FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v HENNA GROUP PTY LTD & ORS [2012] FMCA 244

INDUSTRIAL LAW – Penalty – consideration of factors relevant to penalty.

Clerical and Administrative Employees (Victoria) Award 1999, cl. 18.1, 23.1.1, 21.2.2, 23.1.1, 23.2.1, 29.1.1
Crimes Act 1914, s. 4AA
Fair Work Act 2009, ss. 3, 12, 45, 90(2), 117(2), 323(1), 536(1), 539, 546, 550(1), 557
Fair Work (Transitional Provisions and Consequential Amendments) Act 2000, cl.11(1) Part 3 of Schedule 2
General Retail Industry Award 2010, cl. 23, 29.1, 31.1
Shop Distributive and Allied Employees Association – Victorian Shops Interim Award 2000, cl. 29.1.1, 29.2.1, 38.1.3
Shop Distributive and Allied Employee Association – Victorian Shops Interim (Roping In No 1) Award 2003, cl. 6(g), 29.1
Workplace Relations Act 1996, ss. 3, 4(1), 182(1), 189(1), 235(2), 245, 607, 717, 718(1), 719, 728(1), 841

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8; (2008) 165 FCR 560; (2008) 246 ALR 35; 60 AILR 100-809
Fair Work Ombudsman v Orwill Pty Ltd & Ors [2011] FMCA 730
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	HENNA GROUP PTY LTD (ACN 136 445 504)
Second Respondent:	SAHIL RASUL
Third Respondent:	BULBULA AMIN
File Number:	MLG 1782 of 2010
Judgment of:	Riethmuller FM

Hearing date:	11 November 2011
Date of Last Submission:	11 November 2011
Delivered at:	Melbourne
Delivered on:	30 March 2012

REPRESENTATION

Counsel for the Applicant:	Ms Parkes
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	There being no appearance by or on behalf of the Respondents

ORDERS

(1) Pursuant to section 841(a) of the *Workplace Relations Act 1996* ('WR Act') and section 546(3)(a) of the *Fair Work Act 2009* ('FW Act') the First Respondent pay to the Applicant an aggregate penalty of $160,000.

(2) Pursuant to section 841(a) of the WR Act and section 546(3)(a) of the FW Act, the Second Respondent pay to the Applicant an aggregate penalty of $30,000.

(3) Pursuant to section 841(a) of the WR Act and section 546(3)(a) of the FW Act, the Third Respondent pay to the Applicant an aggregate penalty of $30,000.

(4) Pursuant to section 841(b) of the WR Act and section 546(3)(c) of the FW Act, the Applicant pay the monies received by it under Order 1 to 3 as follows:

(i) The first $16,848.70 to Rebecca Festini in the sum of $5,734.78;

(ii) To Amalia Vincze the sum of $5,030.69;

(iii) To Patricia D'Angelo the sum of $2,094.74;

(iv) To Ewelina Konkoleswka the sum of $3,988.49;

(v) And in the event that less than $16,848.70 is recovered, it be paid in proportion to each of the above; and

(vi) In respect of any remainder, remitting to the Consolidated Revenue Fund of the Commonwealth.

(5) The payment of the penalties in Orders 1 to 3 above be made within 28 days.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE

MLG 1782 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

HENNA GROUP PTY LTD (ACN 136 445 504)
First Respondent

And

SAHIL RASUL
Second Respondent

And

BULBULA AMIN
Third Respondent

REASONS FOR JUDGMENT

1. The First Respondent is a company that conducted a retail shoe business under the name of 'Scarpe Shoes', with shopping centres situated at the Docklands, Chadstone and Fountain Gate along with an office and warehouse in Hallam, Victoria. The Third Respondent is the sole director of the company, and is jointly responsible with the Second Respondent, amongst other things, for paying the wages of the company's employees. On 17 August 2011 the Court declared the Respondents had contravened the *Workplace Relations Act 1996*, the *Fair Work Act 2009* and various awards:

a) The First Respondent contravened clause 29.2.1 of the *Shop Distributive and Allied Employees Association – Victorian Shops Interim Award 2000 (Shops Award)* by failing to pay to Rebecca Festini (Festini) overtime rates for all hours worked in excess of 38 per week.

b) The First Respondent contravened clause 6(g) of the *Shop Distributive and Allied Employee Association – Victorian Shops Interim (Roping In No 1) Award 2003 (the Roping In Award)* by failing to pay to Festini an additional amount for all hours worked on a Saturday.

c) The First Respondent contravened clause 38.1.3 of the Shops Award by failing to pay to Festini double time and a half for all hours worked on public holidays.

d) The First Respondent contravened section 182(1) of the *Workplace Relations Act 1996* by failing to pay to Festini the basic periodic rate of pay prescribed under the Australian Pay and Classification Scale (APCS) for all hours of work.

e) The First Respondent contravened section 235(2) of the *Workplace Relations Act 1996* by failing to pay Festini her accrued and untaken annual leave upon the termination of her employment.

f) The First Respondent contravened section 189(1) of the *Workplace Relations Act 1996* by failing to pay Festini weekly or fortnightly wages in accordance with the APCS.

g) The First Respondent contravened clause 23.1.1 of the *Clerical and Administrative Employees (Victoria) Award* 1999 (Clerical Award) by failing to pay Amalia Vincze (Vincze) overtime rates for all hours worked in excess of 38 per week.

h) The First Respondent contravened clause 21.2.2 of the Clerical Award by failing to pay Vincze an additional amount for all hours worked on Saturday.

i) The First Respondent contravened clause 23.2.1 of the Clerical Award by failing to pay to Vincze double time for all hours

worked on Sunday and double time and a half for all hours worked on a public holiday.

j) The First Respondent contravened section 235(2) of the *Workplace Relations Act 1996* by failing to pay Vincze her accrued and untaken annual leave on termination of employment.

k) The First Respondent contravened section 189(1) of the *Workplace Relations Act 1996* and clause 18.1 of the Clerical Award by failing to pay Vincze all wages on a weekly basis.

l) The First Respondent contravened section 245 of the *Workplace Relations Act 1996* and clause 29.1.1 of the Clerical Award for failing to pay Vincze personal/carers leave for leave taken from 10 to 12 August 2009.

m) The First Respondent contravened section 45 of the Fair Work Act 2009 and clause 29.2 of the *General Retail Industry Award 2010* (Retail Award) for failing to pay Patricia D'Angelo (D'Angelo) overtime rates for all hours worked in excess of 38 per week.

n) The First Respondent contravened section 323(1) of the *Fair Work Act 2009* and clause 23 of the Retail Award for failing to pay D'Angelo her wages in full on a weekly, fortnightly or monthly basis in accordance with her actual hours worked.

o) The First Respondent contravened section 90(2) of the *Fair Work Act 2009* for failing to pay D'Angelo her untaken annual leave upon the termination of her employment.

p) The First Respondent contravened section 607 of the *Workplace Relations Act 1996* and clause 31.1 of the Retail Award for failing to provide D'Angelo with an unpaid meal break of at least 30 minutes duration after 5 hours of continuous work.

q) The First Respondent contravened section 536(1) of the *Fair Work Act 2009* by failing to provide D'Angelo with a payslip within one working day of each payment of wages.

r) The First Respondent contravened section 45 of the *Fair Work Act 2009* by failing to pay to Ewelina Konkolewska (Konkolewska) no less than the transitional APCS for all hours of work in contravention of Item A.2.3 of Schedule A to the Retail Award.

s) The First Respondent contravened section 45 of the *Fair Work Act 2009* by contravening clause 29.2 of the Retail Award by failing to pay Konkolewska overtime rates for all hours worked in excess of 38 per week.

t) The First Respondent contravened section 323(1) of the *Fair Work Act 2009* and clause 23 of the Retail Award by failing to pay Konkolewska her wages in full on a weekly, fortnightly or monthly basis in accordance with actual hours worked.

u) The First Respondent contravened section 117(2) of the *Fair Work Act 2009* by failing to give Konkolewska a minimum of 1 week's notice of termination or make a payment in lieu of notice.

v) The First Respondent contravened section 90(2) of the *Fair Work Act 2009* by failing to pay Konkolewska her untaken annual leave upon the termination of her employment.

w) The First Respondent contravened section 536(1) of *the Fair Work Act 2009* by failing to provide Konkolewska with any payslips throughout her employment with the First Respondent.

Second and Third Respondents:

x) The Second and Third Respondents were involved in the contraventions specified in declarations 1(a)-(w) within the meaning of section 728(1) of the *Workplace Relations Act 1996* and section 550(1) of the *Fair Work Act 2009*.

y) By reason of declaration set out in 1(x), the Second and Third Respondents contravened the contraventions specified in declarations 1(a)-(w).

2. The Applicant now seeks the imposition of penalties with respect to those contraventions.

The Law

The Court's powers

3. With respect to breaches that occurred prior to the repeal of the *Workplace Relations Act* on 1 July 2009, that Act continues to apply to conduct that occurred before it was repealed: cl.11(1) Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ('Transitional Act').

4. Subsection 719(1) of the *Workplace Relations Act* sets out the Court's power to impose a penalty for a breach of an 'applicable provision':

> ***719 [Imposition and recovery of penalties]***
>
> *(1) An eligible* ***court may impose a penalty*** *in accordance with this Division on a person* ***if****:*
>
> *(a)* ***the person is bound by an applicable provision****; and*
>
> *(b) the person breaches the provision.* (emphasis added)

5. Section 717 of the *Workplace Relations Act* defines an 'applicable provision' to include the Australian Fair Pay and Conditions Standard and an award:

> ***717 [Definitions]***
>
> *In this Part:*
>
> ***"applicable provision" , in relation to a person, means:***
>
> *(a) a term of one of these that applies to the person:*
>
> *(i) an ITEA;*
>
> ***(ii) the Australian Fair Pay and Conditions Standard;***
>
> ***(iii) an award;***
>
> *(iv) a collective agreement;*
>
> *(v) an order of the Commission (except one made under Division 4 of Part 9); and*

(aa) section 346ZG (no- disadvantage test compensation); and

(b) section 607 (meal breaks); and

(c) section 612 (public holidays); and

(d) section 689 (extended entitlement to parental leave); and

(e) subsection 691B(1) (prohibition of unauthorised stand downs).

Note 1: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 506). Undertakings are treated the same way (see section 394). Preserved redundancy provisions are treated as if they were workplace agreements (see for example section 399A). This means that a term of one of these is an applicable provision for the purposes of this Part.

Note 2: Division 4 of Part 9 deals with protected action ballots. Breaches of orders made under that Division are dealt with under section 471.

"eligible court" means:

(a) the Court; or

(b) the Federal Magistrates Court; or

(c) a District, County or Local Court; or

(d) a magistrate's court; or

(e) the Industrial Relations Court of South Australia; or

(f) any other State or Territory court that is prescribed by the regulations. (emphasis added).

6. Similarly, for breaches occurring on or after 1 July 2009 s.546(1) of the *Fair Work Act 2009* provides that the Court may impose a pecuniary penalty if the provision breached is a "civil remedy provision":

546 [Pecuniary penalty orders]

*(1) The Federal Court, **the Federal Magistrates Court** or an eligible State or Territory court **may**, on application, **order a person to pay a pecuniary penalty that the court considers is***

appropriate if the court is satisfied that the person has contravened a civil remedy provision.

Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

…(emphasis added)

7. The Applicant submits that each of the contraventions are of applicable provisions or civil remedy provisions for the purposes of ss. 718(1) of the *Workplace Relations Act* and 539 of the *Fair Work Act* respectively. I note that ss. 45, 323 and 536 of the *Fair Work Act* were contravened by the Respondents and are listed as civil penalty provisions in s.539 of the *Fair Work Act.*

The maximum penalties

8. With the exception of the civil penalty provision s.536, the maximum penalty that the Court may impose for an individual is 60 penalty units and 300 penalty units for a body corporate: see ss. 546(2) and 539 of the *Fair Work Act*. With respect to breaches that occurred prior to 1 July 2009, s.719(4) of the *Workplace Relations Act* sets the maximum penalty for both an individual and a body corporate at the same amount. This means that the First Respondent, as a body corporate, may be liable for up to $33,000 for each contravention and the Second and Third Respondents, as individuals, may be liable for up to $6,600 for each contravention: see ss. 12 of the *Fair Work Act,* 4(1) of the *Workplace Relations Act* and s.4AA of the *Crimes Act 1914* where a 'penalty unit' is defined to be $110.

9. The maximum penalty that the Court may impose for a breach of s.536(1) of the *Fair Work Act* is 30 penalty units for individuals and 150 penalty units for a body corporate: see ss. 546(2) and 539 of the *Fair Work Act*. That is, the First Respondent may be liable up for to $16,000 for each contravention and the Second and Third Respondents, as individuals, may be liable for up to $3,300 for each conversation: see ss. 12 of the *Fair Work Act* and 4AA of the *Crimes Act 1914.*

Determining penalty

The contraventions

10. The Applicant submits that there have been 17 contraventions (at paragraph [5.1] of the Penalty Submissions filed on 15 November 2011):

    a) One breach of clause 29.1.1 of the Shops Award;

    b) One breach of clause 6(g) of the Roping In Award;

    c) One breach of clause 38.1.3 of the Shops Award;

    d) One breach of s.182(1) of the *Workplace Relations Act;*

    e) One breach of s.235(2) of the *Workplace Relations Act;*

    f) One breach of s.189(1) of the *Workplace Relations Act;*

    g) One breach of clause 23.1.1 of the Clerical Award;

    h) One breach of clause 21.2.2 of the Clerical Award;

    i) One breach of clause 23.2.1 of the Clerical Award;

    j) One breach of 245 of the *Workplace Relations Act*;

    k) One breach of clause 29.2 of the Retail Award;

    l) One breach of s.323(1) of the *Fair Work Act;*

    m) One breach of s.90(2) of the *Fair Work Act;*

    n) One breach of s.607 of the *Workplace Relations Act;*

    o) s.536(1) of the *Fair Work Act*;

    p) s.45 of the *Fair Work Act*; and

    q) s.117(2) of the *Fair Work Act*.

11. With the exception to ss.117(2) of the *Fair Work Act* and 245 of the *Workplace Relations Act,* the Applicant further submits that each

provision was breached repeatedly by the Respondents and that the maximum penalty should be considered by the Court.

12. However, the Applicant accepts 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.* (emphasis added)

13. Similarly s.557 of the *Fair Work Act* provides:

> ***557 [Course of conduct]***
>
> *(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.*

The provisions ensure that the Respondents are not penalised more than once for the same conduct.

14. I therefore turn to the grouping of the contraventions as set out in the Applicant's submissions. The Applicant submits that the contraventions can be categorised into 10 distinct groups:

a) Failure to pay overtime (clause 29.1.1 of the Shops Award, clause 23.1.1 of the Clerical Award, and clause 29.2 of the Retail Award);

b) Failure to pay an additional amount for hours worked on the weekend (clause 6(g) of the Roping In Award, clauses 21.2.2 and 23.2.1 of the Clerical Award);

c) Failure to pay an additional amount for hours worked on public holidays (clause 38.1.3 of the Shops Award and clause 23.2.1 of the Clerical Award);

d) Failure to pay the basic periodic rate of pay (s.182(1) of the *Workplace Relations Act*);

e) Failure to pay accrued and untaken annual leave upon termination of employment (s.235(2) of the *Workplace Relations,* and s.90(2) of the *Fair Work Act*);

f) Failure to pay wages on a weekly, fortnightly or monthly basis (s.189(1) of the *Workplace Relations*, s.323(1) of the *Fair Work Act*, and clause 23 of the Retail Award);

g) Failure to pay personal/carers leave (s.245 of the *Workplace Relations,* and clause 29.1.1 of the Clerical Award);

h) Failure to provide an unpaid meal break (s.607 of the *Workplace Relations Act* and clause 31.1 of the Retail Award);

i) Failure to provide a payslip within one working day of each payment of wages (s.536(1) of the *Fair Work Act*);

j) Failure to give notice of termination or make a payment in lieu of notice (s.117(2) of the *Fair Work Act*).

15. On the Applicant's calculations, this means the maximum penalty that the Court may impose would be as follows:

a) For the First Respondent:

$33,000 × 9 + $16,500 (for breach of s536(1) of the *Fair Work Act*)

= **$313,500.**

b) For the Second and Third Respondents each:

$6,600 × 9 + $3,300 (for breach of s.536(1) of the *Fair Work Act*)

= **$62,700**.

Relevant factors

16. In *Kelly v Fitzpatrick* [2007] FCA 1080 at paragraph [14] Tracey J of the Federal Court adopted the non-exhaustive list of relevant considerations that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

> *[14] In* Mason v Harrington Corporation Pty Ltd *[2007] FMCA 7 Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:*
>
> • *The nature and extent of the conduct which led to the breaches.*
>
> • *The circumstances in which that conduct took place.*
>
> • *The nature and extent of any loss or damage sustained as a result of the breaches.*
>
> • *Whether there had been similar previous conduct by the respondent.*
>
> • *Whether the breaches were properly distinct or arose out of the one course of conduct.*
>
> • *The size of the business enterprise involved.*
>
> • *Whether or not the breaches were deliberate.*
>
> • *Whether senior management was involved in the breaches.*
>
> • *Whether the party committing the breach had exhibited contrition.*

> • *Whether the party committing the breach had taken corrective action.*
>
> • *Whether the party committing the breach had cooperated with the enforcement authorities.*
>
> • *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
>
> • *The need for specific and general deterrence.*

Nature and extent of the conduct

17. The Applicant submits that the breaches occurred over approximately one year. During this period, the company's breaches included failing to:

    a) Pay overtime;

    b) Pay the applicable penalty rates for hours worked on the weekend or on a public holiday;

    c) Pay accrued and untaken annual leave upon termination of employment;

    d) Pay the required payment for personal/carers leave;

    e) Make a payment in lieu of notice of termination;

    f) Provide an employee the required meal break;

    g) Provide payslips;

    h) Pay wages on a regular basis; and

    i) Pay the basic periodic rate of pay.

18. The company had underpaid the employees a total of $16,036.75 (not including interest). I note that the Second and Third Respondents were jointly responsible for setting and adjusting the pay rates and paying the wages of the company's employees (see paragraphs [8] and [9] of the Applicant's statement of claim). On 15 June 2011 the Court made orders against the First Respondent to pay these sums to the relevant employees. In spite of these orders, the company has failed to pay the

ordered amounts (see paragraphs [45] to [46] of Katherine Goonan's affidavit affirmed on 10 August 2011).

19. In the circumstances, I find that the Respondents have shown a complete disregard of the company's obligations to pay the employees their entitlements.

Circumstances in which that conduct took place

20. During the contraventions, the First Respondent was carrying on a shoe retailing business and the Second and Third Respondents were jointly responsible for its management.

Nature and extent of loss or damage

21. There have been a total of 17 contraventions. The employees together have been underpaid a total $16,036.75, which is not an insignificant sum. I also take into account the applicant's submission that the amounts owing to each employee are significant sums of money for those who rely on the minimum wage.

Similar previous conduct

22. Ms Katherine Goonan, a Fair Work Inspector, deposes in her affidavit that between 2007 and 2010 there have been five complaints of the Respondents to the Fair Work Ombudsman and its predecessor, the Workplace Ombudsman, which were sustained (see paragraphs [4] to [11] of the affidavit).

23. The finalisation letters sent by the Ombudsman in relation to these complaints show that the Respondents have engaged in similar conduct, being underpayment and non-payment of wages. I note that some of the complaints concern breaches of the same Award that has been breached in this matter, being the *Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000*.

Whether the breaches arose out of the one course of conduct

24. As discussed, the Applicant has conceded that some of the breaches arose out of the one course of conduct and accordingly submit that there are ten distinct groups of breaches.

The size of the business enterprise involved

25. The enterprise concerned is a small business run by two individuals. There are three stores situated at the Docklands, Chadstone and Fountain Gate shopping centres. However, I take into account Driver FM's observation in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at paragraph [27]:

> *[27]* ***Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size****. Such a factor should be of limited relevance to the Court's consideration of penalty. As stated recently, by Tracey J in* Kelly v Fitzpatrick [2007] *FCA 1080, at [28]:*
>
> > *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.*
>
> (emphasis added)

Whether or not the breaches were deliberate

26. In light of the history of complaints made against the Respondents, I accept the Applicant's submission that the Respondents were on notice of their obligations under the applicable industrial instruments. I also take into account the conversation between the Second Respondent and Ms Goonan on 30 November 2009 in which he stated that he had paid staff "above the award" rate of pay (see paragraph [14] of Ms Goonan's affidavit affirmed on 10 August 2011). The statement suggests the Second Respondent was aware of the obligation to pay employees minimum wages.

27. In the circumstances, I find that the breaches were deliberate. The history of the matter indicates a deliberate disregard of industrial obligations.

Involvement of senior management

28. The Second Respondent was responsible for the management and control of the company's employees. The Second Respondent was also jointly responsible with the Third Respondent for paying the employees' wages (see paragraphs [8] to [9] of the Statement of Claim). In light of the Respondents' responsibilities, it is clear that senior management were involved in the breaches. There is no evidence before the Court that the breaches were attributable to any other person.

Whether the Respondents had exhibited contrition

29. I find that there has been no evidence of the Respondents' contrition. Ms Goonan's affidavit outlines the Applicant's numerous attempts to contact the Respondents and secure their compliance (see paragraphs [21] to [31] of the affidavit). However, the Respondents have failed to comply.

30. In particular, I note Ms Gonnan's evidence of a conversation with the Second Respondent on 6 September 2010 in which he advised her that he was already winding up the company and that the Applicant would not be able to "touch him" (see paragraph [35] of the affidavit). The statement displays not only a lack of contrition on the part of the Second Respondent but also contempt towards the Applicant.

Whether the Respondents have taken corrective action

31. I note that the Respondents have taken no corrective action and that the Respondents have failed to make the underpayment orders that were made by this Court against the First Respondent on 15 June 2011.

Whether the Respondents cooperated with the enforcement authorities

32. The Respondents' failure to resolve Festini's underpayment despite intervention by the Applicant (see paragraphs [21] to [31] of Ms Goonan's affidavit) demonstrates that there was no cooperation with the enforcement authority. In particular, I note the number of unsuccessful attempts that the Applicant made to directly speak with the Respondents with messages for them to return the Applicant's call.

33. I also take into account Ms Goonan's conversation with the Second Respondent on 22 December 2009 (see paragraph [16] of the affidavit affirmed on 10 August 2011) in which he told the inspector not to talk to the employees and that the employees had all signed confidentiality agreements. Such conduct suggests an intention to hinder rather than cooperate with the Fair Work Ombudsman.

Ensuring compliance with minimum standards

34. The need to ensure compliance with minimum standards by providing an effective means for investigation and enforcement of employee entitlements is set out in the objects of both the *Workplace Relations Act* and the *Fair Work Act.* Section 3 of the *Workplace Relations 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; and*

35. Similarly, the objects of the *Fair Work Act* include:

> ***3 [Object 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) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the*

> *National Employment Standards, modern awards and national minimum wage orders; and*
>
> …

The need for specific and general deterrence

36. There is a strong need for specific deterrence in light of the Respondents' conduct. The history of complaints against the Respondents shows a pattern of non-compliance. Despite intervention by Fair Work inspectors which led to the Respondents' voluntary compliance with respect to five previous breaches (see paragraphs [4] to [11] of Ms Goonan's affidavit), this has not deterred them from engaging in similar conduct with other employees, which are the subject of these proceedings. The lack of cooperation with the Fair Work inspectors also suggests that the Respondents have a complete disregard for the entitlements of their employees.

37. I also take into account the likelihood of the Respondents in engaging further breaches. Despite claiming to a Fair Work inspector that he would be closing his nine stores (see paragraph [31] of Ms Goonan's affidavit), the Applicant was advised by the Australian Securities and Investments Commission ("ASIC") on 29 June 2011 that the Second Respondent was currently operating a shop at Endeavour Hills Shopping Centre (see paragraph [47] of Ms Goonan's affidavit).

38. 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. 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)

Additional considerations

39. Tracey J also sets out the approach in ensuring the aggregate penalty is not oppressive (see paragraph [30]):

> *[30]* ***Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing.*** *Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see* CPSU v Telstra Corporation Limited *(2001) 108 IR 228 at 230[7]*. ***The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches****: see* Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36 at 53. See also* Ponzio v B & P Caelli Constructions Pty Ltd [*2007] FCAFC 65 at [145] per Jessup J*…

40. The Applicant has not proposed a figure for the penalty to be imposed but simply submits that the penalty should be in the "mid range". I note that Lucev FM in *Fair Work Ombudsman v Orwill Pty Ltd & Ors* [2011] FMCA 730 at paragraph [48] appeared to define mid-range being within the range of 30% to 70% of the maximum penalty that can be imposed:

> *[48] In the Court's view the contraventions in this case fall within* ***a broad mid-range*** *as not being in the most serious*

> *category, nor being in the least serious category, of contravention.* ***Therefore, a penalty of somewhere within the range of 30%-70% of the maximum*** *would be appropriate.* (emphasis added)

Penalties

41. While the Applicant has provided a table and summary of cases involving underpayment breaches, the courts have warned against closely comparing other similar cases to determine the penalty amount. Gray J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 stated:

> *[12]* ***Much of the argument put by counsel for the appellant involved a detailed comparison between the facts of this case and the facts of two other cases in which lower penalties had been imposed in respect of award breaches.*** *The two cases, both judgments of the same Federal Magistrate, are* Mason v Harrington Corporation Pty Ltd *[2007] FMCA 7 and* Flattery v The Italian Eatery T/as Zeffirelli's Pizza Restaurant *[2007] FMCA 9.* ***This was a fundamentally wrong approach. Penalties are not a matter of precedent. The choice of penalty must be dictated by the individual circumstances of a case,*** *not by a line by line comparison with another case.* (emphasis added)

42. Whilst no particular penalty case in the comparative decisions provided a precedent it was useful to peruse the range of penalties imposed in a broad range of cases as part of the background material.

43. In light of the circumstances I find that the appropriate penalties to be:

    a) $160,000 for the First Respondent; and

    b) $30,000 for each of the Second and Third Respondents.

44. The Applicant has conducted various searches with respect to the First Respondent's status. A land titles search indicated that the First Respondent is not the proprietor of any Victorian Land Titles and an ASIC search indicated the First Respondent's status is still "Strike Off Action in Progress" (see paragraph [11] and [13] of Ms Goonan's affidavit affirmed on 8 November 2011). It appears that the First Respondent has no assets.

45. Given the First Respondent's status, it is unlikely that the employees will be able to enforce the underpayments orders of 15 June 2011 and it is therefore unlikely that the employees will receive a windfall if part of the penalty payment is ordered to be paid to them by the Court. Accordingly I order that the first $16,848.70 of any penalty imposed on the Second and Third Respondents be paid to each of the employees in proportion to their entitlements and any remainder should be paid to the Consolidated Revenue Fund of the Commonwealth.

I certify that the preceding forty-five (45) paragraphs are a true copy of the reasons for judgment of Riethmuller FM

Associate:

Date: 30 March 2012