FEDERAL MAGISTRATES COURT OF AUSTRALIA

FWO v PROMOTING U PTY LTD & ANOR *[2012] FMCA 58*

INDUSTRIAL LAW – Application for civil penalties – agreed statement of facts – numerous contraventions of industrial law – consideration of range of penalty to be applied – consideration and application of the totality principle.

Workplace Relations Act 1996, s.235(2)
Workplace Relations Regulations 1996
Fair Work Act 2009
Evidence Act 1995, s.128

Ferrall and Others v Blyton; Attorney-General of the Commonwealth (2000) 27 Fam LR 178
Lida Song v Ming Ying (2010) 273 ALR 213
Cornwell v R (2007) 231 CLR 260
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union [2008] FCA 466
Ponzio v B & P Caelli Constructions Pty Ltd [2007] FCAFC 65

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	PROMOTING U PTY LTD A.C.N. 124 022 224
Second Respondent:	SEBASTIAN BOI
File Number:	MLG 1778 of 2010
Judgment of:	Burchardt FM
Hearing date:	25 November 2011
Date of Last Submission:	13 December 2011

Delivered at:	Melbourne
Delivered on:	3 February 2012

REPRESENTATION

Counsel for the Applicant:	Ms Richards
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr McKenna
Solicitors for the Respondents:	Hutchinson Legal

ORDERS

THE COURT DECLARES THAT:

(1) The First and Second Respondents each contravened:

(a) During the period from 18 October 2007 to 30 June 2009, s.182(1) of the Workplace Relations Act 1996 (Cth) ("WR Act") in relation to Angeli, Adams and Tan by failing to pay the guaranteed basic periodic rate of pay contained in the preserved Australian Pay and Conditions Scale ("APSC") derived from the Graphic Arts – General Award 2000 ("the Award");

(b) During the period from 1 July 2009 to 9 December 2009, s.182(1) of the WR Act and item 5, schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ("Transitional Act") in relation to Adams and Tan by failing to pay the guaranteed basic periodic rate of pay contained in the preserved APCS derived from the Award;

(c) Section 185(2) of the WR Act in relation to Angeli by failing to pay at least the guaranteed casual loading contained in the preserved APCS derived from the Award;

(d) Section 235(2) of the WR Act and item 6(1)(a) of schedule 16 of the Transitional Act in relation to Adams and Tan by failing to pay accrued annual leave on termination of employment;

(e) Section 323(1) of the *Fair Work Act 2009* (Cth) ("FW Act") in relation to Adams and Tan by failing to pay amounts payable in relation to the performance of work in full and at least monthly;

(f) Regulation 19.11(1) and regulation 19.11(4) of the *Workplace Relations Regulations 2006* (Cth) ("WR Regulations") in relation to Adams by failing to keep records in relation to rates of remuneration and payments made;

(g) Section 535 of the FW Act in relation to Adams and Tan by:

(i) Failing to keep records in relation to rates of remuneration as required by Regulation 3.33 of the *Fair Work Regulations 2009* (Cth) ("FW Regulations"); and

(ii) Failing to keep records in relation to payment as required by Regulation 3.36 of the FW Regulations;

(h) Section 536(1) of the FW Act in relation to Tan and Bryant by failing to give a payslip within one working day of payment to the employee.

(i) Section 44(1) of the FW Act in relation to Bryant by contravening a provision of the National Employment Standards, by failing to pay accrued leave on termination of employment pursuant to section 90(2) of the FW Act; and

(j) Section 45 of the FW Act in relation to Bryant by contravening terms of a modern award, by contravening the *Graphic Arts, Printing and Publishing Award 2010* ("the Modern Award") by;

(i) Failing to pay Bryant the minimum wages set out in Clause 17.1 of the Modern Award;

(ii) Failing to pay wages to Bryant no more than two clear days after the end of the pay week in respect of which they became due pursuant to Clause 28.1 of the Modern Award; and

(iii) Failing to pay Bryant all monies due to him on termination of employment pursuant to Clause 28.5 of the Modern Award.

THE COURT ORDERS THAT:

(1) Pursuant to s.719(1) of the WR Act, regulation 14.4 of the WR Regulations, and s.546(1) of the FW Act the First Respondent pay an aggregate penalty of $65,000 in respect of the contraventions referred to in declarations 1(a) to 1(j) above.

(2) Pursuant to s.719(1) of the WR Act, regulation 14.4 of the WR Regulations, and s.546(1) of the FW Act the Second Respondent pay an aggregate penalty of $13,000 in respect of the contraventions referred to in declarations 1(a) to 1(j) above.

(3) Pursuant to s.719(6) of the WR Act and s.545(2) of the FW Act the First Respondent pay:

(a) $5,013.73 to Adams; and

(b) $1,998.13 to Tan.

(4) Pursuant to s.545(2) of the FW Act the First Respondent pay $2,406.46 to Bryant.

(5) Pursuant to s.541(2) of the FW Act the First Respondent pay $528.15 to Bryant in respect of unpaid safety net contractual entitlements.

(6) Pursuant to s.722 of the WR Act and s.547 of the FW Act the First Respondent pay to the respective employees interest on the amounts referred to in the preceding Orders 3 to 5 above, in the amounts of:

(a) $635.21 to Adams;

(b) $235.04 to Tan; and

(c) $133.31 to Bryant.

(7) Payment of the amounts referred to in Orders 3 to 5 above is to be made in accordance with Schedule A, by way of bank cheque made out in the stipulated amount to the respective recipient, forwarded to the Applicant by the 15th day of each month.

(8) Payment of the interest amounts referred to in Order 6 above is to be made within 30 days of the last payment made pursuant to Schedule A, by way of bank cheque made out in the stipulated amount to each respective recipient and forwarded to the Applicant.

(9) Pursuant to s.841(a) of the WR Act and s.546(3)(a) of the FW Act each of the Respondents pay the penalties into the Consolidated Revenue Fund of the Commonwealth.

(10) The payment of penalties referred to in Orders 1 and 2 above be made within 90 of the date of this Order.

Schedule A - Repayment schedule to form basis of payment plan – based on $1,000 per month and in respect to principal underpayment amounts only (exclusive of interest)

Amounts Outstanding:

Angeli $534.05

Adams $5,479.68

Tan $1,998.13

Bryant $2,934.61 [$2,406.46 + $528.15]

Dates/Payments/Recipients:

15 November 2011:

- $534.05 to Angeli
- $465.95 to Adams

15 December 2011:

- $1000 to Adams

15 January 2012:

- $1000 to Adams

15 February 2012:

- $500 to Adams
- $500 to Tan

15 March 2012:

- $500 to Adams
- $500 to Tan

15 April 2012:

- $500 to Adams
- $500 to Tan

15 May 2012:

- $498.13 to Tan
- $501.87 to Adams

15 June 2012:

- $500 to Adams
- $500 to Bryant

15 July 2012:

- $511.31 to Adams (Additional $11.31 this month to finalise Adams' payment in full)
- $500 to Bryant

15 August 2012:

- $1000 to Bryant

15 September 2012:

- $934.61 to Bryant

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1778 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

PROMOTING U PTY LTD A.C.N. 124 022 224
First Respondent

SEBASTIAN BOI
Second Respondent

REASONS FOR JUDGMENT

Introductory

1. This is a civil penalty proceeding in which the parties have ultimately been able to produce an amended Statement of Agreed Facts ("SOAF"). Additionally the Second Respondent, who is the sole director and shareholder of the First Respondent, was called to give evidence and was cross-examined.

2. The Respondents' conduct is admitted to have given rise to multiple contraventions of the *Workplace Relations Act 1996* ("WR Act"), the *Workplace Relations Regulations 1996* ("WR Regulations") and the *Fair Work Act 2009* ("FW Act").

3. Because of the multiplicity of the contraventions, it would be easy for this judgment to descend into a very detailed and almost unintelligible morass, when in the circumstances of the outcome it is largely

unprofitable to do so. To the extent that it can properly be done, I propose to paint with a relatively broad brush for reasons which I hope will become apparent. In the ultimate I have concluded that the Respondents committed, as the Applicant submits, 16 separate contraventions of the Acts and Regulations, that these should as the parties submit be grouped to take account of common elements, producing 11 groups of conduct. For the reasons advanced by the Applicant these should be approached in the fashion indicated at paragraph 5.14 of the Applicant's written submissions and I accept the submission that the maximum penalty for the First Respondent would be $330,000 and for the Second Respondent $66,000.

4. Although I accept the submission for the Applicant that the contraventions should be assessed in the low to mid-range, and in this instance I accept it should be assessed prima facie at a level of 30 per cent, a consideration of the totality principle, as explained later, reduces the penalties that I would impose to $65,000 for the First Respondent and $13,000 for the Second Respondent.

The Preliminary Evidentiary Application

5. As I have indicated, the Second Respondent, Mr Boi, gave evidence. Prior to his being called Counsel sought that the Court provide him with a Certificate pursuant to s.128 of the *Evidence Act 1995* ("Evidence Act"). I indicated at the time that I declined this application and that I would give fuller reasons for my decision in this Judgment.

6. Counsel for Mr Boi directed the Court's attention to the decision of the Full Court of the Family Court in *Ferrall and Others v Blyton; Attorney-General of the Commonwealth* (2000) 27 Fam LR 178. In that case, the Full Court of the Family Court considered the operation of s.128 of the Evidence Act and expressed the view, as noted in the head note, that:

> *"It would be unrealistic to limit the availability of a certificate to a situation where a witness is asked a particular question in cross-examination. The availability of a certificate clearly applies to evidence given in chief."*

7. Section 128(1) of the Evidence Act is in the following terms:

> *"This section applies if a witness objects to giving particular evidence on the ground that the evidence may tend to prove the witness:*
>
> *a) has committed an offence against or arising under an Australian Law or a law of a foreign country; or*
>
> *b) is liable to a civil penalty."*

8. In *Lida Song v Ming Ying* (2010) 273 ALR 213 the Court of Appeal of the Supreme Court of New South Wales considered the decision of the Family Court in *Ferrall.* At paragraphs [5]-[12] of the decision Hodgson JA, with whom the other members of the Court agreed, traversed a number of decisions including *Ferrall* both in favour of and against the proposition that a s.128 Certificate was available in circumstances where a party indicates that they will object to giving evidence at all unless a Certificate is given. Having traversed further the decision in *Ferrall* and that of the High Court in *Cornwell v R* (2007) 231 CLR 260, his Honour said at [28]:

> *"In my opinion, having regard to the wording of s128 and the scope of the common law privilege which it displaced, it is not the case that a party to proceedings who is also a witness, giving evidence-in-chief in response to questions from the party's own legal representative, and who wishes to give that evidence but is not willing to do so except under the protection of a s128 certificate, "objects" to giving that evidence within the meaning of s128(1). This is not because this witness subjectively wishes to give the evidence, but rather because there is no element of compulsion or potential compulsion which makes the expression "objects" apposite."*

9. While Hodgson JA did not consider that the operation of s.128 was limited to questions in cross-examination, it is quite clear that he, and the other members of the Court of Appeal who agreed with him, took a diametrically different position to that in *Ferrall.*

10. Counsel for Mr Boi submitted that I was bound to follow a decision of the Full Court of the Family Court. Whether that is so in a non-family law case is open to question. No authority was quoted to me on this issue.

11. On any view, conflicting observations by two intermediate Courts of Appeal create a dilemma for an inferior Court in any event. It should be noted, however, that the decision in *Song* post-dates and considers *Ferrall* and that the Full Court of the Family Court has not reconsidered *Ferrall*, as far as I am aware, in the light of the observations of the Court of Appeal in New South Wales in *Song*.

12. For my part, I would only respectfully say that the reasoning in *Song* is compelling and accords in my view with the ordinary meaning of the words in s.128.

13. Furthermore and in any event, as I think I recall saying on the day, there is nothing to suggest that in the particular circumstances that Mr Boi finds himself in that he is indeed at any risk of being prosecuted for another offence. Counsel for Mr Boi suggested that there might be some question of civil penalty proceedings arising from a breach of s.588G of the Corporations Law which are designed to prevent insolvent trading, and that there might also be difficulties in relation to taxation obligations.

14. To the extent that the evidence reveals anything, I formed the judgment then, and am still of the view, that the risks of Mr Boi facing proceedings under either the Corporations Law or the tax legislation are sufficiently remote to be of no moment. While it is clear that the business had cash-flow problems as Mr Boi described them, there is nothing that suggests it has traded while insolvent. Further, while it is clear that both the business and Mr Boi may have failed to lodge the taxation returns they would otherwise be required to lodge, there was nothing in Mr Boi's affidavit that added to the obvious fact that these failures have already occurred in circumstances the taxation authorities would be well aware of in any event. Moreover, given that Mr Boi's evidence is that the company has never made a profit and he has had only the most minimal income, it is extremely improbable the Australian Taxation Office would take civil penalty proceedings against him.

15. Accordingly, I did not give Mr Boi a Certificate and he elected to give his evidence without the benefit of one.

The Uncontroversial Facts

16. While some of what Mr Boi had to say in his evidence was the subject of criticism from counsel for the applicant, from what he said that is uncontroversial and from the SOAF, it is apparent that the First Respondent was established in about 2007 and is a business which designs and produces promotional material. The First Respondent designs graphics for the promotional material for a client, obtains the materials and then outsources the major parts of the manufacture. The First Respondent rents a factory in Epping and has very few assets of any value. Because the printing work is all outsourced it has no printing equipment. It has generally only employed one or sometimes two graphic designers at a time.

17. According to Mr Boi's affidavit, the First Respondent has always struggled to make a profit and has not had books prepared nor submitted a tax return or Business Activity Statement. Mr Boi deposed (at paragraph 9):

> *"... to date the company's income has been used to meet other obligations to ensure the company is able to continue to trade, including the payment of wages to Daniel and to cover the legal expenses of this proceeding."*

18. Mr Boi continued at paragraph 11 of the affidavit:

> *"Recently the company has refined its business and orders have begun to steadily increase. Promoting U now focuses much more on the production of signs. I believe that this is a much more profitable area and I strongly believe that Promoting U has a successful future ahead of it. I am passionate about making the business work and believe that after several long years of difficult times, the tide is finally beginning to turn."*

19. Mr Boi also deposed that his role with the First Respondent is to run the business. His income from Promoting U has been minimal (in evidence he said $200 a week) and he has no assets of any value. For two years, until about May 2011, he lived in the factory because he had no money to rent separate accommodation. All his money has been invested in the business.

20. It is also clear from the SOAF, and indeed from Mr Boi's evidence, that the First Respondent employed various employees whose treatment gave rise to the contraventions in this proceeding successively between about 2007 and 2011. I note that Mr Boi conceded under cross-examination that from the service upon him of a Breach Notice in June 2009, he was well aware of at least the generality of his obligations under industrial law. I note further that infractions continued thereafter although that is a matter to which I shall return.

The Contraventions

21. The matters giving rise to the contraventions are set out in considerable detail in the SOAF. It should be noted in passing that there are no issues in relation to any formal matters such as the Applicant's entitlement to bring the proceedings and the First Respondent's incorporation and the like.

22. The individual contraventions are all grouped together by the Applicant in his written submissions at paragraph 5.2. What is submitted by the Applicant is that each of the various matters there set out constitutes a contravention. It is further submitted that the failure to pay the basic periodic rate of pay gives rise to three contraventions as it concerned three employees, namely Angeli, Adams and Tan. It is submitted that the conduct of the Respondents in relation to these employees was separate and distinct as the conduct in relation to each employee was different and decisions were made at separate points in time (see paragraph 5.4 of the Applicant's submissions).

23. The Applicant further submitted that the contraventions of s.235(2) of the WR Act, being failure to pay accrued leave on termination, should be assessed as two contraventions because it involved two employees whose termination took place on different dates and related to a different rate of payment and a different calculation of entitlements (see paragraph 5.5 of Applicant's written submissions).

24. It was therefore submitted that in total there were 16 separate contraventions of the Act.

25. The Respondents' written submissions concede that there were 13 contraventions as identified by the Applicant. The issue was however

taken with the characterisation of the three breaches of s.182 of the WR Act and the two breaches of s.235.

26. While it was at least implicitly conceded that the breaches of s.182 were separate as between Angeli, Adams and Tan, it was submitted that the failure to pay the basic periodic rates of pay to Adams and Tan were not separate courses of conduct and distinct contraventions. Likewise, the failure to pay them their annual leave on termination. It was submitted that the failure to pay the basic periodic rates of pay to Adams and Tan was committed by the same person and for the same reason namely, a lack of capacity to pay. At paragraph 3.5 of the Respondents' written submissions it was asserted:

> *"Further, it is submitted that the failure to make weekly payments to Mr Adams and Mr Tan in accordance with their agreed wage did not follow a "decision" in the sense discussed in Rowe v Health Commission. The non-payment of wages (as distinct from payment at a rate below the minimum wage) arose from an inability to pay wages, rather than a conscious decision to deprive the employees of their wages. This occurred in the business of running Promoting U, being a single course of conduct."*

27. The same submission in substance was put in relation to the issue of not paying annual leave.

28. In fact if one looks at Mr Boi's affidavit (see paragraph 20), it is apparent that the decision not to pay Mr Adams his weekly rate arose because:

> *"Shortly after Shannon began work, Promoting U began to have serious cash flow problems. This affected the company's ability to pay him his wage each week."*

29. Mr Boi deposed as to Mr Adams' annual leave:

> *"Again, because of cash flow problems, the company was unable to pay him his annual leave entitlements, ..."* (paragraph 23).

30. In relation to Mr Tan, whose employment only overlapped with that of Mr Adams for a very short period, Mr Boi said:

> *"Eric began employment with Promoting U in 2009 prior to Shannon's departure. He was paid at a rate of $15.18 per hour*

as I believed it to be the correct minimum rate at that time. During this period I had a number of orders imminent that I was confident would allow me to pay both Eric and Shannon. In addition, the company was expecting a number of significant payments from clients at this time. Unfortunately those payments were never received despite numerous attempts to recover by me ..." (paragraph 24).

31. Thus, while each of the failures to pay the appropriate wage level and to pay the annual leave payments due on termination arose, it would appear, from the same cause (at least in part the lack of funds to do so), as I see the materials it is clear that Mr Boi made decisions from time-to-time that he had not enough money to pay the obligations that have given rise to the contraventions.

32. To the extent that the failure to pay correct wages arose out of ignorance, I am not prepared to accept that this constitutes a course of conduct (see *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 221).

33. In all the circumstances, it seems to me that the various Acts that give rise to the contraventions in relation to Mr Adams and Mr Tan are sufficiently separate in their nature that they should be regarded as separate contraventions.

34. As I earlier indicated, therefore, there are 16 separate contraventions.

The Grouping of the Contraventions

35. The Applicant submits, and the Respondents agree, that because the various contraventions may be said to overlap with each other and involve the potential punishment of the Respondents for the same or substantially the same conduct, they should be grouped. The proposed groupings of the Applicant are set out at paragraphs 5.13 to 5.14 of the Applicant's submissions on penalty. It is sufficient to say that if the Court accepts the proposed grouping approach, there would be 11 groups of contraventions of the legislation and the regulations.

36. By way of contrast, the Respondents submit that there are only eight such groups (see paragraph 4.5 of the Respondents' submissions). Although the groupings are set out slightly differently, the essential

difference between the parties (leaving aside the matter of the additional three contraventions with which I have already dealt) is that the Respondents would group the failure to pay Ms Angeli's basic periodic rate of pay with her casual loading and would put the failure to pay Mr Adams and Mr Tan their basic periodic rate of pay as one grouping and the failure to pay them annual leave as another.

37. It is sufficient for these purposes to say, bearing in mind that such grouping is a discretionary exercise including matters of weight and judgment in any event, that I think that the grouping proposed by the Applicant more accurately reflects the true measure of overlay (or lack thereof) in the various contraventions. Accordingly, I uphold the Applicant's submission that there are 11 groups of conduct giving rise, as is submitted in paragraph 5.15 of the Applicant's submissions on penalty, to a maximum penalty for the First Respondent of $330,000 and for the Second Respondent of $66,000.

The Relevant Considerations as to Penalty

38. Case law has developed a non-exhaustive list of factors potentially relevant to the imposition of a penalty under the legislation with which we are concerned. The list of matters identified by Mowbray FM in *Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 has been adopted and applied by the Federal Court (see for example Tracy J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [14]). The matters that are thus indicated, however, are not prescriptive (see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [91] per Buchanan J). I bear steadily in mind the observations of Giles J in *A & L Silvestri Pty Limited v Construction, Forestry, Mining and Energy Union* [2008] FCA 466 at [6]:

> *"..., the discretion is at large. There are no mandatory statutory criteria and it is wrong to regard factors seen as relevant by one court as statutory criteria. Indeed, lists of factors can confuse an essentially straightforward task and lead to over-elaborate reasoning. ..."*

The nature and extent of the conduct

39. Both parties made submissions about this matter. The submissions of the Applicant tended to accentuate the long-running and multifarious nature of the contraventions. It is certainly true the contraventions took place over an extended period of time and involved a number of different employees, giving rise to total under-payments of approximately $11,000. Those sums are not in the scheme of things enormous but there is no reason to suppose that the amounts of moneys underpaid were not keenly felt by employees whose employment was at the less-remunerated end of the employment scale.

40. While the conduct did involve a large number of contraventions, they arose from a combination of a lack of knowledge on the part of the Respondents of what their true obligations were in some instances and appear in each and every instance to have been significantly if not wholly caused by lack of operating funds on the part of the First Respondent.

41. Nonetheless, the Respondents knew by mid-2009 that their conduct was inadequate and they failed to make restitutionary payments for a very long period of time despite promising to do so. To say that the contraventions did not arise as a calculated course of conduct to defraud employees of their entitlements, that these were not deliberate breaches, as the Respondents' submissions do at paragraph 5.2, is in my view to be overly beneficent to the Respondents.

42. Rather, the picture I get from the evidence as a whole is that Mr Boi, a man striving hard and it would appear by no means successfully to establish a business, concentrated his mind on paying those he had to pay to keep the business going without proper regard to his obligations as an employer. It is certainly clear that the Respondents' failure to keep proper records shows a complete disregard for the obligation the First Respondent had in this regard.

Size of the business and involvement of senior management

43. This was on any view a small operation and while Mr Boi is in one sense senior management, in another sense he is almost all there is of the company. In my view, these matters add little in the context of this

case save perhaps to explain the state of ignorance of the relevant industrial law and rates of pay and the like that the Respondents evinced.

Contrition, corrective action, co-operation with the authorities

44. Although Mr Boi filed an affidavit in which he expressed contrition, I accept the submission of the Applicant that that contrition must be approached with some measure of caution. The Respondents committed their conduct over a very protracted period of time and the contrition was expressed a matter only of days before the hearing. Furthermore, the Respondents have been exceptionally tardy with rectification of the under-payments that they had known about for a considerable time. Even making allowances for the cash-flow problems to which reference has been made, I note Mr Boi's assertion that of more recent times, things have been going much better. One would expect, for example, the small amount of money owing to Ms Angeli to have been paid long before it was paid.

45. The pattern of persistent contravening behaviour asserted by the Applicant, and in my view made out on the materials, has continued in the face of multiple complaints, investigations and determinations by the Applicant. While it is true that the Respondents have agreed a SOAF, this is not in the scheme of the circumstances in this case an overwhelming factor.

Ensuring compliance with minimum standards

46. I accept the submissions made by the Applicant at paragraphs 5.73 and 5.74 of the submissions as to the importance of the maintenance of an effective safety net and effective enforcement mechanisms. This is particularly perhaps the case in relation to time-keeping and payslip obligations which of course the Respondents contravened significantly. I also accept that the substantial penalties set by the legislature for contravention of such minimum entitlements and record-keeping obligations do indeed reinforce the importance placed on compliance with minimum standards.

General and specific deterrence

47. The parties have provided substantial amounts of authority in relation to these issues but in my opinion the general principles relating to both general deterrence and specific deterrence are sufficiently well-known not to require detailed elaboration.

48. I accept that general deterrence is important in cases such as this as it is important to publicly denounce repeated contravening conduct such as that of the Respondents.

49. I think it is also important to bring home to any other employers who are experiencing the sort of cash-flow problems described by the Respondents that they nonetheless do not evade their responsibilities merely because of that circumstance. It is not properly open to an employer simply to avoid or evade their obligations under Workplace Relations law simply because they are struggling.

50. So far as specific deterrence is concerned, I think that the submissions of the Applicant are somewhat overstated. True it is that the Respondents have contravened repeatedly and over a long time despite the interventions of the Applicant. Nonetheless, I think that the imposition of a penalty, which will necessarily have to be a substantial one, is highly likely to deter the Respondents from any further contraventions.

Previous conduct by the Respondents

51. There is no assertion that the Respondents have previously been found to have breached any applicable industrial law or instrument.

The appropriate level of a penalty

52. Following the evidence given my Mr Boi and in particular his evidence as to his finances, described by Counsel for the Applicant as sketchy and inadequate, the Applicant submitted that a low to mid-level penalty was appropriate in the range of some 30 to 50 per cent.

53. Counsel for the Respondents submitted that keen regard should be had to the totality principle and the fact that the penalty should not be such as to crush the person upon whom it is imposed or used to make that

person a scapegoat (see *Ponzio v B & P Caelli Constructions Pty Ltd* [2007] FCAFC 65 per Lander J at [93]). Counsel for the Respondents did not submit any particular range. Counsel rather said that the aggregate imposed should not be pressing or crushing. He submitted that the issue of proportionality should be borne in mind keeping in mind three issues. First, that the total under-payments was less than $11,000. Secondly, that the conduct was not premeditated and third, that the Respondents had not gained significant benefit from their contraventions.

54. Subject to the fact that the conduct in my view was if not premeditated certainly at least deliberate, I would be prepared to accept the force of those three propositions.

55. Submissions of Counsel for the Respondents, however, somewhat tended to elide discrete matters. The Court is required to come to a conclusion as to the appropriate penalty that ought to be imposed and then to reconsider finally whether such a penalty would or would not, as a matter of intuitive synthesis, be appropriate. That latter step is the operation of the totality principle.

56. In my opinion, taking into consideration all the matters to which I have referred, an appropriate level of penalty is indeed some 30 per cent of the applicable maximum. That is a total of $99,000 in respect of the First Respondent and $19,800 in respect of the Second Respondent.

57. Turning to the application of the totality principle, given the parlous financial position of the First and Second Respondents, imposition of a penalty at that level would be highly likely to be crushing in the sense described by Lander J in *Caelli*. Nonetheless, the Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay.

58. In my view, the appropriate penalties that should be imposed, bearing in mind the competing considerations that give rise to significant penalties (already summarised above) and the particular difficulties that

the Respondents face, the amounts that should be imposed by way of penalties are $65,000 in respect of the First Respondent and $13,000 in respect of the Second Respondent. These represent 20 per cent of the maximum (rounded down) which, while outside the prima facie appropriate range, give in my view proper weight to all the relevant considerations.

59. From correspondence I have received via my associate from the Fair Work Ombudsman dated 13 December 2011, I gather that the form of orders and declarations to be made is largely agreed between the parties. In the circumstance of this case, I think declarations are appropriate and I have prepared draft declarations and orders to the extent possible. I will hear from the parties as to the amount of time that should be granted to the Respondents to pay the penalties to be imposed, and as to the final form of declarations and orders to be made.

I certify that the preceding fifty-nine (59) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 3 February 2012