;

(h) the cheque number relating to the cheque used to pay the Employee's wages; and

(i) details of when personal leave was taken.

59. Copies of the Payslips issued to the Employee were provided to the Applicant during the course of its investigation by the Employee.

Superannuation record

60. On about 15 November 2008, the Respondent made a record in relation to superannuation contributions made by the Respondent on behalf of the Employee for the period 25 October 2007 and 30 June 2008 (the **Superannuation Record**).

61. The Superannuation Record relevantly recorded the following information:

(a) the name of the Employee and his superannuation fund membership number;

(b) the name of the superannuation fund;

(c) the period for which the contributions were made; and

(d) the amount of the contribution made.

62. The Superannuation Record was provided to the Applicant by the Employee on or about 12 March 2010.

The Payslip and Record Keeping Contraventions

63. With the exception of two Payslips, the Employer Record, the Respondent's Termination Note, the Employee's Termination Note and the Payslips do not record:

(a) the number of hours worked by the Employee as overtime and when the Employee started and ceased such overtime in contravention of sub-regulation 19.9(1) of the WR Regulations, sub-section 535(2) of the FW Act and regulation 3.34 of the FW Regulations;

(b) details of personal leave accrued by the Employee, all personal leave taken by the Employee or the balance of personal leave from time to time in contravention of sub-regulation 19.12(1) of the WR Regulations, sub-section 535(2) of the FW Act and sub-regulation 3.36(1) of the FW Regulations; and

(c) details of the Employee's annual leave balance from time to time in contravention of sub-regulation 19.12(1) of the WR Regulations, sub-section 535(2) of the FW Act and sub-regulation 3.36(1) of the FW Regulations'.

64. For the period 1 July 2009 until about 26 October 2009, the Respondent did not record any information whatsoever in relation to the Employee's entitlement to superannuation contributions in contravention of sub-section 535(2) of the FW Act and sub-regulation 3.37(1) of the FW Regulations.

65. The Superannuation Record and the Employee's Termination Note do not record the basis on which the Respondent became liable to make superannuation contributions on behalf of the employee, including any election by the Employee as to the fund and the date on which the election occurred in contravention of sub-regulations 19.13(1) and 19.21(1)(k) of the WR Regulations, sub-section 535(2) of the FW Act and sub-regulation 3.37(1) of the FW Regulations.

66. At least one of the Payslips does not record:

(a) the date on which the payment to which that particular payslips relates was made in contravention of sub-regulation 19.21(1)(c) of the WR Regulations; and

(b) the name of the Employee in contravention of sub-regulation 19.21(1)(a) of the WR Regulations.

67. None of the Payslips record:

(a) the name of the Respondent in contravention of sub-regulation 19.21(1)(b) of the WR Regulations; and

(b) details of superannuation contributions made on behalf of the Employee in contravention of sub-regulation 19.13(1) of the WR Regulations.

68. From about 3 May 2008 to about 26 October 2009, the Respondent did not issue any payslips to the Employee in contravention of sub-regulation 19.20(3) of the WR Regulations and sub-section 536(1) of the FW Act.

69. None of the records include information showing whether the Employee's termination was by consent, notice, summarily or otherwise and who acted to terminate the Employee's employment in contravention of regulation 3.40 of the FW Regulations.

70. The Employer Record, the Respondent's Termination Note, the Superannuation Record and the Payslips were not kept in a single location nor did they appear in any coherent order and as such were not in a condition that allowed the Workplace or Fair Work Inspectors to determine the Employee's entitlements and whether the Employee was receiving those entitlements in contravention of sub-regulation 19.5(1) of the WR Regulations.

**Underpayments**

71. By reason of the Contraventions in paragraphs 22, 27, 39 and 41, the Respondent has underpaid Employee $17,062.24.

**THE INVESTIGATION**

72. On 16 March 2010, the Employee lodged a complaint with the Applicant in relation to underpayment of the Employee's hourly rate of pay, not being issued with payslips and non-payment of superannuation contributions on the Employee's behalf (the **Complaint**).

73. On 23 April 2010, Fair Work Inspector Graham Wilcox (**FWI Wilcox**) contacted the Respondent, notifying him that the Applicant had received the Complaint. FWI Wilcox spoke with the Respondent on 7, 10, 12 and 18 May 2010. The Complaint did not resolve.

74. The Respondent provided the Applicant with information relevant to the Complaint as follows.

(a) On 3 July 2010, the Respondent wrote to Fair Work Inspector Doe (**FWI Doe**) stating his understanding of which apprenticeship course the Employee was enrolled in prior to commencing employment.

(b) On 21 July 2010, the Respondent wrote to FWI Doe and provided the Employee's employment commencement and termination dates and the Respondent's own calculation of underpayments based on the rates of pay in the *Agriculture, Forestry and Fishing Industry Minimum Wage Order* [AP767376] (the **AFFI MWO**). The Respondent calculated that the Employee had been underpaid $3995.20 and stated that the underpayment was an innocent oversight for which the Respondent apologised to the Employee.

75. On 23 July 2010, Fair Work Inspector Adam Doe (**FWI Doe**) issued a notice to produce pursuant to section 712 of the FW Act on the Respondent (the **First NTP**). The First NTP was served on the Respondent by fax on 23 July 2011 at

approximately 15:11. The First NTP required production of the following records in relation to the Employee's employment by no later than close of business on 3 August 2010:

(a) time and wage records;

(b) classification and basis of employment;

(c) duties and agreed terms and conditions of employment;

(d) employment records indicating relevant instrument and/or contract of employment;

(e) payroll records and calculations of wages and entitlements;

(f) details of accrued annual leave entitlements;

(g) records of all requests for approved annual leave and/or personal leave;

(h) detailed dates of commencements and terminations;

(i) copy of the final termination pay slip;

(j) copies of any records containing personal records including but not limited to communications including letters of termination, warnings or other employment related requests; and

(k) copies of all documents sent or received in relation to the Employee's training agreements or contracts, including but not limited to advice and communications from Jobs Plus or an appointed representative or North Melbourne Institute of TAFE (**NMIT**) or an appointed representative.

76. No response was received to the First NTP.

77. On 20 August 2010, Fair Work Inspector Nancy Melito (**FWI Melito**) issued a second notice to produce in accordance with section 712 of the FW Act on the Respondent (the **Second NTP**). The Second NTP required production of the same documents as the First NTP with the addition of the apprenticeship documents including the list of training modules completed by no later than 15 days from the date of service.

78. The Second NTP was served personally on the Respondent at the Principal Place of Business on 31 August 2010 making the return date for the Second NTP 15 September 2010.

79. On 3 September 2010, the Respondent wrote to FWI Melito in response to the Second NTP, enclosing the following documents:

(a) a PAYG summary of the Employee for financial year 2007/08;

(b) a disabled Australian Apprentice Wage Support claim application in relation to the Employee dated 14 November 2008;

(c) a training contract between the Employee and the Respondent dated 13 November 2007;

(d) approval for the above training contract issued by Office of Training and Tertiary Education Victoria dated 11 December 2007;

(e) training report results for 2007 and 2008 issued by NMIT;

(f) an Office of Training and Tertiary Education record of Agreements for Employer Workplace in relation to Greenvale Rose Farm and the Employee;

(g) record of Agreement Details for the Employee's apprenticeship;

(h) the Employer Record; and

(i) the Respondent's Termination Note.

80. In the Respondent's letter dated 3 September 2010, the Respondent stated:

(a) he could not locate wage sheets for the Employee for the period 25 October 2007 until 30 June 2008;

(b) the Employee was employed on a full time basis as a nursery production apprenticeship;

(c) the Employee's duties including plant propagation, potting, pruning, setting up grow area, watering, fertilising, mowing, weeding and spraying; and

(d) he had not received any written requests from the Employee regarding the taking of personal leave as he and the Employee had a verbal request and approval system for the taking of personal leave.

81. The Respondent did not provide any other documents to the Office of the Applicant than those discussed above and provided on 3 July 2010, 21 July 2010 and 3 September 2010.

82. Later that day, FWI Doe served a determination of contravention letter on the Respondent by registered post (the **Contravention Letter**). The Contravention Letter stated that the applicable instrument was the Transitional Award/AWTI and calculated, on a without prejudice basis, an underpayment amount of $16,049.28. The Contravention Letter invited the Respondent to rectify the underpayment amount and advise the Applicant of such action by 12 March 2011.

83. On 3 March, FWI Doe confirmed with a representative from Australia Post that the Contravention Letter had not been delivered to the Respondent.

84. On 7 March 2010, the Contravention Letter was delivered to the Respondent.

85. The Respondent did not offer to resolve the matter on the terms in the Contravention Letter on or before 26 March 2011.

86. On 8 April 2011, the Respondent attended at the Melbourne office of the Applicant and participated in a recorded interview (**RoI**). A copy of the transcript of the recorded interview can be found at "**ASOF-1**" to this Agreed Statement of Facts.

**Institution of proceedings**

87. On 28 June 2011, an Application and Statement of Claim (the **FWO Claim**) was filed in the Federal Magistrates' Court Melbourne Registry (the **Court**).

88. On 28 June 2011, Elizabeth Priest, lawyer employed by the office of the Applicant (**Ms Priest**) caused to be sent by email to Mr Kaine, solicitor for the Respondent, a cover letter and stamped copy of the FWO Claim. Ms Priest advised that the underpayment amount claimed in the FWO Claim had increased from $16,049.28 (as claimed in the Contravention Letter) to

$16,680.24. The letter invited the Respondent to admit to the contraventions alleged in the FWO Claim and rectify the underpayments claimed therein.

89. On 5 July 2011, Mr Kaine confirmed that he had instructions from the Respondent to accept service and had in fact received the FWO Claim by email on 28 June 2011.

90. On 8 July 2011, Alexander Charles Roy, legal officer employed by the office of the Applicant (**Mr Roy**) personally delivered a copy of the letter of Ms Priest dated 28 June 2011 and the stamped FWO Claim to a person who identified himself as Graeme Efron at the offices of Efron & Associates located at Suite 10, Level 1, 600 Lonsdale Street, Melbourne in the state of Victoria.

91. On 29 July 2011, the Respondent filed a response, defence and certificate of legal practitioner in the Court (the **Response**) and served the Response on Mr Roy by email.

92. On 20 September 2011 the Applicant filed a notice to admit in accordance with the Rules (the **Notice to Admit**).

93. On 3 October 2011, the Respondent filed and served on the Applicant by email a notice of dispute in response to the Notice to Admit (the **Notice of Dispute**).

94. On 14 October 2011, the parties attended a Court-ordered mediation conducted by Registrar Pringle at the Melbourne Registry of the Court (the **Mediation**).

95. Following the mediation, the parties presented a minute of proposed consent orders to the Court on 9 November 2011. On 10 November 2011, the Court made orders in the terms of the minute of proposed consent orders (the **November Orders**) requiring the following:

(a) the Respondent provide to the Applicant evidence of its financial position by 15 November 2011;

(b) the Respondent provide to the Applicant evidence of its compliance with the FW Act, FW Regulations and any other relevant industrial instrument in relation to its current employees by 15 November 2011;

(c) the Applicant file an Amended Statement of Claim by 19 November 2011;

(d) the Respondent pay the Employee $17,062.24 by no later than 10.00 on 27 April 2012;

(e) the parties file an Agreed Statement of Facts by 3 February 2012; and

(f) the parties file joint submissions on penalty by 2 March 2012.

96. On 9 November 2011, the Respondent sent the Applicant records relevant to the Respondent's financial position in response to the November Orders. The records provided by the Respondent include:

(a) a loan agreement dated 1 July 2004;

(b) a loan agreement dated 30 November 2011;

(c) an asset and liability statement of the Respondent dated 31 October 2011;

(d) a bank statement for ANZ account #5289-85544 for period 9/9/2011 to 11/10/2011;

(e) an unsigned e-tax estimate for financial year 2008/09; and

(f) an unsigned e-tax estimate for financial year 2009/10,

(collectively, the **Financial Records**) which are annexed and marked "**ASOF-2**" to this Agreed Statement of Facts.

97. On 16 November 2011, the Applicant filed and served the Amended Statement of Claim pursuant to the November Orders.

98. On 16 November 2011, the Respondent sent the Applicant a record relating to the Respondent's compliance with industrial laws and instruments. The record consisted of a single payslip issued by the Respondent on 11 November 2011 to Zoran Trajkovsky (the **Trajkovsky Payslip**). A copy of the Trajkovsky Payslip can be found at "**ASOF-3**" to this Agreed Statement of Facts.

99. On 18 November 2011, the Applicant sent a letter to the Respondent seeking better and further records concerning the Respondent's financial position and compliance with relevant industrial laws and instruments by 24 November

2011. A copy of the letter can be found at "**ASOF-4**" to this Agreed Statement of Facts.

100. The Applicant did not receive any response by 24 November 2011.

101. On 25 November 2011, the Applicant sent a second letter to the Respondent seeking better and further records concerning the Respondent's financial position and compliance with relevant industrial laws and instruments. The Applicant did not receive any records in response to this request.

102. On 13 January 2012, the Applicant sent a third letter to the Respondent repeating the Applicant's request in its 25 November 2011 letter and again sought such records from the Respondent by no later than 20 January 2012. A copy of this letter can be found at "**ASOF-5**" to this Agreed Statement of Facts.

103. The Applicant has not received any such records by or since 20 January 2012.

104. On 31 January 2012, the Applicant wrote to the Court seeking the matter be brought on for a directions hearings, with the Respondent being provided with a copy of the correspondence. A copy of this letter can be found at "**ASOF-6**" to this Agreed Statement of Facts.