FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v REACTA STAFFING SOLUTIONS PTY LTD and ANOR [2012] FMCA 76

INDUSTRIAL LAW – breaches of award – under payment of employees – agreed statement of facts – breaches admitted – grouping of contraventions – consideration of matters relevant to penalty.

Fair Work Act 2009, s.12, s.45, s.539(2), s.541(1), s.546(2), s.546(3)(a), s.550, s.557
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Item 15 of Schedule 16
Workplace Relations Act 1996, s.182, s.185

Contract Call Centre Award 2010, cl.A.2.3, cl.A.5.2

Australian Ophthalmic Supplies Pty v McAlary-Smith [2008] FCAFC 8
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor [2011] FMCA 191
Flattery v The Italian Eatery t/a Zeffirelli's Pizza Restaurant [2007] FMCA9
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
R v Thompson (1975) 11 SASR 217
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550
Yardley v Betts (1979) 22 SASR 108

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	REACTA STAFFING SOLUTIONS PTY LTD
Second Respondent:	MARK VINCENT GULIFA
File Number:	MLG 1779 of 2010

Judgment of:	O'Dwyer FM
Hearing date:	29 November 2011
Date of Last Submission:	29 November 2011
Delivered at:	Melbourne
Delivered on:	10 February 2012

REPRESENTATION

Counsel for the Applicant:	Mr Follett
Solicitors for the Applicant:	Ms Sarah Krins of Fair Work Australia
The First Respondent:	Mr Mark Gulifa
The Second Respondent:	In person

THE COURT DECLARES THAT:

1. The First Respondent contravened:

   a) Item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (s.182 of the *Workplace Relations Act 1996*) by failing to pay the basic periodic rate of pay in relation to Ryan Dixon, Alexandra Sinopoli, Hadieh Rahmani and Sandi Charleston, and each of them;

   b) Item 5 of Schedule 16 of the *Fair Work Act (Transitional Provisions and Consequential Amendments) Act 2009* (s.185 of the *Workplace Relations Act 1996*) by failing to pay the guaranteed casual loading percentage in relation to Ryan Dixon, Alexandra Sinopoli, Hadieh Rahmani and Sandi Charleston, and each of them;

   c) Section 45 of the *Fair Work Act 2009* (clause A.2.3 of the *Contract Call Centre Award 2010*) by failing to pay the minimum wage derived from the transitional minimum wage instrument in relation to Telmo Do Vale; and

   d) Section 45 of the *Fair Work Act 2009* (clause A.5.2 of the *Contract Call Centre Award 2010*) by failing to pay the guaranteed casual loading percentage in relation to Telmo Do Vale.

2. The Second Respondent contravened the various provisions as set out in paragraph 1 above.

THE COURT ORDERS THAT:

3. The Applicant have leave to amend his Statement of Claim in the form of the Amended Statement of Claim signed and dated 16 November 2011 and handed up in Court on 29 November 2011.

4. The Applicant have leave to file in Court his Amended Statement of Claim dated 16 November 2011.

5. Pursuant to section 541(1) of the *Fair Work Act 2009*, the First Respondent pay $178.65 to Ryan Dixon by way of underpayments, within 20 days of the date of this order.

6. Pursuant to section 546(3)(a) of the F*air Work Act 2009*, the First Respondent pay into the consolidated revenue fund of the Commonwealth a penalty of $26,400 for breaches of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work Act 2009*.

7. Pursuant to section 546(3)(a) of the *Fair Work Act 2009*, the Second Respondent pay into the Consolidated Revenue Fund of the Commonwealth, a penalty of $5,280 for breaching the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work Act 2009*.

8. Payment of the pecuniary penalties referred to in Orders 4 and 5 above shall be made within 60 days of the date of this order.

9. There be no order as to costs.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

No. MLG 1779 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

REACTA STAFFING SOLUTIONS PTY LTD
First Respondent

And

MARK VINCENT GULIFA
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This matter comes before the Court after leave was granted for the Applicant to file an Amended Application and an Amended Statement of Claim wherein orders were sought against the two remaining Respondents that they pay outstanding wages to a former employee of the First Respondent and pay penalties in respect of breaches of workplace legislative provisions applicable to other employees. The Amended Application reflected the withdrawal of proceedings against a Third Respondent that was named in the initiating Application, and also reflects that various payments had been made since the initiating Application in respect of moneys owing to named employees.

Background

2. The Second Respondent conducted a telemarketing business through the First Respondent, which proved unsuccessful. The consequence of the failure of that business, I am satisfied, has had serious financial ramifications for the Second Respondent, and that through his attendance at Court and subsequent cooperation with the Applicant, he has displayed a genuine endeavour to address his responsibilities to his employees and others to whom he may be financially liable.

3. The long and the short of it is, however, that during the time he conducted the business, the First Respondent failed to fully pay employees at the level demanded by legislation. The Second Respondent has acknowledged his liabilities and to a significant degree has paid the First Respondent's former employees moneys due to them. At the time of the hearing there was a small amount owed to one employee and I am satisfied that had the Second Respondent been aware of it, he would have paid it prior to the hearing.

4. This case, therefore, is about what penalty should be imposed upon the Respondents in respect of their admitted breaches.

5. I have the benefit of an Agreed Statement of Facts (ASOF) and written submissions by the Applicant on penalty.

6. In respect to the agreed facts, in short summary, the following is of note.

    - There were five employees of the First Respondent who were underpaid a total of $3,326.49, in amounts ranging from $417 to $913.56 for each.

    - The original Statement of Claim, however, had indicated the amount owing was $3,147.84, which sum was paid by the Second Respondent prior to the hearing, in the understanding he was making full payment. However the Applicant's original calculation was in error to the extent of $178.65 payable to one employee. As stated, the Second Respondent was not aware of this and had hoped to come to the hearing having paid the full

amount that was calculated to have previously been underpaid by the First Respondent.

- Initially, and this was at a time the Second Respondent was under a great deal of stress in respect of his failing business, he was not cooperative with the Applicant, but once this proceedings was issued, it is fair to say, he has been fully cooperative with the Applicant and has been attentive to the Court process by appearing at Directions Hearings.

- At all relevant times the Second Respondent was responsible for the engagement of staff; for approving payment of wages for staff; was aware that the First Respondent was obliged to pay amounts to the employees for the work they performed; was aware that outstanding amounts for the performance of that work were owing to the employees; and never made any attempt to pay any amounts to the employees, or to see to it that the employees were so paid until after the instigation of these proceedings.

- The Second Respondent acknowledged that at all material times, by way of his acts or omissions, he was knowingly concerned in, or a party to, each of the First Respondent's contraventions.

The Applicant's Submissions

7. The Applicant's submissions, having regard to the agreed facts and concessions made on behalf of the First and Second Respondents, centred on the question of determining an appropriate penalty

8. Sections 539(2) and 546(2) of the *Fair Work Act 2009* (FW Act) prescribe the maximum penalties that may be imposed for each contravention, which in the case of an individual is 60 penalty units, and in the case of a body corporate, 300 penalty units. A penalty unit is $110 (see s.12 of the FW Act and the *Crimes Act 1914*).

9. Consequently, the maximum penalty that may be imposed by this Court for each of the breaches of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) and the FW Act is:

- $33,000 for each breach of an applicable provision by the First Respondent; and

- $6,600 for each breach of the applicable provision by the Second Respondent.

10. Should maximum penalties be imposed upon the First Respondent, the total would be $132,000; and, again, if the maximum was imposed upon the Second Respondent, it would total $26,400.

11. In his submissions, the Applicant has set out the approach taken by the Courts to date in determining the appropriate penalties under these provisions, which submissions, in my view, reflect the appropriate approach to take in this matter.

12. For the sake of completeness, I repeat those submissions below.[1]

13. The first step for the Court, is to identify the separate contraventions involved. Each breach of each separate obligation found in the award, the Transitional Act, the Modern Award and the FW Act, in relation to each employee is a separate contravention of a term of an applicable provision for the purposes of s.557 of the FW Act.

14. However, s.557(1) of the FW Act provides that where two or more breaches of a term of an applicable provision are committed by the same person, and the breaches arose out of a course of conduct by that person, the breaches are taken to constitute a single breach of the provision.

15. Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances of each contravention. A respondent should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.[2] This task is distinct from and in addition to the final application of the "totality principle".[3]

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1 [13] to [78] are taken directly, with minor alteration, from the Applicant's submissions.
2 *Australian Ophthalmic Supplies Pty v McAlary-Smith* [2008] FCAFC 8 at [46]
3 *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46]

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

17. Fourth and finally, having fixed an appropriate penalty for each group for contraventions or course of conduct, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches.[4] The Court should apply an "instinctive synthesis" in making this assessment.[5] This is what is known as an application of the "totality principle."

APPLICATION OF FACTS TO LAW

Identified contraventions

The First Respondent's Breaches

18. The First Respondent has admitted to four separate contraventions of the Transitional Act and the FW Act in respect of RYAN DIXON (Dixon), ALEXANDRA SINOPOLI (Sinopoli), HADIEH RAHMANI (Rahmani), SANDI CHARLESTON (Charleston) and TELMO DO VALE (Do Vale)(together the employees).

19. The following terms were breached by the First Respondent:

    (a) Item 5 of Schedule 16 of the Transitional Act (S.182(1) of the WR Act) – failure to pay basic periodic rate of pay in relation to Dixon, Sinopoli, Rahmani and Charleston (maximum penalty $33,000);

    (b) Item 5 of Schedule 16 of the Transitional Act (s.185(2) of the WR Act) – failure to pay the guaranteed casual loading percentage in relation to Dixon, Sinopoli, Rahmani and Charleston (maximum penalty $33,000);

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[4] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J); *Australian Ophthalmic Supplies*, supra at [23] (Gray J)

[5] *Australian Ophthalmic Supplies*, supra, at [27] (Gray J) and [55] and [78] (Graham J)

(c) Section 45 of the FW Act (clause A.2.3 of the Modern Award) – failure to pay the minimum wage derived from the Transitional Minimum Wage Instrument in relation to Do Vale (maximum penalty $33,000); and

(d) Section 45 of the FW Act (clause A.5.2 of the Modern Award – failure to pay the guaranteed casual loading percentage in relation to Do Vale (maximum penalty $33,000).

20. The Applicant accepted that the First Respondent has the benefit of section 557(2) of the FW Act in relation to repeated breaches of a provision.

21. Consequently, I should consider that the maximum penalty it could impose in this matter on the First Respondent is $132,000.

The Second Respondent's Involvement In The Breaches

22. The Second Respondent has admitted his involvement in the contravention set out in paragraph 19 above within the meaning of s.550 of the FW Act

23. The maximum penalty that may be imposed on an individual is $6,600 in respect of each contravention. Therefore, the Court should consider that the maximum penalty it could impose in this matter against the Second Respondent is $26,400.

Grouping of Contraventions

24. It is not inappropriate to consider the maximum penalties that could be imposed on the Respondents as part of the comparative exercise of assessing where the current contraventions sit.[6]

25. It is open to me to group separate contraventions together where the contraventions may be said to overlap with each other or involve the potential punishment of the respondents for the same or substantially similar conduct.[7] The Full Court of the Federal Court in *Australian*

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[6] See *Mornington Inn*, supra at [88] (Stone and Buchanan JJ)

[7] This position is in accordance with the authority in Pearce v R (1998) 194 CLR 194 610 at [40], Johnson v R (2004) 205 ALR 346 at [27] – [34] and *Australian Ophthalmic Supplies*, supra at [46] (Graham J) and [93] (Buchanan J)

Ophthalmic Supplies accepted that this approach is open to the Court in determining appropriate penalties.[8]

26. The Applicant accepted that some of the contraventions have come in elements and this should be taken into account in considering an appropriate penalty to ensure that the Respondents are not punished more than once for the same, or substantially similar, conduct.

27. Whilst I am not required to group contraventions, the Applicant considered grouping appropriate in this case, and suggested that the contraventions of the First and Second Respondents could be grouped as falling into the following two categories:

- failure to pay basic periodic rate of pay/minimum wage (Item 5 of Schedule 16 of the Transitional Act (s.182(1) of the WR Act) and section 45 of the FW Act (clause A.2.3 of the Modern Award)). (Maximum penalty $33,000 against the First Respondent and $6,600 against the Second Respondent);

- failure to pay the guaranteed casual loading percentage (Item 5 of schedule 16 of the Transitional Act (s.185(2) of the WR Act) and section 45 of the FW Act (clause A.5.2 of the Modern Award)). (Maximum penalty $33,000 against the First Respondent and $6,600 against the Second Respondent).

28. If I was to adopt the grouping approach outlined above, which I intend to do, then the maximum penalty for the First Respondent would be $66,000 and the maximum penalty for the Second Respondent would be $13,200.

Factors Relevant To Penalty

29. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act had been summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant and Bar* [2007] FMCA 7 (*Pangaea*), [26]-[59], as follows:

(a) the nature and extent of the conduct which led to the breaches;

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[8] *Australian Ophthalmic Supplies*, supra at [46] & [72] (Graham J) and [93] (Buchanan J)

(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(s);

(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 of investigation and enforcement of employee entitlements; and

(m) the need for specific and general deterrence.

30. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. While the summary is a convenient checklist, it does not describe or restrict the matters which may be taken into account in the exercise of the Court's discretion.[9]

[9] *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550, [11]; *Australian Ophthalmic Supplies*, supra, at [91] per Buchanan J

Nature and Extent of the Conduct

31. The Applicant became aware of the first of the contraventions on 18 November 2009 when the Applicant received an underpayment of wages complaint from Dixon. The Applicant received subsequent underpayment of wages complaints on 27 November 2009 (Sinopoli); 16 December 2009 (Rahmani); 19 January 2010 (Charleston); and 25 March 2010 (Do Vale).

32. The breaches in this matter represent a failure to provide basic and important entitlements under the workplace relations legislation. The fundamental nature of the breaches displays a disregard for the Respondent's statutory obligations. I note, however, the Second Respondent's assertion from the Bar Table that he ascertained what he understood to be the correct entitlement from WageLine. Be that as it may, his obligation, as the controlling mind of the First Respondent, was to enquire further and to satisfy himself beyond doubt, not rely on that casual referral to WageLine with the potential for misunderstanding or defective advice inherent in such reliance. Too much reliance was placed on Wageline where it should only be considered a first point of referral to be followed up with hard copy of current awards applying.

33. The Respondents did receive a benefit from the underpayments for a significant period of time; although it must be acknowledged the benefit was minor from the Respondents' perspective; but nonetheless significant from the employees' perspective (see [36], [38-39] & [41] below).

    The combined underpayments identified in the statement of claim ($3,147.84) were rectified in full by the Second Respondent on 5 August 2011; however, the underpayments remained outstanding for periods of between 1 year and 5 months and two years after the employee's employment with the First Respondent ended.

34. The Second Respondent was responsible for the day to day management, direction and control of the First Respondent's operation which included setting and adjusting wage rates and hours of work for the employees (see ASOF, paragraph 7). The Second Respondent was aware that the First Respondent was obliged to pay amounts to the employees for the work they performed; was aware that the

outstanding amounts for the performance of that work were owing to the employees; and never made any attempts to pay any amounts to the employees, or see to it that the employees were so paid (see ASOF, paragraph 33). It was submitted by the Applicant that in the circumstances, the Second Respondent showed a complete disregard of the First Respondent's obligations to pay the employees their minimum entitlements in accordance with the law. Whilst that is open to me to find, I am of the view that the difficulties the Respondents found themselves in, reflects more on the Second Respondent's inexperience, naivette and anxiety arising from the failure of the business, with its commensurate financial burden placed upon him in respect of other creditors, besides the employees. The Second Respondent did address me from the Bar Table only, but his comments and explanation persuaded me he was earnest and determined to do the right thing now and ensure not only the employees are paid, but other creditors as well.

35. The Applicant has not been provided with any evidence to explain why the First Respondent failed to pay the employees their entitlements under the relevant industrial instrument.

Circumstances in which the conduct took place

36. At the time of their employment, Dixon, Sinopoli, Rahmani and Charleston were between 17 and 21 years of age; Do Vale was 42 years of age, with a dependent family. The employees were employed for short periods between 4 days and two weeks on a casual basis and performed work in a call centre environment making sales calls on behalf of external clients.

37. At all relevant times, the First Respondent carried on the business of a call centre operating in Ravenhall, Victoria.

Nature and extent of loss or damage

38. The conduct affected four young employees. The Court could find in these circumstances, that four of the five employees were vulnerable.

39. There is no evidence to suggest that any of the employees were particularly well versed in industrial and employment matters, or the exercise of their rights under industrial instruments.

40. The First Respondent failed to make any payment to the employees for any of the hours they worked. The employees worked between 46 hours to 19 hours without pay.

41. The combined underpayments in this matter equated to $3,326.46 gross. Whilst the total underpayment is not large compared to some other cases prosecuted by the Applicant, with the employees each underpaid between $377.34 and $913.56, and, as stated, they are significant amounts to young and vulnerable workers with limited workplace experience who were reliant on the minimum wage. The Applicant sought to contrast the modest nature of this sum to an employer as indicative of the Respondents' failure to rectify the underpayment at an earlier point more marked and worthy of condemnation accordingly. However, the reality of the Respondents is that, when the business collapsed, there were very limited financial resources available to pay creditors more generally and I accept the Second Respondent's assertion in that regard and that his present financial circumstances are precarious.

42. The Applicant wished to highlight that, whilst the full underpayment identified in the Statement of Claim ($3,147.84) was rectified by the First Respondent on 5 August 2011, the employees were denied their minimum entitlements for substantial periods of time and the First Respondent had the enjoyment and use of this amount during this time. Again, this understanding ignores the reality of the Respondents financial position.

43. An amount of $178.65 owing to Dixon was recently identified due to Dixon being mistakenly classified as a full-time, rather than a casual employee. At the time of the hearing, the amount of $178.65 remains outstanding. The Applicant noted that its ability to correctly calculate the outstanding entitlements was hindered by the Respondent's failure to fully participate in the investigation.

44. Again, the Second Respondent's explanation for the earlier period of lack of cooperation is reflective of his state of mind when coming to terms with the broader ramifications of the failed business.

45. The First Respondent has admitted to four contraventions, with the Second Respondent admitting to his involvement in each of these contraventions. The number of contraventions is also significant, but in context should not be determinate of the penalty.

46. However, and relevantly, were it not for the investigation and subsequent prosecution by the Applicant, the employees may never have been reimbursed.

Similar previous conduct

47. The Applicant was not aware of any previous findings of breach of the Commonwealth workplace laws by the First or Second Respondents.

Whether the breaches arose out of the one course of conduct

48. The Respondent's breaches arose out of two breaches of the Transitional Act and the Award in relation to four employees, and two breaches of the FW Act and the Modern Award in relation to one employee as detailed above. The employees were engaged at different points between August 2009 and March 2012.

Size of the business

49. The First Respondent ceased carrying on a business on or around 30 March 2010 and is not operating elsewhere. There is no evidence about the exact number of employees engaged by the First Respondent. Suffice to say, the First Respondent was not a large operation.

50. The apparent small size of the business and apparent lack of dedicated human resources personnel is not a particularly relevant matter on the question of penalty. No reduction should be afforded to the Respondents because of this.[10]

[10] See *Cotis v MacPherson* (2007) 169 IR 30 at [16] (Driver FM) (Cotis) and *Kelly*, supra at [28]

51. In *Kelly v Fitzpatrick* [2007] FCA 1080 at [28] Tracey J stated:

> *"No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level."*

52. Likewise, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 where the Court stated at [27]:

> *"Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size and such a factor should be of limited relevance to the Court's consideration of penalty."*

Deliberateness of the breaches

53. It is not clear whether there was a deliberate campaign on behalf of the Respondents to underpay the employees. However, the Respondents are best described as either reckless, or negligent, rather than showing a complete disregard of their obligations to pay the employees their minimum entitlements in accordance with the law. Nonetheless, the Respondents should have realised that failing to pay the employees at all for the hours they worked must be in a contravention of workplace legislation, and their failure to be so until these proceedings were issued has to carry some weight in determining penalty.

Involvement of senior management

54. At the time of the contraventions, the Second Respondent was one of two directors of the First Respondent and was the "directing mind and will" of the First Respondent.

55. The Second Respondent has admitted to his involvement in all four of the contraventions. There is no evidence that the contraventions were attributable to any other person or agent. He freely admitted this.

Contrition, corrective action, co-operation with authorities

56. During the investigation relating to the employees, the Respondents' conduct was at first uncooperative and characterised by a failure to enter into communication with the Applicant. The Second Respondent explains this by the collapse of his capacity to respond appropriately caused by the failure of the business and personal devastation caused to his normal functioning by his failure to attain his aspiration. However, the Applicant acknowledged that the Second Respondent met with the Applicant to discuss the complaints and provided certain documents in response to the Notice to Produce Records or Documents issued in January 2010. However, no response was received to a Contravention Letter and Final Contravention Letter issued in February 2010 on the Second Respondent in his capacity as director of the First Respondent (see paragraphs 39 to 43 of the ASOF).

57. The Applicant began its investigation into complaints received by the employees in December 2009. It was not until one year later that the proceedings were filed in this Court on 22 December 2010.

58. The Applicant notes that the Respondents failed to file and serve a defence in accordance with the Court orders dated 7 March 2011 and did not participate in a Court ordered mediation. Because the Respondents' were not participating in proceedings, the Applicant filed an Application in a Case and Submissions in support of default judgment on 14 June 2011.

59. The First and Second Respondents first participated in proceedings by attending Court for the hearing of the Applicant's Application in a Case on 27 June 2011.

60. Since this date, the First and Second Respondents have been cooperative and have participated in proceedings. The Applicant notes that the underpayment identified in the Statement of Claim ($3,147.84) was rectified in full by the Second Respondent on 5 August 2011.

61. Whilst the Applicant acknowledged that the underpayment identified in the Statement of Claim has been rectified, the Applicant had not been provided with evidence of any genuine contrition by the Respondents

for their contraventions, such as an apology to the complainants either before or at the time the underpayment was rectified.

62. On 30 September 2011 the parties filed an ASOF in the Court whereby the Respondents admitted to the contraventions.

63. The Applicant acknowledged that the Respondents have considerably shortened and assisted the litigation process, and reduced costs to the public purse, by admitting liability and entering into an ASOF. This has removed the necessity for the Applicant to file evidence in relation to liability and has allowed this matter to progress to a hearing on penalty only.

64. The Applicant noted that where wrong-doers have co-operated and have also made admissions early in the course of an investigation or soon after the commencement of proceedings it is appropriate to allow a discount of penalty (in the vicinity of up to 25-30%). However, consistent with the decision in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 (at 74-76 per Stone and Buchanan JJ):

> *"... the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:*
>
> *(a) has indicated an acceptance of wrongdoing and a suitable credible expression of regret; and/or*
>
> *(b) has indicated a willingness to facilitate the course of justice.*

65. The Applicant also referred to the statements of Federal Magistrate Burnett in *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor* [2011] FMCA 191 at 125-127:

> *"Although the applicant concedes that the respondents have admitted liability and could be said to have cooperated by partaking in the investigation, at least in a limited fashion; particularly by engaging in the record of interview process; by providing some necessary records and, by signing the agreed statement of facts, although that itself was only agreed on the day of the trial and, of course, only after some delay, the Applicant says that the Court should not be too anxious to afford the respondent a significant discount for its admission and conduct.*

In considering whether or not a discount should be applied, I have regard to the observations of Branston J in Morning Inn Pty Ltd v Jordon, where her Honour said:

> *"The rationale for providing a discount for early plea of guilty in a criminal case does not apply neatly to a case such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather the benefit of such a discount should be reserved for cases where it can fairly be said an admission of liability (a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret and/or (b) has indicated a willingness to facilitate the course of justice."*

In my view, this is a case where neither of those qualities can be demonstrated and, accordingly, I do not consider that any discount ought to be provided in this instance on this basis.

66. Further to the Respondents' cooperation as set out above, the Applicant acknowledged that the Respondents are entitled to a discount in the penalty to be awarded as a result of this cooperation, but also that the Respondents would have been entitled to a larger discount had they been cooperative from the beginning of the investigation. The Applicant noted that in *Mornington Inn*, the Court awarded a discount of 10% for an admission of liability two weeks before the trial in the absence of the Respondents displaying contrition or remorse. The Applicant noted that his proposed penalty set out in his submissions (40% of maximum penalty) had already factored in a discount in this regard. However, in doing that the Applicant admitted he had factored in a partial discount of approximately 20% and not the maximum discount of 25% given that the Respondent's did not begin cooperating at the earliest possible opportunity. I agree with the Applicant's logic in this regard and that 20% is appropriate on this basis.

Ensuring compliance with minimum standards

67. One of the principal objects of the FW Act is to ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions. The substantial penalties set by the legislature for breaches of such minimum entitlements reinforce the importance placed on compliance with minimum standards. The penalty I intend to order, in my view, in no way derogates from these principal objects of the FW Act.

General and specific deterrence

68. The Applicant submits that there is a high need for both general and specific deterrence in the present case. It is well-established that the "need for specific and general deterrence" is a factor that is relevant to the imposition of a penalty under the FW Act.[11]

General deterrence

69. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543, [93].

> *"In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts (1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should 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."*

70. Similarly in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231 where Finkelstein J said:

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[11] See for example, Mowbray FM in *Pangaea*, supra at[26]-[59].

> *"even if there be no need for specific deterrence, there will be occasions when the general deterrence must take priority, and in that case a penalty should be imposed to mark the law's disapproval of the conduct in question, and act as a warning to others not to engage in similar conduct."*

71. General deterrence will, it is submitted, always be a significant factor in sentencing for breaches of the FW Act. The circumstances where specific deterrence will not also form a part of the exercise of the discretion will be rare.

72. As to general deterrence, it is appropriate for the Court to hold, as it was held to be in *Flattery v The Italian Eatery* at 66[12], that *'a clear message needs to be sent to both the employer and the industry in general that underpayment of wages will not be tolerated.'*

73. The Applicant submitted, with which submission I agree, that general deterrence is important in the present case as the contraventions involved young employees who lacked workplace experience. I further agree with the Applicant's contention that it is particularly important that I impose a penalty that demonstrates to employers of such workers the importance of complying with Australian workplace laws. Regardless of the size of the First Respondent and its financial position, the law should mark its disapproval of the conduct in question, and set a penalty which serves as a warning to others.[13] General deterrence is also important in relation to the underpayments of wages, particularly in the call centre industry which is notorious for employing young workers.

74. There is a need, it was submitted, to send a message to the community at large, and small employers particularly, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements (as opposed to ignoring those obligations). Compliance should not be seen as the bastion of the large employer, with human resources staff

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[12] *Flattery v The Italian Eatery t/a Zeffirelli's Pizza Restaurant* [2007] FMCA9

[13] See paragraph [25] of *Kelly*, supra, and the cases cited therein. See *also Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at 559-60 [93] (Lander J)

and advisory consultants (accounts, consultants, lawyers) behind them.[14]

Specific deterrence

75. Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357 observed at [37]:*

> *"Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur."*

76. The need for specific deterrence in this case is, in my view, not as high as for a general deterrent. The Respondents will nonetheless be left in no doubt that underpayment of wages will not be tolerated and this is particularly the case where vulnerable employees are involved.

77. Whilst the First Respondent is no longer trading there is at least the chance that the Second Respondent will engage employees at some point in the future, but I am confident the nature of his experience to date, together with the penalty I will impose, would act with sufficient deterrence to prevent a repeat of what has happened here.

Instinctive Synthesis Test

78. Having fixed an appropriate penalty for each contravention or group of contraventions, the Court should take a final look at the aggregate penalty, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing.[15]

RESPONDENTS' SUBMISSIONS AND RECOMMENDATIONS

79. From the Bar Table the Second Respondent gave a brief account of how the experience of a failed business had affected him, both emotionally and financially. He stated his financial circumstances were such that his credit rating was destroyed and he relies on others to

[14] See paragraph 31 of *Bonsen,* supra
[15] *Kelly* at [30]; *Merringtons* at [23] per Gray J, [71] per Graham J, [102] per Buchanan J

support him. He, in effect, was asking for sympathy from the Court and that it not impose too high a penalty.

80. I have no reason not to accept this summary of his present circumstances and, in my view, it would be wrong to impose a penalty that would be crushing. In his present circumstances, it would not need to be too great to have that effect.

APPLICANT'S RECOMMENDATIONS AND CONCLUSION

81. The Applicant recommended that a penalty of 40% of the maximum penalty be imposed in this matter. Whilst I am at some minor variance with the Applicant's assessment of the conduct of the Second Respondent as indicated, I nonetheless am of the view, when all the circumstances are taken into account, the Applicant's recommendation is appropriate; satisfying as it does the need to uphold the principal objects of the FW Act whilst not being a crushing penalty.

82. Accordingly, I shall impose a penalty on both Respondents that is 40% of the maximum penalty as calculated above.

83. It is to be noted that the Applicant seeks an order under section 546(3)(a) of the FW Act that any penalty imposed on the First and/or Second Respondent be paid to the Consolidated Revenue of the Commonwealth. This is appropriate and that order shall be made.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of O'Dwyer FM.

Associate:

Date: 10 February 2012