FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v MINEEFF *[2012] FMCA 232*

INDUSTRIAL LAW – Civil penalty proceedings – agreed facts and admissions – relevant factors.

Bankruptcy Act 1966 (Cth), ss.58, 82
Fair Work Act 2009 (Cth), ss.44, 87, 90, 535, 536, 546, 550, 557
Fair Work Regulations 2009 (Cth), regs.3.31, 3.32, 3.36, 3.40
Workplace Regulations 2006 (Cth), regs.14.3, 14.4, 19.4, 19.6, 19.5, 19.8, 19.12, 19.14, 19.20
Workplace Relations Act 1996 (Cth), ss.234, 235, 717, 718, 719, 728, 841, 846, 900, 902, 904, 909

Australian Competition and Consumer Commission v Black on White Pty Ltd (2001) 110 FCR 1
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560, [2008] FCAFC 8
Cotis v Macpherson (2007) 169 IR 30; [2007] FMCA 2060
Damevski v Giudice (2003) 135 FCR 438; [2003] FCAFC 252
Hollis v Vabu (2001) 207 CLR 21
Ian Seymour v Stawell Timber Industries Pty Ltd (1985) 9 FCR 241
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Matheson Engineers Pty Ltd and Exearne Pty Ltd v Sami El Raghy; Michael John Brenz Kriewaldt and Kevin Bond (1992) 37 FCR 6
McIver v Healey [2008] FCA 425
Minister for Industry Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70
NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission (1996) 71 FCR 285
On-Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No. 3) [2011] FCA 366
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543, [2007] FCAFC 65
R v Thompson (1975) 11 SASR 217
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Stephen Gibbs v the Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
Torpia v Empire Printing (Australia) Pty Ltd and Anor (2009) 234 FLR 103,

(2009) 188 IR 306
Wells v Locarno Management Pty Ltd [2008] FCA 1034
Williams v Automotives, Food, Metals, Engineering, Printing and Kindred Industries Union (2010) 196 IR 365
Yardley v Betts (1979) 22 SASR 108

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	JOHN MINEEFF
File Number:	SYG1346 of 2011
Judgment of:	Barnes FM
Hearing date:	21 February 2012
Delivered at:	Sydney
Delivered on:	27 March 2012

REPRESENTATION

Solicitors for the Applicant:	Fair Work Ombudsman
Respondent:	In person

ORDERS

(1) The Respondent was involved (within the meaning of s.728(1) of the *Workplace Relations Act 1996* (WR Act)) in the contraventions committed by Villtruck Pty Ltd of the following provisions:

(a) s.902(1) of the *WR Act*;

(b) s.900(1) of the *WR Act*;

(c) subs.234(2) of the *WR Act* which is an "applicable provision" for the purpose of s.718 of the *WR Act*;

(d) subs.235(2) of the *WR Act* which is an "applicable provision" for the purpose of s.718 of the *WR Act*; and

(e) chapter 2, Part 19, Division 2, regulations 19.4, 19.5(1), 19.6(1), 19.8(1)(c) – (e), 19.12(1)(a) – (c), 19.14(1)(a) – (b) and 19.20 of the *Workplace Relations Regulations 2006* (*WR Regulations*).

(2) The Respondent was involved (within the meaning of s.550 of the *Fair Work Act 2009* (*FW Act*)) in the contraventions committed by Villtruck Pty Ltd of the following provisions:

(a) S.44 of the *FW Act* by virtue of s.90(2) of the *FW Act*;

(b) S.535 of the *FW Act* and Chapter 3, Part 3-6, Division 3, regulations 3.31(1), 3.32(c) – (e), 3.36(1)(a)-(b) and 3.40(a)-(b) of the Fair Work Regulations 2009 (*FW Regulations*); and

(c) S.536(1) of the *FW Act*.

(3) Pursuant to subs.904(1) of the *WR Act*, a penalty of $2,112.00 be imposed on the Respondent in respect of his involvement in the contravention of subs.902(1) of the *WR Act* in relation to the employment of Mr Shane Nathan Scholte.

(4) Pursuant to subs.904(1) of the *WR Act*, a penalty of $2,112.00 be imposed on the Respondent in respect of his involvement in the contravention of subs.900(1) of the *WR Act* in relation to the employment of Mr Shane Nathan Scholte.

(5) Pursuant to subs.719(1) of the *WR Act*, a penalty of $2,112.00 be imposed on the Respondent in respect of his involvement in the contravention of subs.235(2) of the *WR Act* in relation to the employment of Mr Shane Nathan Scholte.

(6) Pursuant to subs.719(1) of the *WR Act*, a penalty of $2,112.00 be imposed on the Respondent in respect of his involvement in the contravention of subs.234(2) of the *WR Act* in relation to the employment of Mr Shane Nathan Scholte.

(7) Pursuant to regulations 14.3 and 14.4 of Part 14 of Chapter 2 of the *WR Regulations*, a penalty of $352.00 to be imposed on the Respondent in respect of his involvement of the contravention of Chapter 2, Part 19, Division 2, regulations 19.4, 19.5, 19.6, 19.8(1)(c)-(e), 19.12(1)(a)-(c), 19.14(1)(a)-(b) and 19.20 of the *WR Regulations* in relation to the employment of Mr Shane Nathan Scholte.

(8) Pursuant to subs.719(1) of the *WR Act*, a penalty of $2,112.00 be imposed on the Respondent in respect of his involvement in the contravention of s.44 of the *FW Act* by virtue of s.90(2) of the *FW Act* in relation to the employment of Mr Shane Nathan Scholte.

(9) Pursuant to subs.546(1) of the *FW Act* a penalty of $1056.00 be imposed on the Respondent in respect of his involvement in the contravention of s.535 of the *FW Act* in relation to the employment of Mr Shane Nathan Scholte.

(10) Pursuant to subs.546(1) of the *FW Act* a penalty of $1056.00 be imposed on the Respondent in respect of his involvement in the contravention of subs.536(1) of the *FW Act* in relation to the employment of Mr Shane Nathan Scholte.

(11) Pursuant to s.841 of the *WR Act* and subs.546(3)(c) of the *FW Act*, the penalties referred to in paragraphs 3 to 10 above be paid by the respondent to Mr Shane Nathan Scholte.

(12) The penalties referred to in order 11 to be paid within 28 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1346 OF 2011

FAIR WORK OMBUDSMAN
Applicant

And

JOHN MINEEFF
Respondent

REASONS FOR JUDGMENT

These Proceedings

1. This is an application for the imposition of penalties on the respondent for contraventions of the *Workplace Relations Act 1996* (Cth) (*WR Act*) and the *Fair Work Act 2009* (Cth) (*FW Act*) and the regulations under both Acts.

2. By application and statement of claim filed on 28 June 2011 the Fair Work Ombudsman (the FWO) alleged that Mr Mineeff was involved in a number of contraventions by Villtruck Pty Ltd (in liquidation)(Villtruck). Prior to the hearing the parties signed an Agreed Statement of Facts (ASF) in which it was admitted by Mr Mineeff that Villtruck had breached a number of provisions of the *WR Act* and *FW Act* and the regulations thereunder and that Mr Mineeff, who was at all material times the sole director and secretary of Villtruck, was involved in such contraventions.

3. The FWO seeks declarations as to Mr Mineeff's involvement in the contraventions committed by Villtruck and orders for the imposition of penalties on Mr Mineeff. As discussed below I am satisfied that Mr Mineeff was involved in the contraventions by Villtruck of ss.234(2), 235(2), 900(1) and 902(1) of the *WR Act* and reg.19.4, 19.5(1), 19.6(1), 19.8(1)(c)-(e),

19.12(1)(a)-(c), 19.14(1)(a)-(b) and 19.20 of the *Workplace Relations Regulations 2006* (Cth) (the *WR Regulations*) and in the contraventions by Villtruck of ss.44, 535 and 536(1) of the *FW Act* and regs.3.31(1), 3.32(c)-(e), 3.36(1)(a)-(b) and 3.40(a)-(b) of the *Fair Work Regulations 2009* (*FW Regulations*).

4. The parties made joint submissions in the ASF as to penalty. Mr Mineeff, who is self-represented, also relied on an affidavit he swore on 7 February 2012 raising a number of matters relevant to the appropriate penalties while the FWO relied on affidavits of Shane Nathan Scholte sworn on 9 February 2012 and Matthew Dennis Christie (a Fair Work Inspector) sworn on 10 February 2012.

Background

5. Mr Mineeff was at all material times the sole director and secretary of Villtruck which operated a business in New South Wales purchasing, selling and repairing second-hand trucks. Villtruck is currently under external administration and liquidators have been appointed.

6. Mr Scholte was an employee of Villtruck from about early 2003 until about March 2009 (Period 1). I accept that, as agreed in the ASF, in April 2007 Mr Scholte was diagnosed with a heart condition. He was hospitalised for two weeks, but subsequently returned to work for Villtruck. At that time there was some reduction in the volume of his work output, but no variation in his usual hours of work or job duties. He received further in-patient treatment for his heart condition over nine calendar days across three treatment periods between 2007 and 2009. Following each such period of treatment he returned to work for Villtruck with no variation to his usual hours of work or job duties, although there may have been some reduction in the volume of his work output.

7. It is agreed that in the period from approximately April 2009 until approximately March 2010 Villtruck represented that Mr Scholte was an independent contractor engaged to perform services for it (Period 2). However, it is also agreed that during both Periods 1 and 2 Mr Scholte performed duties for Villtruck such as panel beating and vehicle detailing and typically performed 40 hours of work per week.

8. The relevant instrument which applied to Mr Scholte's work for Villtruck was the *Vehicle Industry – Repair Services and Retail Award 2002*, a copy of which

was tendered by the FWO. It is agreed that Mr Scholte was not provided with payslips during his employment with Villtruck except on request, that he was not paid out any accrued annual leave at the time he purportedly ceased employment and became an independent contractor at the end of Period 1, and that in Period 2 he was not credited with any annual leave and did not receive any payment for accrued annual leave.

9. During Mr Scholte's employment Villtruck was required to keep and maintain employee records (including details regarding Mr Scholte's type of employment, periods of leave taken, leave balances and details regarding termination of employment). During the course of the investigation by the FWO, Villtruck was required to produce copies of such employee records, but did not do so.

10. On 1 February 2011 Mr Mineeff signed the ASF and admitted that he was involved in specified contraventions of the *WR Act*, the *FW Act* and the regulations.

Was Mr Scholte an employee of Villtruck?

11. It is an element of several of the contraventions in issue that Mr Scholte be, as a matter of law, an employee, in particular during Period 2. I am satisfied on the basis of the material before the court, including the ASF, the Statement of Claim and the affidavit material, that as was admitted in the ASF, for all of the relevant time during both Periods 1 and 2, Mr Scholte was a full-time employee of Villtruck.

12. During Period 1 Villtruck (through Mr Mineeff) directed Mr Scholte as to his day-to-day duties and through Mr Mineeff paid weekly wages to Mr Scholte from which taxation was withheld (except for a brief initial period when he was paid on a daily basis). Contributions were made to Mr Scholte's superannuation fund, he was paid when on annual leave (except from March 2002 until March 2006) and on sick leave, payslips were created for the period 3 March 2006 to 8 April 2009 regarding payments made to him, and PAYG documents were issued to him at the end of each financial year.

13. In or about March 2009 Villtruck, through Mr Mineeff, approached Mr Scholte outside the workshop at Villtruck's premises and told him that his employment with Villtruck was terminated and that he would instead be offered work as an independent contractor. However it is agreed that despite this, during Period 2

Mr Scholte continued to perform the same or substantially the same work as he had performed in Period 1, although there may have been some reduction in the volume of his work output.

14. In both periods Mr Scholte undertook duties associated with panel beating and vehicle detailing, performed work at Villtruck's principal place of business, used heavy machinery supplied by Villtruck and self-supplied hand tools, commenced work at approximately 9 am each weekday, typically finished work at approximately 5 pm each weekday (apart from when he assisted with urgent after-hours work) and received instructions and directions regarding the duties he was required to perform from Mr Mineeff. In both periods he wore a promotional baseball cap supplied by Villtruck bearing its logo.

15. On the evidence before the court and having regard to all indicia (see *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] 160 CLR 16, *Hollis v Vabu* [2001] 207 CLR 21, *Damevski v Giudice* (2003) 135 FCR 438; [2003] FCAFC 252 and *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*[2011] FCA 366) I am satisfied that, as agreed by the parties, Mr Scholte was an employee of Villtruck in both Period 1 and Period 2.

The Contraventions

16. There are a number of contraventions admitted in these proceedings.

17. First, by dismissing Mr Scholte from his employment for the sole or dominant purpose of engaging him to perform the same work, or substantially the same work, allegedly as an independent contractor, Villtruck contravened s.902(1) of the *WR Act*.

18. By misrepresenting an employment contract as a contract for services Villtruck contravened s.900(1) of the *WR Act*. I note that as set out in the ASF not only did Villtruck (through Mr Mineeff) represent to Mr Scholte that during Period 2 he was an independent contractor rather than an employee, but also Villtruck made further representations through its conduct during the period from 18 May 2009 until 10 March 2010 when it paid Mr Scholte on the basis of invoices, rather than on the basis of weekly wages as it had done in the past. Nonetheless, this did not represent a significant difference in the nature of the relationship. Mr Scholte did not prepare his own invoices. These were prepared by another employee of Villtruck and for the majority of the period Mr Scholte was actually paid a set amount per fortnight. The majority of

relevant invoices for this period were not itemised and in many cases payment was made on the basis of "*various labour*".

19. Further, while Mr Mineeff had advised Mr Scholte that he could vary his hours of work, in general Mr Scholte did not utilise that capacity, but performed the same or substantially the same work. He did not have his own work-related insurance and did not make himself available to any other person to perform the same work that he performed for Villtruck, except on one or two occasions when he assisted friends with vehicles and for a month in about early 2007 when he performed paid work for one of the employer's suppliers who required additional staff during a busy period under an arrangement made and approved by Mr Mineeff.

20. By failing to credit Mr Scholte with the amount of annual leave which he had accrued Villtruck contravened s.234(2) of the *WR Act* (see Item 6(1)(a) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* (2009) (the Transitional Act). While the *WR Act* was repealed on 1 July 2009 the relevant *WR Act* contraventions relied on in these proceedings continued to operate after the repeal date pursuant to Item 13 of Part 3 of Schedule 18 of the Transitional Act. During both Periods 1 and 2 Villtruck failed to determine or record the amount of annual leave which Mr Scholte had accrued to which he was entitled as a full-time employee and as a result he was not aware of his entitlement to annual leave.

21. For the period from March 2003 to 26 March 2006 Mr Scholte was entitled to accrue four weeks annual leave per annum in accordance with cl.27(a) of the Vehicle Award, but was not paid any annual leave. For the period from 27 March 2006 to late March 2009 he was entitled to accrue four weeks annual leave per annum in accordance with s.234(2) of the *WR Act*. During this period he was provided with limited paid leave of approximately 35 days on an ad hoc basis. The parties have agreed that in relation to this period Mr Scholte had accrued but untaken leave in the amount of approximately 25 working days.

22. At the time of Mr Scholte's termination of employment at the end of Period 1, he had approximately 85 working days accrued but untaken annual leave, and Villtruck was required to pay him for each hour (646 hours) of such untaken accrued annual leave at a rate of pay based on the pay scale derived from the Vehicle Award. The total underpayment for annual leave owing on termination at the end of Period 1 was $10,839.88. By failing to pay accrued annual leave

at the time of Mr Scholte's termination of employment in or about March 2009 Villtruck contravened s.235(2) of the *WR Act*.

23. In circumstances where, during Period 2 (approximately April 2009 until approximately March 2010) Mr Scholte was further entitled to accrue four weeks annual leave per annum in accordance with subs.87(2) of the *FW Act* upon termination of his employment Villtruck was required to pay him for his untaken accrued annual leave in accordance with s.90(2) of the *FW Act*. This did not occur.

24. The total underpayment for annual leave owing to Mr Scholte on termination at the end of Period 2 was $2,752.50. The employer's failure to make this payment to Mr Scholte amounted to a contravention of the National Employment Standard in s.90(2) of the *FW Act* which is a contravention of s.44(1) of the *FW Act*. The total underpayment arising from the employer's failure to pay Mr Scholte's accrued but untaken annual leave amounted to $13,592.38.

25. For the period 27 March 2006 to 30 June 2009 Villtruck was required to make or cause to be made records relating to Mr Scholte's employment and keep those records for a period of seven years in accordance with Chapter 2, Part 19, Division 2. There was a contravention of Reg.19 of the *WR Regulations*. Villtruck did not keep records which met the requirements of this provision.

26. For the period on and from 1 July 2009, Villtruck was required to make records relating to Mr Scholte's employment which were to contain certain specific information in accordance with s.535(2) of the *FW Act* and keep those records for a period of seven years in accordance with s.535 of the *FW Act* and the *FW Regulations*. Villtruck did not make or keep records which contained the requisite content and hence contravened s.535(1) of the *FW Act* and regs.3.31(1), 3.32(c)-(e), 3.36(1)(a)-(b) and 3.40(a)-(e) of the *FW Regulations*.

27. Villtruck was required to issue Mr Scholte with a written payslip in each pay period within one day of the payment of wages in accordance with reg.19.20 of the *WR Regulations* for the period 27 March 2006 to 30 June 2009, and s.536(1) of the *FW Act* for the period on and from 1 July 2009. It did not do so except on a few occasions when Mr Scholte specifically requested payslips in relation to banking transactions. Hence there were contraventions of reg.19.20 of the *WR Regulations* and s.536(1) of the *FW Act*.

28. The parties agree that there were eight contraventions by the employer. I am satisfied that there were such contraventions and that Mr Mineeff was involved in such contraventions within the meaning of s728(1) of the *WR Act* and s550 of the *FW Act*. Mr Mineeff was at all times the sole director and secretary of Villtruck. He was in day-to-day control of its operations and was the operative and controlling mind of Villtruck. He was the representative of Villtruck who caused persons to be engaged by Villtruck and the person who made decisions on behalf of Villtruck regarding the basis on which persons would be engaged to perform such work, their terms and conditions, and payments.

29. Mr Mineeff was the procurer and maker of the representation that Mr Scholte would be engaged as an independent contractor in Period 2, when by virtue of his day-to-day management of the worksite he knew that Mr Scholte continued to perform the same or substantially the same work in both periods. He was also responsible for directing the work of the administrative employee who prepared and submitted invoices in relation to work performed by Mr Scholte. As the sole director of Villtruck Mr Mineeff was the ultimate decision-maker in relation to Mr Scholte's terms and conditions of engagement.

30. Mr Mineeff has, appropriately, admitted that during the period 27 March 2006 to 30 June 2009 he was involved within the meaning of s728 of the *WR Act* in the contraventions by Villtruck of that Act and the *WR Regulations* and that during the period from 1 July 2009 to March 2010 he was involved within the meaning of s.550 of the *FW Act* in the contraventions of that Act and the *FW Regulations* by Villtruck.

31. In light of the admissions made by Mr Mineeff and the facts and circumstances outlined in the ASF, the parties made joint submissions as to penalty. I have considered these submissions and also the oral submissions and affidavit evidence in relation to penalty.

Legislative Provisions Relating to Liability

32. The Court has power to impose pecuniary penalties in respect of the contraventions of the *WR Act* and Regulations and the *FW Act* and Regulations. By virtue of s.728 of the *WR Act* and s.550 of the *FW Act* a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Any penalty to be imposed on Mr Mineeff is to be assessed as though he contravened the relevant sections of the *WR Act* and *FW Act*.

33. The contraventions in question occurred through a period in time when the applicable legislation changed. Notwithstanding that the *WR Act* was repealed on 1 July 2009, in these proceedings the contraventions of that Act continued to operate after the repeal date pursuant to the Transitional Act.

34. Power to impose a penalty in respect of the contraventions of ss.234(2) and 235(2) of the *WR Act* in relation to annual leave arises from s.719(1) of the *WR Act* (and see s.717). Relevantly for present purposes, s.719(2) of the *WR Act* provides that where the same person commits two or more breaches of an applicable provision (such as s.234 or s.235 of the *WR Act*) and the breaches arose out of the same course of conduct by that person, the breaches are to be taken to constitute a single breach.

35. The course of conduct provisions in s.719(2) of the *WR Act* do not apply to contraventions of ss.900 and 902 of the *WR Act* in relation to which the power to impose pecuniary penalties arises under s.904(1). The contraventions of the *WR Regulations* are also not subject to the course of conduct provisions but are civil penalty provisions by virtue of s.846 of the *WR Act*. The maximum penalty that can be imposed on an individual for a breach of the *WR Act* is in each case $6,600 and the maximum penalty for a breach of the *WR Regulations* is $1,100.

36. The power to impose a penalty in respect of contraventions of ss.90(2), 535 and 536 of the *FW Act* arises from s.546 of the *FW Act*. Under s.557 of the Act two or more contraventions of such civil penalty provisions are taken to constitute a single contravention if committed by the same person arising out of the course of conduct by the person. The maximum penalties for a contravention of the *FW Act* by an individual are $6,600 in relation to a contravention of s.90(2) and $3,300 for a contravention of s.535, s.536 or the *FW Regulations*.

Principles Relevant in Determining Penalties

37. In this case each breach of each obligation under the *WR Act* and the *FW Act* is a separate contravention (*Stephen Gibbs v the Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216 at 223; and *McIver v Healey* [2008] FCA 425 at 16). It is necessary to consider whether the breaches identified constitute a single course of conduct (see s.557(1) of the *FW Act* and s.719(2) of the *WR Act* in relation to the contraventions to which these provisions apply). In this case each breach pleaded and established is of a separate obligation under the *WR Act*, *WR Regulations* and *FW Act*. Each civil remedy

provision is separate for the purposes of the respective Acts and the breaches arose out of separate acts or decisions by the employer, not out of a single act or decision (see *Ian Seymour v Stawell Timber Industries Pty Ltd* [1985] 9 FCR 241 at 266-267). The matter involves only one employee and each of the breaches related to separate acts or decisions by the respondent on behalf of Villtruck which were made at different points in time. I am satisfied in the circumstances of this case that the respondent engaged in a total of eight contraventions of the relevant legislation as set out above.

38. It is the case that some of the contraventions have common elements and this should be taken into account in considering an appropriate penalty to ensure that Mr Mineeff is not punished more than once for the same or substantially similar conduct. The penalties imposed by the court should be an appropriate response to the action of the respondent (*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at 46). This is distinct from and in addition to the final application of the "*totality principle*" (*Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at 41-46) by virtue of which it is necessary after considering the appropriate penalty for each breach and taking into account all of the relevant circumstances to then consider whether the penalties are an appropriate response to the conduct which lead to the breaches (*Kelly v Fitzpatrick* [2007] 166 IR 14 at 30; and *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [23], [71] and [102]). At that stage the Court should apply an "*instinctive synthesis*" in making the assessment of the totality principle (ibid at [27], [55] and [78]).

39. A number of cases have summarised factors relevant to the imposition of penalties. These various summaries provide a convenient check-list, but do not prescribe or restrict the matters that may be taken into account in the exercise of the court's discretion (*Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11] and see for example *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26] to [59] and *Kelly v Fitzpatrick* at [14]). There are a number of factors relevant in the present circumstances which warrant specific mention.

Circumstances in which the conduct took place and nature and extent of the conduct

40. As set out above, the conduct in this matter involved the respondent dismissing Mr Scholte from his employment with Villtruck and re-engaging him to perform the same or substantially the same work, allegedly as an independent

contractor. This was so notwithstanding that there were few differences in Mr Scholte's working arrangements between Period 1 and Period 2. During Period 2 the respondent misrepresented the nature of the working relationship between Mr Scholte and Villtruck as an independent contracting relationship for a period of approximately one year, when it was more properly characterised as an employment relationship.

41. This sham contracting arrangement had a significant effect on the working conditions of Mr Scholte, insofar as it purported to deprive him of rights to employment protections including superannuation, insurance, protection from unfair dismissal and employment entitlements under the *WR Act* and the *FW Act*.

42. In his affidavit of 7 February 2012 Mr Mineeff stated that his motivation for what he described as his 2009 offer to Mr Scholte to work on a job by job basis (notwithstanding the admissions in the ASF), was related to his concern about Mr Scholte's health, as Mr Scholte had been diagnosed with cardiomyopathy in 2007. According to Mr Mineeff, his proposal would enable Mr Scholte to do such work as he felt able to do in light of his medical condition.

43. Mr Scholte's evidence (in his affidavit of 9 February 2012) is that he had only general conversations with Mr Mineeff about his health, that he never discussed his particular symptoms with him, that he did not provide him with any detailed medical information relating to his health and that Mr Mineeff never requested any medical documentation regarding specific details of his health.

44. The approach by Mr Mineeff to Mr Scholte, however motivated, did not occur until approximately two years after Mr Scholte was first diagnosed and hospitalised for his heart condition. It occurred at a time when Villtruck was, on Mr Mineeff's own evidence, having financial difficulties.

45. I accept the unchallenged affidavit evidence of Mr Mineeff that he had concerns regarding Mr Scholte's health and ability to perform work. However that does not establish that the actions he took were in fact in the best interests of Mr Scholte. Mr Mineeff did not have sufficient evidence about Mr Scholte's health in order to make an informed decision in relation to his ability to perform his duties. In essence, the nature of the work Mr Scholte performed did not change during Periods 1 and 2. Furthermore, Mr Mineeff's action on behalf of Villtruck in dismissing Mr Scholte from his employment and re-

engaging him, allegedly as an independent contractor, had a significant adverse effect on Mr Scholte's ability to access employee entitlements such as personal leave. If Mr Scholte was an independent contractor Villtruck would not be obliged to pay or provide such entitlements. There is no suggestion in the evidence before the court that Mr Mineeff sought to address his concerns about Mr Scholte's condition in a way which would not have such potentially adverse consequences to Mr Scholte's entitlements, for example by reducing his hours of work or providing for flexible working hours as an employee.

46. Mr Mineeff's evidence is that Mr Scholte had a low level of output and a decline in productivity over time, including after his diagnosis of cardiomyopathy and subsequent treatment. It is unclear whether this is now said to be a further motivation for the action taken in relation to Mr Scholte. Mr Scholte's evidence is that during Periods 1 and 2 he was able to perform the same duties and work the same hours and that Mr Mineeff never performance-managed or provided any warnings to him about his performance. There is no documentary evidence supporting the contention that Mr Scholte's work output was reduced in a substantive way.

47. Furthermore, even if an employee's output/performance was reduced, this would not entitle an employer to breach the relevant provisions of the *WR Act* or the *FW Act* or to change an employee to an independent contractor simply to avoid conducting performance management. If such an approach were to be permitted it would enable employers to minimise their risks of unfair dismissal and adverse action claims merely by changing the status of an affected employee prior to termination.

48. The respondent was also involved in the employer's failure to record accrued annual leave, keep prescribed employee records or issue payslips to Mr Scholte, as a result of which Mr Scholte was not able to have a clear understanding of his accrued but untaken entitlements. The absence of proper records also hindered the FWO in calculating the amount of annual leave owed to Mr Scholte and resulted in a conservative approach to the calculations. Mr Mineeff, on behalf of Villtruck also failed to pay annual leave entitlements owed to Mr Scholte.

Nature and Extent of the Loss

49. It is agreed that there was an underpayment to Mr Scholte in respect of annual leave. The parties agree that the value of the accrued but untaken annual leave

entitlement of Mr Scholte is the amount of $13,592.38. This is a significant underpayment and it has not been rectified. I accept that the agreed figures are likely to be conservative figures in circumstances where Villtruck failed to make or keep prescribed employee records during Period 1 such that Mr Scholte did not have certainty about his accrued employee entitlements.

50. Beyond this, the consequences of the contraventions in question, in particular sham contracting, cannot be measured in purely monetary terms in circumstances where the result was that Mr Scholte appeared not to have, and hence did not utilise, employee entitlements (such as protections under the *FW Act,* the right to bring proceedings, entitlements to various kinds of leave and superannuation, guaranteed pay, termination benefits and insurance such as worker's compensation). Such entitlements are significant and the loss of such benefits is a matter of some weight in determining the appropriate penalty.

Similar Previous Conduct

51. There is no evidence that Mr Mineeff has previously engaged in similar conduct.

Whether the Breaches Arose out of the one Course of Conduct

52. I accept that, as the FWO contended, in the circumstances of this matter no course of conduct considerations arose. The matter involved one employee and each of the breaches related to separate acts or decisions by the respondent on behalf of Villtruck.

Size and Financial Circumstances of the Business

53. It appears that Mr Mineeff relies to some extent on the size and financial circumstances of Villtruck in relation to the quantification of penalty. Villtruck is currently under external administration and liquidators were appointed on 2 June 2010. The fact that the principal contravener has been placed into liquidation does not prevent proceedings from continuing against person who may be accessorily liable such as Mr Mineeff (*Torpia v Empire Printing (Australia) Pty Ltd and Anor* [2009] 188 IR 306 at 65. Also see *Australian Competition and Consumer Commission v Black on White Pty Ltd* [2001] 110 FCR 1; and *Matheson Engineers Pty Ltd and Exearne Pty Ltd v Sami El Raghy; Michael John Brenz Kriewaldt and Kevin Bond* [1992] 37 FCR 6).

54. The relevance of the size and financial circumstances of a contravener such as Villtruck was addressed in *Workplace Ombudsman v Saya Cleaning Pty Ltd and Anor* [2009] FMCA 38 at [27] to [28] as follows:

> *In Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paras.27 to 29 it was said:*
>
> > *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 a Court's consideration of penalty.*
>
> *Notwithstanding financial hardship that an employer may be experiencing Lynch v Buckley Sawmills Pty Ltd [1984] FCA 306; (1984) 3 FCR 503, 508 Keely J said:*
>
> > *In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*

55. The same may be said in relation to breaches of the *WR Act* and *FW Act* and the Regulations.

56. Similarly, insofar as Mr Mineeff appears to rely on his personal financial circumstances, in particular the fact that he has been made a bankrupt, this does not impede the court from granting the relief sought. The applicant is not a creditor for the purposes of s.58(3) of the *Bankruptcy Act 1966* (Cth) and the penalty sought is not a "*provable debt*" within s.82(1) of the Bankruptcy Act (See *Cotis v Macpherson* [2007] FMCA 2060). The respondent's financial circumstances, while relevant, nonetheless do not change the fact that any sanction should be imposed at a meaningful level (*Kelly v Fitzpatrick* at [28]).

The fact of either corporate or personal insolvency is not a refuge from such a sanction (*Cotis v Macpherson* at [12]).

Deliberateness of the Breaches

57. It is apparent from the ASF that Mr Mineeff took the deliberate step of terminating the employment of Mr Scholte and then offering him the opportunity to be re-engaged as an independent contractor. Notwithstanding that Mr Mineeff stressed that the offer to Mr Scholte was motivated by concern for his health issues, his affidavit suggests that this action was also a response to Mr Mineeff's belief that Mr Scholte's output had reduced due to his health issues.

58. The respondent was the controlling mind of Villtruck. The action involved a careless disregard for Villtruck's statutory obligations. Mr Mineeff acknowledged that he employed subcontractors. Hence he was clearly in a position to be aware of the difference in functions and benefits of an independent contractor as opposed to an employee, at least in general terms. Further, there is no evidence that once the respondent became aware of the contravention he took any steps to rectify the underpayments or resolve the issue.

Involvement of Senior Management

59. Mr Mineeff was the guiding mind of Villtruck as its sole director and secretary and was involved in Villtruck's contraventions within the meaning of s.728(2)(c) of the *WR Act* and s.550(2)(c) of the *FW Act*. There is no suggestion that any other person was involved in the contraventions.

Contrition, Corrective Action, Cooperation with Authorities

60. The respondent has demonstrated a degree of contrition and cooperation with authorities, albeit to a limited extent. I accept the affidavit evidence of Mr Christie, a Fair Work Inspector, that Mr Mineeff provided very limited assistance to him during the course of his investigation of Mr Scholte's complaint. In particular, Mr Mineeff failed to respond to notices to produce, did not participate in a record of conversation with Mr Christie on the basis that he did not have time and did not see the point, failed to take steps to rectify the contraventions and failed to respond to communications sent by the FWO in respect of Mr Scholte.

61. Mr Mineeff's evidence is that from early 2009 to the current time he has received treatment for depression and anxiety triggered by financial and family events and that he was not well enough to talk to the FWO until the mediation on November 17, 2011. However the medical certificate he provided states only that he was treated for anxiety and depression from April 2009 to May 2010.

62. There is no evidence that Mr Mineeff has apologised or demonstrated direct contrition for the contraventions. He has however, cooperated more recently, in particular by agreeing to the ASF. This cooperation has avoided the necessity for a contested hearing in this matter and is of some relevance.

63. Insofar as Mr Mineeff sought to justify his conduct leading to the contraventions on the basis that the steps he took were for the benefit of Mr Scholte, in fact such steps had the consequence that Villtruck reduced its obligations and potentially its expenses in relation to Mr Scholte.

Ensuring Compliance with Minimum Standards

64. As the applicant submitted, this is a consideration of some importance in the present case. It is an object of the *WR Act* and the *FW Act* to maintain an effective safety net of employer obligations and effective enforcement mechanisms. The potentially substantial penalties provided for by the legislature for contravention of such obligations reinforces the importance placed on compliance with minimum standards.

65. In this case, as a consequence of Mr Scholte allegedly being classified as an independent contractor during Period 2, he was not able to access employee benefits described above. During Period 1 Villtruck's failure to make or keep prescribed employee records resulted in Mr Scholte not having certainty about his accrued employee entitlements, in particular his accrued but untaken leave entitlements.

General Deterrence

66. As Mowbray FM pointed out in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26] to [59], it is well established that the need for specific and general deterrence is relevant to the imposition of penalty. The role of general deterrence is illustrated by the remarks of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] 158 FCR 543 at [93] as follows:

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.

67. In this case the contraventions involved the removal of key employment conditions by way of an alleged independent contracting relationship. In such circumstances penalties should be imposed at a meaningful level to deter other employers from committing similar contraventions, in particular from implementing alleged independent contracting relationships as a mechanism to deal with employment issues relating to health or performance issues.

68. The penalties should also make it clear to employers and the community generally that insolvency, whether personal or corporate, will not be a refuge from sanction.

Specific Deterrence

69. Mr Mineeff has an extensive history of being a company director and secretary of various companies dating back to at least 1990. He currently remains a director and secretary of Villtruck (which is however in liquidation), and Mineeff Property Group Pty Ltd. He is a bankrupt. However it is appropriate that he be left in no doubt that failing to comply with minimum obligations including by reclassifying an employee as an alleged independent contractor will result in the imposition of meaningful penalties.

70. In fixing the appropriate penalty I have taken a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing (*Kelly v Fitzpatrick* at 30, and *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* at [23] per Gray J, [71] per Graham J, and [102] per Buchanan J).

Conclusion

71. In the ASF the parties made joint submissions as to the appropriate penalties to be imposed on Mr Mineeff. In his subsequent affidavit Mr Mineeff attempted to provide some explanation for his conduct. The Court's task is to fix a penalty having regard to all of the circumstances of the case paying appropriate regard to the circumstances in which the contraventions occurred and the need to sustain public confidence in the statutory regime imposing the obligations in question (*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [91] per Buchanan J) notwithstanding any agreement between the parties. In fixing the penalty I have had regard to the principles considered by the Full Court of the Federal Court in *Minister for Industry Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 in relation to the matters to be taken into account where parties have reached agreement about penalty. In particular I have borne in mind that determining the amount of penalty is not an exact science; that there is a public interest in promoting settlement of litigation, particularly of an action which would otherwise be likely to be lengthy; that the view of the regulator is relevant but not determinative; that the court is to examine all the circumstances of the case; and that it is a question of whether the penalty proposed is appropriate in the circumstances of the case being within the permissible range. (Also see *NW Frozen Foods Pty Ltd v Australian Competition & Consumer Commission* (1996) 71 FCR 285 at 298-299 per Burchett and Kiefel JJ; *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 at [57] and [129]; and *Williams v Automotives, Food, Metals, Engineering, Printing and Kindred Industries Union* [2010] 196 IR 365 at [158]).

72. The contraventions in issue involve breaches of important statutory protections relating to acceptable workplace conduct. A light-handed approach to such contraventions is not appropriate. I am satisfied that the agreed penalty range in the ASF falls within the permissible range of appropriate penalties and that the penalties, both individually and overall, are neither manifestly inadequate nor manifestly excessive (See *Wells v Locarno Management Pty Ltd* [2008] FCA 1034 at [23] per Jessup J).

73. In particular, I am satisfied that the circumstances warrant penalties in the range of one-third of the maximum in each instance. Such penalties take into account not only the nature and seriousness of the contraventions in question and the context in which they occurred, but also the nature and extent of cooperation by Mr Mineeff, the absence of rectification or contrition and the

need for general deterrence. I have also had regard to Mr Mineeff's difficult financial position.

74. In all the circumstances I am satisfied that where the maximum penalty for a contravention of each of s.902(1), 900(1), 234(2) and 235(2) of the *WR Act* is $6,600 the penalty should be $2112 in each case. For a contravention of the *WR Regulations* for which the maximum penalty is $1,100 the penalty should be $352. Thus the total penalties for the contraventions during Period 1 would be $8,800 in circumstances where the maximum penalty available would have been $27,500.

75. In relation to the contraventions during Period 2, I am satisfied that the penalty for the contravention of s.90(2) (for which the maximum penalty is $6,600) should be $2,112, while the penalty for the contravention of each of s.535 (which I accept that, as the applicant submitted, should be seen together with the *FW Regulations*) and for which the maximum penalty is $3,300, should be $1,056. The penalty for the contravention of s.536(1) of the *FW Act* (for which the maximum penalty is $3,300) should be $1,056. Hence the penalties for the contraventions during Period 2 would be $4,224, in circumstances where the maximum penalty would have been $13,200.

76. In fixing the appropriate penalty I have taken a final look at the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing (*Kelly v Fitzpatrick* at 30, and *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* at [23] per Gray J, [71] per Graham J, and [102] per Buchanan J).

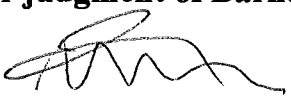
77. I am satisfied that the total penalty of $13,024 is appropriate and not such that it ought to be reduced in accordance with the totality principle, bearing in mind the need not to impose an aggregate penalty that would be crushing.

Payment of the Penalty

78. The FWO submitted that to the extent that the penalty imposed did not exceed the amount of $13,592.38 it would be appropriate to order that such penalty should be paid to Mr Scholte, rather than to the Consolidated Revenue Fund of the Commonwealth. I accept that this is the only way that Mr Scholte could realistically recover the amount owed to him in respect of his accrued but untaken annual leave entitlement, given that Villtruck is in liquidation and Mr Mineeff is bankrupt.

79. I am satisfied that it is appropriate to make such orders consistent with s.841(b) of the *WR Act* and s.546(3)(c) of the *FW Act*. The penalty does not exceed the amount of accrued but unpaid annual leave. The whole of the penalty should be paid to Mr Scholte within 28 days.

I certify that the preceding seventy-nine (79) paragraphs are a true copy of the reasons for judgment of Barnes FM.

Associate: 

Date: 27 March 2012