FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557

Citation:	Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557
Parties:	**FAIR WORK OMBUDSMAN v MACLEAN BAY PTY LTD (ACN 106 012 748) and WENDY ANN WELLS**
File number:	TAD 33 of 2010
Judge:	**MARSHALL J**
Date of judgment:	31 May 2012
Catchwords:	**INDUSTRIAL LAW** – penalties and declaratory relief – breach of multiple provisions of the *Workplace Relations Act 1996* and an industrial award – assessment of penalties – single course of conduct – grouping of contraventions – relevant considerations
Legislation:	*Workplace Relations Act 1996* (Cth) ss 718, 719, 728, 792, 809, 841(b), 900, 901, 902 *Federal Court of Australia Act 1976* (Cth) s 21
Cases cited:	*Fair Work Ombudsman v Maclean Bay Pty Ltd* (2012) 200 FCR 57; [2012] FCA 10 *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142; [2010] FCAFC 150 *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 *Kelly v Fitzpatrick* (2007) 166 IR 14 *Australian Building and Construction Commissioner v Inner Strength Steel Fixing Pty Ltd* [2012] FCA 499 *Markarian v The Queen* (2005) 228 CLR 357 *Jordan v Mornington Inn Pty Ltd* (2007) 166 IR 33 *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479
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Place:	Melbourne

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IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY
FAIR WORK DIVISION

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**MACLEAN BAY PTY LTD (ACN 106 012 748)** **First Respondent**
	WENDY ANN WELLS **Second Respondent**

JUDGE:	**MARSHALL J**
DATE OF ORDER:	**31 MAY 2012**
WHERE MADE:	**MELBOURNE**

THE COURT DECLARES THAT:

1. On or about 1 December 2008, the first respondent contravened s 902(1) of the *Workplace Relations Act 1996* (Cth) when it dismissed its employee Mrs Sharon Williams who performed particular work for it, for the sole or dominant purpose of engaging Mrs Williams as an independent contractor to perform the same work, or substantially the same work, under a contract for services.

2. On or about 1 December 2008, the second respondent contravened s 902(1) of the Act by being a person involved in, within the meaning of s 728(1) of the Act, the contravention of that provision referred to in declaration 1.

3. On or about 1 December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Mrs Sharon Williams for the sole or dominant reason that Mrs Williams was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

4. On or about 9 December 2008, the first respondent contravened s 901(1) of the Act when it offered to enter into a contract with Mrs Sharon Williams and represented to Mrs Williams that the contract, if entered into, would be a contract for services under which Mrs Williams would perform work for the first respondent as an independent contractor, in circumstances where, as a matter of fact and law, the contract, if entered

into, would have been a contract of employment under which the first respondent would have been the employer of Mrs Williams, rather than a contract for services under which Mrs Williams would have performed work as an independent contractor.

5. On or about 9 December 2008, the second respondent contravened s 901(1) of the Act by being a person involved in, within the meaning of s 728(1) of the Act, the contravention of that provision referred to in declaration 4.

6. In or about early December 2008, the first respondent contravened s 902(1) of the Act when it dismissed its employee, Mr Jeffrey Golding who performed particular work for it, for the sole or dominant purpose of engaging Mr Golding as an independent contractor to perform the same work, or substantially the same work, under a contract for services.

7. In or about early December 2008, the second respondent contravened s 902(1) of the Act by being a person involved in, within the meaning of s 728(1) of the Act, the contravention of that provision referred to in declaration 6.

8. In or about early December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Mr Jeffrey Golding for the sole or dominant reason that Mr Golding was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

9. From 2 March 2009 until 9 April 2009, the first respondent contravened s 900(1) of the Act when it represented to Ms Kerryn Smith that the contract to which she was a party with the first respondent was a contract for services under which Ms Smith performed, or was to perform, work for the first respondent as an independent contractor, in circumstances where, as a matter of fact and law, the contract as in force at the time of the representations, was a contract of employment under which the first respondent was the employer of Ms Smith, rather than a contract for services under which Ms Smith performed work as an independent contractor.

10. From 20 April 2009 until 26 April 2009, the first respondent contravened s 900(1) of the Act when it represented to Mrs Janette Kubank that the contract to which she was a party with the first respondent was a contract for services under which Mrs Kubank performed, or was to perform, work for the First Respondent as independent contractor, in circumstances where, as a matter of fact and law, the contract, as in force at the time of the representations, was a contract of employment under which

the first respondent was the employer of Mrs Kubank, rather than a contract for services under which Mrs Kubank performed work as an independent contractor.

11. From 20 April 2009 until 26 April 2009, the first respondent contravened s 900(1) of the Act when it represented to Ms Alison Kubank that the contract to which she was a party with the first respondent was a contract for services under which Ms Kubank performed, or was to perform, work for the first respondent as independent contractor, in circumstances where, as a matter of fact and law, the contract, as in force at the time of the representations, was a contract of employment under which the first respondent was the employer of Ms Kubank, rather than a contract for services under which Ms Kubank performed work as an independent contractor.

12. Between about October 2008 and prior to 10 December 2008, the first respondent contravened s 792(1)(c) of the Act when it altered the position of Ms Sarah Harrison to her prejudice for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

13. Between about October 2008 and prior to 10 December 2008, the first respondent contravened s 792(1)(c) of the Act when it altered the position of Ms Rebecca Lord to her prejudice for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

14. Between about October 2008 and prior to 10 December 2008, the first respondent contravened s 792(1)(c) of the Act when it altered the position of Ms Lucy Richardson to her prejudice for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

15. Between about October 2008 and prior to 10 December 2008, the first respondent contravened s 792(1)(c) of the Act when it altered the position Mrs Robyn Taylor to her prejudice for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

16. On or about 10 December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Ms Sarah Harrison for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s793(1)(i) of the Act.

17. On or about 10 December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Ms Rebecca Lord for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s793(1)(i) of the Act.

18. On or about 10 December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Ms Lucy Richardson for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s793(1)(i) of the Act.

19. On or about 10 December 2008, the first respondent contravened s 792(1)(a) of the Act when it dismissed Ms Robyn Taylor for the sole or dominant reason that she was entitled to the benefit of an industrial instrument, being a reason prohibited by s 793(1)(i) of the Act.

20. On or about 23 February 2009, the first respondent contravened clause 49(g) of the *Hotels, Resorts, Hospitality and Motels Award* by failing to pay Ms Katherine Homes her accrued untaken pro rata annual leave upon the termination of her employment with the first respondent.

21. On or about 12 February 2009, the first respondent contravened clause 49(g) of the NAPSA by failing to pay Ms Kerryn Smith her accrued untaken pro rata annual leave upon the termination of her employment with the first respondent.

22. In 2008, the first respondent contravened clause 77(c)(iv) of the NAPSA when it failed to make monthly superannuation contributions on behalf of:

    (a) Mrs Sharon Williams;
    (b) Mr Jeffrey Golding;
    (c) Ms Sarah Harrison;
    (d) Ms Rebecca Lord;
    (e) Mr Toby Garrett; and
    (f) Ms Kelly Griffiths.

THE COURT ORDERS THAT:

1. A combined penalty of $280,500 is imposed on the first respondent for contraventions of the *Workplace Relations Act 1996* (Cth) and of a Notional Agreement Preserving State Awards, in accordance with the accompanying reasons for judgment.

2. A combined penalty of $13,860 is imposed on the second respondent for contraventions of the Act, in accordance with the accompanying reasons for judgment.

3. The penalty referred to in paragraph 1 above is to be paid into Consolidated Revenue within 30 days of the date of this order.

4. The penalty referred to in paragraph 2 above is to be payable in accordance with paragraph [53] of the accompanying reasons for judgment, within 30 days of the date of this order.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

IN THE FEDERAL COURT OF AUSTRALIA
TASMANIA DISTRICT REGISTRY
FAIR WORK DIVISION

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**MACLEAN BAY PTY LTD (ACN 106 012 748)** **First Respondent**
	WENDY ANN WELLS **Second Respondent**
JUDGE:	**MARSHALL J**
DATE:	**31 MAY 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE CONTEXT

1 On 16 January 2012, the Court found that the respondents had contravened various provisions of the *Workplace Relations Act 1996* ("the Act") and of an industrial instrument made under the Act. The "liability judgment", as it will be called in these reasons, is reported as *Fair Work Ombudsman v Maclean Bay Pty Ltd* [2012] FCA 10; (2012) 200 FCR 57. These reasons for judgment are intended to be read in conjunction with the liability judgment. Expressions used in the liability judgment are intended to have the same meaning in this judgment.

2 The industrial instrument found to be breached was a *Notional Agreement Preserving State Awards* ("the NAPSA"). Those breaches concerned the failure of the first respondent, Maclean Bay Pty Ltd ("Maclean Bay"), to make monthly superannuation contributions on behalf of certain employees and its failure to pay certain employees an amount in respect of their unused annual leave on termination. The other breaches involved sham contracting, dismissal of employees for a prohibited reason and prejudicial alteration of employment for a prohibited reason.

3 At para [8] of the liability judgment, the Court said:

> Apart from those alleging breaches of the NAPSA, the allegations are particularly serious ones. Nonetheless, the evidence in support of each such contravention is strong and in many respects uncontradicted.

4 The Court found that the following contraventions had occurred as a result of the conduct of Maclean Bay:

- two contraventions of s 902(1) of the Act concerning Mrs Williams and Mr Golding;
- one contravention of s 901(1) of the Act concerning Mrs Williams;
- three contraventions of s 900(1) of the Act concerning the Kubanks and Mrs Smith;
- six contraventions of s 792(1)(a) of the Act concerning Mrs Williams, Mr Golding and the housekeepers;
- four contraventions of s 792(1)(c) of the Act concerning the housekeepers;
- six contraventions of cl 77(c)(iv) of the NAPSA concerning superannuation contributions payable to six employees;
- two contraventions of cl 49(g) of the NAPSA concerning failure to pay unused annual leave on termination in respect of two employees.

5 The Court found the second respondent, Mrs Wells, accessorily liable under s 728 of the Act for breaches by Maclean Bay as follows:

- two contraventions of s 902(1) of the Act for being a person involved in Maclean Bay's breach of s 902(1) concerning Mrs Williams and Mr Golding; and
- one contravention of s 901(1) of the Act for being a person involved in Maclean Bay's contravention of s 901(1) concerning Mrs Williams.

6 The function of these reasons for judgment is to determine the pecuniary penalties which the respondents should be ordered to pay, by reason of their contravening conduct. The applicant also seeks declaratory relief in respect of the contraventions pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth). The respondents do not resist the making of declarations in respect of the contraventions. The parties were at odds as to which declarations should be made. The declarations made by the Court reflect the Court's view as to the appropriate groupings of categories of contravention referred to later in these reasons.

APPROACH TO GROUPING OF CONTRAVENTIONS BY MACLEAN BAY

(a) Clause 77(c)(iv) of the NAPSA

7 The parties acknowledge that it may be appropriate for the Court to group certain contraventions together, as arising out of a "course of conduct". Two or more contraventions may have common characteristics which may make it appropriate to consider them as part of a course of conduct.

8 It is common ground that the six contraventions of cl 77(c)(iv) of the NAPSA concerning Mr Garrett, Mr Griffiths, Ms Harrison, Ms Lord, Mr Golding and Mrs Williams constitute a single breach of cl 77(c)(iv). This is a consequence, specifically, of s 719(2) of the Act. That sub-section provides, so far as is material, that 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.

"Applicable provision" is defined in s 718(1) Item 4 to include a term of a collective agreement. Clause 43(1) of Sch 8 to the Act provides that:

> A notional agreement preserving State awards may be enforced as if it were a collective agreement.

9 I agree with the parties that it is appropriate to treat Maclean Bay's six breaches of cl 77(c)(iv) of the NAPSA as one breach in accordance with s 719(2) of the Act. In due course, the Court will consider what penalty is appropriate to impose on Maclean Bay for its failure to pay superannuation contributions in respect of the relevant employees on a monthly basis.

(b) Clause 49(g) of the NAPSA

10 In the liability judgment, the Court found that Maclean Bay had breached cl 49(g) of the NAPSA in two respects. It found that Maclean Bay had failed to pay pro rata annual leave entitlements on termination to Mrs Smith and Ms Holmes.

11 Maclean Bay submits that the two contraventions should be treated as a single contravention, as they arise out of the same course of conduct. The applicant contends that

there is no evidence to establish that the two contraventions arose out of the same course of conduct. The applicant concedes that the six superannuation-related breaches of the NAPSA occurred during the same time period as a consequence of a single decision of Maclean Bay not to comply with its obligations in respect of the timing of making superannuation payments. However, it is submitted that the contraventions of clause 49(g) of the NAPSA occurred on different dates and in respect of different individuals. I agree with the applicant's submissions. Maclean Bay's failure to pay accrued annual leave entitlements to Mrs Smith and Ms Holmes occurred at different times and in circumstances unique to each former employee as to amount and payment rate.

12 The two contraventions of cl 49(g) of the NAPSA did not arise out of a single course of conduct, but involved two separate and distinct failures to comply with a NAPSA obligation in respect of different people at different times.

(c) The contraventions concerning Mrs Williams

13 Maclean Bay submits that all three contraventions concerning Mrs Williams should be considered as part of a single course of conduct. Those contraventions relate to breaches of ss 792(1)(a), 901(1) and 902(1) of the Act. Although there is no equivalent to s 719(2) of the Act relevant to the above provisions, the applicant concedes that it may nonetheless be appropriate to group non-NAPSA related contraventions if they arise out of the same course of conduct. This submission is accepted. As a matter of sentencing discretion, a court may take into account as a relevant factor that a number of contraventions have arisen out of a single course of conduct; see *QR Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia* (2010) 204 IR 142; [2010] FCAFC 150 at [49] to [50] per Keane CJ and Marshall J. The Court should, where possible, avoid imposing multiple punishments for what is essentially the same transgressing conduct.

14 The applicant submits, and the Court agrees, that the contraventions by Maclean Bay concerning Mrs Williams should be treated as two contraventions. The breaches of ss 902(1) and 792(1)(a) arise out of Maclean Bay's dismissal of Mrs Williams. The breach of s 901(1) concerned post-dismissal conduct and the basis upon which Maclean Bay was prepared to re-engage Mrs Williams. Each such conduct is of a different nature and does not constitute the same course of conduct.

(d) The contraventions concerning Mr Golding

15 The parties are agreed, and the Court accepts, that the two contraventions concerning Mr Golding should be treated as one contravention. The breach of s 902(1) and the breach of s 792(1)(a) each arose out of the dismissal of Mr Golding by Maclean Bay.

(e) The contravention concerning Mrs Smith

16 The parties are agreed, and the Court accepts, that the contravention of s 900(1) of the Act by Maclean Bay concerning Mrs Smith is a stand-alone contravention.

(f) The Kubank contraventions

17 Maclean Bay submits that its contraventions of s 900(1) in respect of Janette and Alison Kubank should be treated as one contravention on the basis that they were committed in a single course of conduct. The applicant concedes that these contraventions arose out of a single course of conduct but says the Court should treat them as two separate contraventions nonetheless. The applicant points to authority dealing with s 792 where the Court has considered that where the conduct affects more than one employee, a separate contravention is considered to have occurred regarding each employee; see *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at [7] per Merkel J and the authorities there cited.

18 Applying those authorities, each breach of a civil penalty provision of the Act affecting each person, where workplace rights have been transgressed, is properly considered as a separate contravention, notwithstanding that it arose out of a single course of conduct. Whether or not the transgressor is punished for each such contravention is a matter to be taken into account when assessing the appropriate penalty to be imposed.

19 Each Kubank contravention is to be treated as a separate contravention, but whether the same punishment is imposed for each is a matter for later consideration.

(g) The s 792(1)(c) contraventions in respect of the housekeepers

20 The analysis referred to above in respect of the Kubank contraventions applies equally here. Each contravention is to be treated as separate.

(h) The s 792(1)(a) contraventions in respect of the housekeepers

21 Again, the same analysis as for the Kubank contraventions applies and each is to be treated as a separate contravention.

MRS WILLIAMS' DISMISSAL CONTRAVENTIONS - RELEVANT FACTORS

22 In considering the possible penalties to be imposed for contraventions of the Act, Tracey J, in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14], referred to some relevant considerations. They are:

(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.

23 The conduct which led to the contraventions relating to Mrs Williams dismissal is well traversed in the liability judgment and at [13] and [14] above. It involved an appalling abuse of power by an employer. The distress it caused Mrs Williams was real and should

have been foreseen. This is a sufficient summary of the relevance of considerations (a), (b) and (c) referred to in *Kelly*.

24 There is no evidence of any similar previous conduct by Maclean Bay; see consideration (d) in *Kelly*.

25 A penalty for the contravening conduct will be assessed by reference to the breach of s 902(1) only, the breach of s 792(1)(a) being part of the same course of conduct with respect to the same employee; see consideration (e) in *Kelly*.

26 Consideration (f) relates to the size of the business enterprise involved. Maclean Bay conducted a relatively small business at Diamond Island Resort. However, as the evidence disclosed, Maclean Bay is a part of the WAW Group of Companies ("the WAW group"). The WAW group has several businesses primarily engaged in investment, construction and property development. One of the companies in that group owns a shopping centre in Brisbane and constructed a six-storey building in that city. It would be wrong to treat Maclean Bay as some minor small business, the imposition of fines on which would cause hardship. The respondents sought to rely on an affidavit of Mr Wells to make out financial difficulties in the WAW group, particularly for Maclean Bay. Counsel for the applicant required Mr Wells to attend court to be cross-examined on his affidavit. He failed to do so without any excuse being offered by counsel for the respondents for Mr Wells' non-attendance. I declined to receive his affidavit. In any event, any inability to pay as a consequence of the financial position of a transgressor is of much less relevance than the issue of general deterrence; see *Jordan v Mornington Inn Pty Ltd* (2007) 166 IR 33 at [99] per Heerey J. See also, on appeal, *Mornington Inn Pty Ltd v Jordan* [2008] FCA 383 at [69] per Stone and Buchanan JJ.

27 Considerations (g) to (j) in *Kelly* may be dealt with together. The contraventions were deliberate, as distinct from inadvertent. Senior management directed the conduct. There is no evidence that Maclean Bay has taken corrective action to mitigate the contraventions.

28 As to consideration (k), Maclean Bay did co-operate with investigators from the applicant and engage in an interview with them. However, as disclosed in the liability

judgment, that "co-operation" included attempts to mislead the investigators as to the truth of matters the subject of investigation.

29 Considerations (l) and (m) in *Kelly* may be grouped. It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected. Employers need to understand that they cannot, with impunity, treat their employees the way Maclean Bay treated Mrs Williams. I agree, with respect, with the recent observations of Gilmour J about the need for general deterrence in sham contracting matters; see *Australian Building and Construction Commissioner v Inner Strength Steel Fixing Pty Ltd* [2012] FCA 499 at [13] to [15] and especially at [30]. Specific deterrence is also relevant. Given the blatant breaches of the Act engaged in by the respondents, the need for such conduct not to be repeated by them must be strongly emphasised.

30 The considerations discussed above in respect of the assessment of penalty for contravening conduct concerning the dismissal of Mrs Williams apply with equal force to the assessment of other penalties now to be considered.

ASSESSMENT OF PENALTY FOR THE CONTRAVENTIONS CONCERNING MRS WILLIAMS

(a) The dismissal contraventions

31 In the liability judgment, at [67], the Court observed that "it is difficult to imagine a clearer case of contravention of s 902(1)". It has already been emphasised that, apart from the NAPSA-related breaches, the contraventions by Maclean Bay were particularly serious. That is especially so in the case of Mrs Williams. Her treatment by Maclean Bay was disgraceful and showed a complete lack of care for the dignity of a hard-working, loyal employee. To force an employee to accept a sham arrangement where she and her employer are to pretend that she is a contractor and have her lose all her rights as an employee (such as entitlement to the rights afforded by the NAPSA) is conduct which deserves a high range penalty. Maclean Bay needs to have it driven home that its conduct was unacceptable by community norms of decency and respect for fellow human beings, as well as being a breach of this country's labour laws.

MRS WILLIAMS' DISMISSAL: CONCLUSION ON PENALTY

32 The only factors mitigating against the imposition of a maximum penalty are Maclean Bay's lack of previous transgressions and the fact that it co-operated in permitting its officers to be interviewed by inspectors from the applicant. Set against those factors is the abhorrent nature of the conduct and the fact that misleading evidence was given to the inspectors, especially by Mrs Wells (as referred to in the liability judgment). Taken together, these considerations make it appropriate for a penalty of 90 per cent of the maximum to be imposed. The resulting penalty is $29,700.

THE SECTION 901(1) CONTRAVENTION REGARDING MRS WILLIAMS

33 Having punished Mrs Williams for failing to engage in a sham contracting arrangement, Maclean Bay then set about trying to entice her into one. This was another display of breathtaking arrogance by an uncaring employer. It is unnecessary to repeat the *Kelly* considerations when assessing penalty for this contravention. It is also deserving of a high range penalty for the same reasons discussed regarding Mrs Williams' dismissal contraventions. It is appropriate to impose a penalty of $29,700 in respect of this contravention.

THE GOLDING CONTRAVENTIONS

34 The effect on Mr Golding of his dismissal was devastating. He did not want to lose his job. He searched for workers' compensation insurance but was unable to find any at a rate which made it worthwhile to continue working at Diamond Island. He should not have been put through that cruel exercise.

35 Instead of confessing to its real reason for terminating Mr Golding's employment, Maclean Bay engaged in hurtful untruths. That shameful episode, engaged in by Mr Wells in his evidence, was the subject of discussion in the liability judgment. No worker deserves to be treated in such a manner. To force a gardener to become a contractor to keep his job and then tell lies about why it dismissed him is the conduct of a rogue employer which deserves to be met with the full force of the law. This conduct also deserves a penalty of $29,700.

THE SMITH CONTRAVENTION

36 Maclean Bay engaged Mrs Smith as a contractor in a sham contracting arrangement. Then, Maclean Bay, through Mr and Mrs Wells, lied about Mrs Robinson's authority to arrange for the sham to be put into effect. That is so when it was beyond doubt that, as general manager of the resort, Mrs Robinson had authority to deal with current and prospective staff. So much was integral to her function.

37 The effect on Mrs Smith of this sham contracting arrangement was not nearly as devastating as it was for Mrs Williams and Mr Golding. The circumstances were not as pernicious. Consequently, a penalty of 70 per cent of the maximum is appropriate. The penalty for breach of this provision is set at $23,100.

THE KUBANK CONTRAVENTIONS

38 The Kubank contraventions are similar in nature to the contravention concerning Mrs Smith. However, they are more serious because they involve an attempt to convert an existing employment situation into a sham contracting arrangement. The sham was perpetrated against two powerless laundry workers, one of whom had an intellectual disability. The only mitigating factor for Maclean Bay (other than those addressed in reference to Mrs Williams) was that the transgression lasted less than one week. A penalty of 80 per cent of the maximum is appropriate in respect of the contravention against Miss Alison Kubank, the intellectually disabled daughter of Mrs Janette Kubank. I would impose a penalty of 20 per cent of the maximum in respect of the contravention against Mrs Janette Kubank. The respective fines are $26,400 and $6,600.

THE HOUSEKEEPER CONTRAVENTIONS

39 The dismissal of the housekeepers, Ms Taylor, Ms Harrison, Ms Richardson and Ms Lord, involves eight separate contraventions of the Act. The conduct concerned four dismissals. It was conduct designed to deprive the housekeepers of the benefit of the NAPSA. It also involved four separate acts of prejudicial alteration on account of the housekeepers' entitlement to the benefit of the NAPSA. It was conduct in the nature of victimisation. It deserves a mid to high range penalty in each case. However, the dismissal conduct was more serious than the prejudicial conduct. I assess the dismissal conduct at 60 per cent of the maximum available in each of four cases and at 20 per cent otherwise.

40 The penalties in respect of each housekeeper will therefore be $19,800 for their dismissal and $6,600 each for their prejudicial alteration.

TOTAL PENALTIES FOR NON-NAPSA BREACHES FOR MACLEAN BAY

41 The penalties to be imposed on Maclean Bay for its non-NAPSA related breaches are as follows:

- The Williams dismissal contraventions;

  - $29,700.

- The Williams s 901(1) contraventions;

  - $29,700.

- The Golding contraventions;

  - $29,700.

- The Smith contravention;

  - $23,100.

- The Kubank contraventions;

  - $33,000 in total.

- The housekeeper dismissal contraventions;

  - $79,200 in total.

- The housekeeper prejudicial alteration contraventions;

  - $26,400 in total.

42 The total of the non-NAPSA penalties, prior to the application of the totality principle, is $250,800.

THE NAPSA PENALTIES

43 Maclean Bay committed one contravention of cl 77(c)(iv) and two contraventions of cl 49(g) of the NAPSA. The maximum penalty for each of the three contraventions is $33,000.

44 The breaches of cl 49(g) involved the failure to pay substantial sums of money to employees who would have been expected to receive that money on their termination. They should not have had to fight to obtain what was theirs by workplace right. Although the payments have been rectified with some interest, that correction was not made until after the commencement of this proceeding. A penalty of 40 per cent of the applicable range is appropriate. This results in a penalty of $13,200 in each case, making a total of $26,400 for breaches of cl 49(g) of the NAPSA.

45 The breach of cl 77(c)(iv) of the NAPSA was rectified but not until the affected employees complained to the Australian Taxation Office. The breach affected six employees. A penalty of 30 per cent of the maximum is appropriate.

46 A penalty of $9,900 is imposed for the contravention of cl 77(c)(iv) of the NAPSA.

47 The total NAPSA-related penalty is $36,300.

APPLICATION OF TOTALITY PRINCIPLE

48 The total of the non-NAPSA and NAPSA related penalties is $287,100. The Court is now obliged to impose a final check on the total of the penalties to ensure the overall penalty is a just one in all the circumstances; see *Markarian v The Queen* (2005) 228 CLR 351 at [83].

49 The essential question to ask here is whether the total penalties are appropriate having regard to the potential maximum penalties for the 17 categories of contravention. The potential maximum penalty is $561,000. The total penalty which may be imposed on Maclean Bay of $287,100 is 51.2 per cent of that maximum sum. The Court now applies its instinctive synthesis to the total penalty it has considered appropriate and in doing so assesses 50 per cent of the potential total maximum as a sum which is proper to be imposed as a penalty in all the circumstances. Half of $561,000 is $280,500.

TOTAL PENALTY TO BE IMPOSED ON MACLEAN BAY

50 Having regard to the foregoing, the total penalty to be imposed on Maclean Bay is $280,500. It should be paid into the Consolidated Revenue Fund of the Commonwealth within 30 days of the date of the accompanying order.

PENALTIES TO BE IMPOSED ON MRS WELLS

51 Mrs Wells committed three contraventions of the Act. She breached s 902(1) in respect of Mrs Williams and Mr Golding. She breached s 901(1) in respect of Mrs Williams. Mrs Wells was the driving force and guiding hand behind all these contraventions and has been held accessorily liable for the related contravening conduct of Maclean Bay. I consider, given the seriousness of the offending, that a penalty of 70 per cent of the maximum is appropriate in each case in respect of Mrs Wells. A higher penalty would have been imposed but for the fact that Mrs Wells has no history of previous contravening conduct.

52 Mrs Wells' conduct was nothing short of disgraceful. She treated Mrs Williams and Mr Golding in an appalling manner and told lies about her conduct to the applicant's inspectors. The only matter of substance in her favour is that she has no record of previous transgression. Applying the totality principle to her, I cannot in good conscience reduce her penalty. Anything less than 70 per cent of the maximum would not adequately reflect the gravity of her conduct.

53 A penalty of $13,860 is to be imposed on Mrs Wells, constituted by a $4,620 penalty in respect of each contravention. The applicant contends, and the Court agrees, that it is appropriate that such penalty be paid to the individuals who were affected by Mrs Wells' contravening conduct. Pursuant to s 841(b) of the Act, the total penalty of $13,860 is to be divided as follows:

(a) to Mrs Williams - 13 per cent of the total of the penalties imposed on the Second Respondent by orders 2, 4 and 6 equalling $1,801.80.

(b) Mr Jeffrey Golding - 5 per cent of the total penalties imposed on the Second Respondent by orders 2, 4 and 6 equalling $693.00;

(c) Ms Sarah Harrison – 60 per cent of the total penalties imposed on the Second Respondent by orders 2, 4 and 6 equalling $8,316.00;

(d) Ms Lucy Richardson – 13 per cent of the total penalties imposed on the Second Respondent by orders 2, 4 and 6 equalling $1,801.80; and

(e) Mrs Robin Taylor – 9 per cent of the total of the penalties imposed on the Second Respondent by orders 2, 4 and 6 equalling $1,247.40.

54 The Court has recognised the appropriateness of ordering the payment of a part or all of a penalty to those who have been affected by a respondent's contravening conduct; see *Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq)* [2012] FCA 479 at [34] per Bromberg J. It is appropriate to do so in the current circumstances to help alleviate the losses suffered by the persons referred to in the preceding paragraph.

COMMENT

55 Maclean Bay has not complied with the compensation orders made on 16 January 2012, other than in respect of Ms Lord. The extent of the failure to comply is unclear. The applicant may wish to bring a contempt proceeding in respect of that non-compliance. If it does so, the Court will attempt to expedite any such proceeding. That persons affected by Maclean Bay's unlawful conduct remain uncompensated is a matter of great concern and should be rectified as soon as possible. If that is not immediately possible from the resources of Maclean Bay, those who stand behind it should have the decency to attempt to remedy their corporate entity's failure to comply with the law rather than cowering behind the corporate veil.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate: 

Dated: 31 May 2012