

**IN THE FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT SYDNEY**

FILE NO: (P)SYG 2255 of 2010

**FAIR WORK OMBUDSMAN
APPLICANT**

**ROSARIO PUCCI
RESPONDENT**



BEFORE: FEDERAL MAGISTRATE EMMETT
DATE: 16 DECEMBER 2011
MADE AT: SYDNEY

THE COURT ORDERS THAT:

1. Pursuant to section 719(1) of the *Workplace Relations Act 1996* (Cth) a penalty of \$4,400 be imposed on the respondent in respect of his involvement in the contraventions of subsection 182(1), section 235 of the *Workplace Relations Act 1996* (Cth) and ch 2 reg 19.20 of the *Workplace Relations Regulation 1996* (Cth) in relation to the employment of Poala Nady, Debbie Burns and Andrew Litson pursuant to s.728 of the *Workplace Relations Act 1996* (Cth).
2. Pursuant to section 841 of the *Workplace Relations Act 1996* (Cth) part of the penalty in the amount of \$1,578.81 be paid to Paola Nady.
3. Pursuant to section 841 of the *Workplace Relations Act 1996* (Cth) part of the penalty in the amount of \$1,234.79 be paid Debbie Burns.
4. Pursuant to section 841 of the *Workplace Relations Act 1996* (Cth) part of the penalty in the amount of \$655.18 be paid to Andrew Litson.

5. Pursuant to section 841 of the *Workplace Relations Act 1996* (Cth) part of the penalty in the amount of \$931.22 be paid to the Commonwealth of Australia.
6. No order as to cost.

By the Court



DATE ENTERED: 16 DECEMBER 2011

FEDERAL MAGISTRATES COURT OF AUSTRALIA

Fair Work Ombudsman v Rosario Pucci

[2011] FMCA 997

INDUSTRIAL LAW – admitted contraventions of ss. 182, 235, of the *Workplace Relations Act 1996* (Cth) and Reg19.20 of the *Work Place Regulations 1996* (Cth) – whether pecuniary penalties should be awarded pursuant to s.719 of the *Workplace Relations Act 1996* (Cth) – whether the pecuniary penalties agreed upon by the parties are appropriate – appropriate amount of pecuniary penalties;

Workplace Relations Act 1996 (Cth) ss 182; 235; 719; 728

Fair Work Act 2009 (Cth) s 701.

Workplace Relations Regulations 1996 (Cth) reg 19.20.

Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7;

Kelly v Fitzpatrick (2007) FCA 1080;

Australian Ophthalmic Supplies Pty Ltd v McAlary –Smith [2008] FCAFC 8;

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	ROSARIO PUCCI
File Number:	SYG 2255 of 2010
Judgment of:	EMMETT FM
Hearing date:	6 December 2011
Date of Last Submission:	7 December 2011
Delivered at:	SYDNEY
Delivered on:	16 December 2011

REPRESENTATION

Counsel for the Applicant: Ms P. Lawson

Solicitors for the Applicant: Ms L. Andelman (Fair Work Ombudsman)

The Respondent appeared in person

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG2255/2010

FAIR WORK OMBUDSMAN
Applicant

And

ROSARIO PUCCI
Respondent

REASONS FOR JUDGMENT

Introduction

1. By Application and Statement of Claim filed on 19 October 2010, the applicant sought declarations against Wash and Go Pty Limited (in liquidation) ("**Wash and Go**") in respect of alleged contraventions of the *Workplace Relations Act 1996* (Cth) ("**the WRA**") by Wash and Go and the respondents knowing involvement in those contraventions within the meaning of s.728 of the WRA. The applicant further sought a penalty against the respondent pursuant to s.719(1) WRA for his involvement in the alleged contraventions of Wash and Go.
2. Section 728 of the WRA is as follows:

Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.

(2) For this purpose, a person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

3. Section 719 of the WRA is as follows:

Imposition and recovery of penalties

(1) An eligible court may impose a penalty in accordance with this Division on a person if:

(a) the person is bound by an applicable provision; and

(b) the person breaches the provision.

(2) Subject to subsection (3), where:

(a) 2 or more breaches of an applicable provision are committed by the same person; and

(b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

(4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:

(a) 60 penalty units for an individual; or

(b) 300 penalty units for a body corporate.

(5) If, in a proceeding under this section in relation to an ITEA, it appears to the eligible court that a party to the ITEA has suffered loss or damage as a result of a breach of the ITEA by the other

party, the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.

(6) Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an ITEA), the court may order the employer to pay to the employee the amount of the underpayment.

(7) Where, in a proceeding against an employer under this section, it appears to the eligible court that the employer has not paid an amount to a superannuation fund that the employer was required, under an applicable provision (except a term of an ITEA), to pay on behalf of a person, the court may order the employer to make a payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to pay the amount to the superannuation fund.

*(8) Without limiting the generality of subsection(7), the eligible court may order that the employer pay to the superannuation fund referred to in subsection (7), or another superannuation fund, an amount equal to the amount (in this subsection called the **unpaid amount**) that the employer failed to pay together with such additional amount as, in the opinion of the court, represents the return that would have accrued in respect of the unpaid amount had it been duly paid by the employer.*

(9) An order must not be made under subsection (6) or (7) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of the proceeding.

(10) A proceeding under this section in relation to a breach of an applicable provision must be commenced not later than 6 years after the commission of the breach.

4. The applicant is an inspector for the purposes of s.701 of the *Fair Work Act 2009* (Cth).
5. The respondent was at all material times the director, shareholder and controller of Wash and Go.

6. On 6 December 2011, the parties filed in Court an Amended Agreed Statement of Facts as to liability and penalty. That statement of facts is as follows:

“Introduction

- 1. The parties agree that the facts referred to in this agreement mean agreed facts as per section 191 of the Evidence Act 1995 (Cth).*
- 2. The applicant is the Fair Work Ombudsman appointed pursuant to section 701 of the Fair Work Act (Cth) (FW Act) and a person with standing and authority to bring these proceedings pursuant to subsection 718(1) Item 2 of the Workplace Relations Act 1996 (Cth) repealed (WR Act) to bring these proceedings.*
- 3. Sub-item 11(1) of Part 3 of Schedule 2 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth) (Transitional Act) has the effect that the WR Act continues to apply on or after repeal day in relation to conduct that occurred before the WR Act repeal day.*
- 4. Sub-item 13(1) of Part 3 of Schedule 18 of the Transitional Act has the effect that an application that could have been made by a Workplace Inspector may be made on and after the WR Act repeal date, by a Fair Work Inspector.*
- 5. Wash and Go was bound by the WR Act and Workplace Relations Regulations 2006 (Cth) (repealed).*
- 6. Wash and Go had two separate parts of the business. One part operated a car wash cafe in Strathfield, Sydney and the second part provided contract cleaners to corporate clients.*
- 7. The respondent placed Wash and Go under external administration on the 3 February 2010.¹*
- 8. The respondent is a person who was at all times the sole Director and shareholder of Wash and Go Pty Limited (under external administration) (Wash and Go).²*
- 9. At all relevant times, the respondent was the Managing Director and also had the title of “Group Business Manager³” of Wash & Go.*

¹ Affidavit of Ross Pucci sworn on 24 May 2011 (Affidavit of Ross Pucci) [13].

² Affidavit of Angela Roberts affirmed on 30 May 2011 (Affidavit of Angela Roberts in Reply), Exhibit B.

10. *The respondent had regular contact with Ms Burns and Ms Nady.⁴*

11. *The respondent no longer operates a car cleaning business.*

Agreed facts as to Debbie Burns and Paola Nady

12. *Wash and Go was bound by an APCS derived from the Restaurant &c., Employees' Retail Shops Award (Restaurant Award) in regard to Ms Nady and Ms Burns.*

13. *Ms Nady and Ms Burns performed duties within the Cafeteria Attendant classification in the Restaurant Award.*

14. *Ms Nady and Ms Burns were permanent full time employees and were entitled to be paid 38 hours per week at ordinary rates of pay.*

15. *When Ms Nady and Ms Burns worked less than 38 hours a week they were paid for actual hours worked.*

16. *Ms Burns was employed as a permanent full time employee by Wash and Go from 19 December 2007 to 1 April 2008 as a supervisor of the cafe.⁵*

17. *Ms Burns performed the following duties during employment; making coffee, cleaning the cafe, preparing sandwiches, serving food in the cafe, serving customers, checking quality, driving cars, end of day cash reconciliation, paying staff wages and rostering staff and generally supervising the car wash business.⁶*

18. *When the weather was inclement, Ms Burns would be directed to not attend for work and was not paid when she was not at work.⁷*

19. *Wash and Go offered to pay Ms Burns an hourly rate of \$13.47.⁸ As a permanent employee under the Restaurant Award Ms Burns was entitled to be paid an ordinary hourly rate of \$14.56. Ms Burns was underpaid by \$543.19 during her employment.*

³ Affidavit of Angela Roberts in Reply [14] Exhibit H.

⁴ Affidavit of Debbie Burns affirmed on 15 February 2011 (Affidavit of Debbie Burns) [14] – [18], [22], Affidavit of Paola Nady affirmed on 27 May 2011 (Affidavit of Paola Nady in Reply) [4], Affidavit of Ross Pucci [33].

⁵ Affidavit of Ross Pucci [32]; Affidavit of Debbie Burns [9].

⁶ Affidavit of Debbie Burns [8] to [13].

⁷ Affidavit of Debbie Burns [15] to [23].

⁸ Affidavit of Angela Roberts affirmed on 24 February 2011 (Affidavit of Angela Roberts) [36] Exhibit AR27, also affidavit of Debbie Burns [5].

20. *During the contravention period Wash and Go:*
- a. *Did not pay Ms Burns for full time work*
 - b. *Did not pay for all of the hours worked by Ms Nady.*
21. *Ms Burns did not take any annual leave during her employment.*⁹
22. *Ms Burns was not paid accrued annual leave of \$691.60 on termination of employment.*¹⁰
23. *Ms Burns did not receive any pay slips during her employment.*¹¹
24. *Ms Nady was employed as a permanent full time employee by Wash and Go from 17 November 2008 to 23 May 2009 as a cafe attendant and supervisor of the cafe and the car wash business.*¹²
25. *Ms Nady performed the following duties during employment: making coffee, cleaning the cafe, preparing sandwiches, serving food in the cafe, serving customers, checking quality, driving cars, end of day cash reconciliation, paying staff wages and rostering staff.*¹³ *In addition she undertook general supervision of the car wash business.*
26. *When the weather was inclement, Ms Burns would be directed to not attend for work and was not paid when she was not at work.*
27. *Wash and Go offered to pay to Ms Nady an hourly rate of \$14.20 from 17 November 2008 to 7 December 2008 and \$14.75 from 8 December 2008 to 23 May 2009.*¹⁴ *As a permanent employee under the Restaurant Award Ms Burns was entitled to be paid an ordinary hourly rate of \$15.13. Ms Nady was underpaid by 4333.46 during her employment.*
28. *During the contravention period Wash and Go:*
- a. *Did not pay Ms Burns for full time work*
 - b. *Did not pay for all of the hours worked by Ms Nady.*

⁹ Affidavit of Debbie Burns [30].

¹⁰ Affidavit of Debbie Burns [29].

¹¹ Affidavit of Debbie Burns [20].

¹² Affidavit of Ross Pucci [52], [53] and [32], Affidavit of Paola Nady [5]-[11].

¹³ Affidavit of Ross Pucci [32]; Affidavit of Paola Nady affirmed on 23 February 2011 (Affidavit of Paola Nady) [7]- [10].

¹⁴ Affidavit of Angela Roberts [24] Exhibit AR18, also Affidavit of Paola Nady [24]- [25].

29. Ms Nady did not take any annual leave during her employment.¹⁵

30. Ms Nady was not paid accrued annual leave of \$1245.35 on termination of employment.¹⁶

31. Ms Nady did not receive any pay slips during her employment within one day of being paid.¹⁷ Ms Nady only received occasional pay slips when she insisted on obtaining them for the purposes of advising Centrelink.

32. On the last day of Ms Nady's employment there was an altercation between the respondent and Ms Nady. The altercation resulted in the respondent terminating Ms Nady's employment and Ms Nady making a police complaint.¹⁸

33. The contravention period in regard to Ms Burns is 19 December 2007 to 1 April 2008.

34. The contravention period in regard to Ms Nady is 17 November 2008 to 23 May 2009.

35. The total underpayment to Ms Burns is \$1 234.79.

36. The total underpayment to Ms Nady is \$1 578.81.

Agreed facts as to Andrew Litson

37. Wash and Go was bound by the Australian Pay and Classification Scale (APCS) derived from the Cleaning and Building Services Contractors (State) Award (**Cleaning Award**) in respect of Mr Andrew Litson.

38. Mr Litson performed duties within the Day Shift Worker A classification in the Cleaning Award.

39. The contravention period in regard to Mr Litson is 18 June 2009 to 3 July 2009.

40. Mr Litson was employed as a permanent part time employee by Wash and Go from 18 June 2009 to 3 July 2009 as a contract cleaner.¹⁹

¹⁵ Affidavit of Angela Roberts [24] Exhibit AR18.

¹⁶ Affidavit of Angela Roberts [24] Exhibit AR18; also Affidavit of Paola Nady in Reply [20].

¹⁷ Affidavit of Paola Nady [22], [23].

¹⁸ Affidavit of Ross Pucci [40] to [44]; Affidavit of Paola Nady [30] to [41].

¹⁹ Affidavit of Andrew Litson affirmed on 17 February 2011 (**Affidavit of Andrew Litson**) [2] to [9].

41. Pursuant to the Cleaning Award Mr Litson was entitled to be paid an hourly rate of \$17.95. Mr Litson was not paid at all during his employment.²⁰ Mr Litson was entitled to be paid \$655.18.

42. Mr Litson did not receive any pay slips during his employment.²¹

Agreed facts as to the provision of pay slips and the payment of wages

43. The respondent put in place a system for the provision of pay slips and payment of wages.²²

44. Ms Burns and Ms Nady were at times responsible for the payment of wages to other employees.²³

45. Most of the complaints received by the Applicant from other employees of Wash and Go included complaints that they did not receive pay slips.²⁴

46. The applicant has provided the respondent and his legal representatives with significant assistance so that the corporation he was managing could comply with its legal obligations.²⁵

Agreed facts as to the Respondent

47. Wash and Go contravened the WR Act and Workplace Relations Regulations 2006 (Cth) (repealed). The respondent was involved pursuant to subsections 728(a) and (c) of the WR Act in the contraventions by Wash and Go as follows:

a. Failure to pay Ms Nady and Ms Burns pursuant to the Restaurant Award. The respondent knew during the contravention periods that:

i. the Restaurant Award applied to Wash & Go;

ii. Ms Burns and Ms Nady were performing duties listed in paragraphs 17 and 25 above;

²⁰ Affidavit of Andrew Litson [33].

²¹ Affidavit of Andrew Litson [34].

²² Affidavit of Ross Pucci [19], [21], [37], [38] and [55].

²³ Affidavit of Debbie Burns affirmed on 24 May 2011 (Affidavit of Debbie Burns in Reply) [2] to [11], Affidavit of Paola Nady [9], [13] to [20]; Affidavit of Paola Nady in Reply [7], [8], [10], [11].

²⁴ Affidavit of Angela Roberts AR3, AR16, AR29, AR35, AR42; Affidavit of Angela Roberts in Reply Annexure A pg 7, 15,27,28,32,37,41,44-46, 54, 56, 59.

²⁵ Affidavit of Roberts in Reply, [11] and [13].

iii. Ms Nady was paid \$14.20 from 17 November 2008 to 7 December 2008 and \$14.75 from 8 December 2008 per hour;

iv. Ms Burns was paid an hourly rate of \$13.47.

b. Failure to pay Mr Litson pursuant to the Cleaning Award; The respondent knew during the contravention period that:

i. the Cleaning Award applied to Wash & Go²⁶;

ii. Mr Litson performed work for Wash & Go; and

iii. Mr Litson was not paid for work performed for Wash & Go.

c. Failure to pay Ms Nady and Ms Burns accrued annual leave; The respondent knew during the contravention period that:

i. Ms Nady and Ms Burns were not paid accrued annual leave on termination.

d. Failure to issue pay slips to Ms Nady, Ms Burns and Mr Litson. The respondent knew during the contravention period that:

i. Wash and Go was required to provide each employee with a pay slip within one day of payment; and

ii. Wash and Go did not provide the employees with a pay slip.

48. The respondent agrees to pay a penalty of \$4 400 for his involvement in the following breaches of Wash and Go:

a. Section 182 of the WR Act by failing to pay Mr Litson pursuant to Cleaning Award;

b. Section 182 of the WR Act by failing to pay Ms Burns and Ms Nady pursuant to the Restaurant Award;

c. Section 235 of the WR Act by failing to pay Ms Burns and Ms Nady accrued annual leave on termination; and

²⁶ Affidavit of Angela Roberts, Exhibit AR2.

d. Regulation 19.20 of chapter 2 of the WR Regulations; by failing to provide pay slips to Mr Litson, Ms Burns and Ms Nady.

7. In the circumstances, as between these parties, I make findings in accordance with the Amended Agreed Statement of Facts as to liability.
8. Further, I note the agreement of the parties that the respondent pay a penalty of \$4,400 for his involvement in the breaches of Wash and Go.
9. I now turn to consider whether the agreed penalty is appropriate having regard to all the circumstances of the respondents conduct and involvement in the contraventions by Wash and Go in respect of Ms Nady, Ms Burns and Mr Litson.
10. In support of the agreed penalty, the applicant filed submissions on 7 December 2012. I accept the applicant's submissions on the approach to determining penalty and the determination of penalties. Those submissions are as follows:

"18. The Applicant submits the following approach for the Court to follow in determining appropriate penalties.

19. The first step is to identify each of the separate contraventions involved.

20. Each contravention of each separate obligation found in the WR Act in relation to the Claim Employees is a separate contravention of a term of an applicable provision for the purposes of s 719(2) of the WR Act.²⁷

21. Secondly, consider whether the breaches arising in the first step constitute a single course of conduct.

22. Thirdly, to the extent that two or more contraventions have common elements, this may be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondent should not be penalised more than once for the same conduct.

²⁷ *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

23. The penalties imposed by the Court should be an appropriate response to what the respondent did.²⁸ This task is distinct from, and in addition to, the final application of the “totality principle”.²⁹

24. Fourthly, consider the appropriate penalty for the breaches taking into account all of the relevant circumstances.

25. Finally, having fixed an appropriate penalty for each group of 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.³⁰ The Court should apply an “instinctive synthesis” in making this assessment.³¹ This is what is known as an application of the “totality principle”.

III Determination of penalties

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

26.1 the nature and extent of the conduct which led to the breaches;

26.2 the circumstances in which that conduct took place;

26.3 the nature and extent of any loss or damage sustained as a result of the breaches;

26.4 whether there had been similar previous conduct by the Respondent;

26.5 whether the breaches were properly distinct or arose out of the one course of conduct;

²⁸ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at [46] (Graham J) (unreported, Full Court of the Federal Court of Australia, 20 February 2008, Gray, Graham and Buchanan JJ) (**Merringtons**).

²⁹ *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70 at [41]-[46] (Stone and Buchanan JJ) (unreported, Full Court of the Federal Court of Australia, 7 May 2008, Gyles, Stone and Buchanan JJ) (**Mornington Inn**).

³⁰ See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (**Kelly**); *Merringtons*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).

³¹ *Merringtons*, supra at [27] (Gray J) and [55] and [78] (Graham J).

- 26.6 *the size of the business enterprise involved;*
- 26.7 *whether or not the breaches were deliberate;*
- 26.8 *whether senior management was involved in the breaches;*
- 26.9 *whether the party committing the breach had exhibited contrition;*
- 26.10 *whether the party committing the breach had taken corrective action;*
- 26.11 *whether the party committing the breach had cooperated with the enforcement authorities;*
- 26.12 *the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and*
- 26.13 *the need for specific and general deterrence.*

27. *This summary was adopted by Tracey J in Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080, [14].*

28. *While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion: Merringtons at [91] per Buchanan J.*

29. *Each of the relevant factors identified in Pangaea is addressed in turn below.*

11. Further, the applicant made written submissions in respect of each of the matters referred to in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 ("**Pangaea**"). The respondent did not wish to be heard against those submissions. Accordingly, I accept the submissions of the applicant in respect of each of the relevant factors identified in *Pangaea*. Those submissions are as follows:

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

30. *The respondent is an experienced business man who has had considerable experience in employing employees as a director of*

numerous corporations from 1990.³² The respondent has been in regular contact with the applicant from September 2008.

31. The applicant has provided the respondent and his legal representatives with significant assistance so that the corporation he was managing and controlling at the time could comply with its legal obligations.³³ Notwithstanding this assistance Wash & Go failed to comply with its legal obligations.

32. The respondent had opportunities to redress the underpayment and non-payment of salary to the claim employees, with the assistance of the FWO, but at no time did Wash & Go or the respondent make payments to the claim employees.

33. The respondent only made admissions that he was involved in the breaches in Court on the 28 November 2011. One week prior to the liability hearing.

Nature and extent of loss or damage

34. The total underpayment to the claim employees is \$3,468.78 which has not been rectified. This amount is small compared to some other cases brought by the applicant. However, there are 16 other employees who made complaints to the applicant and the amounts were rectified.³⁴

35. The respondent also benefited financially by the underpayments to the employees.

36. Were it not for the investigation, it is very unlikely that the employees would have been reimbursed because most of the employees that complained to the applicant allege that prior to lodging complaints they attempted to recover the money from the respondent without success.³⁵

Similar previous conduct

37. There is no evidence that the respondent has previously engaged in similar conduct.

Whether the breaches arose out of the one course of conduct

³² Affidavit of Roberts in Reply, Exhibit B.

³³ Affidavit of Roberts in Reply, [11] to [13].

³⁴ Affidavit of Roberts AR2.

³⁵ Affidavit of Roberts AR3, AR16, AR29, AR42; Affidavit of Roberts in Reply Annexure A pgs 7, 27, 28, 32, 37, 41, 44-46, 54, 56 and 59.

38. *The contraventions arose from four separate courses of conduct as they are four separate and distinct provisions of the WR Act, WR Regulations, Restaurant Award and Cleaning Award.*

Size of the business enterprise

39. *Wash & Go was a medium size company. There is no evidence before the court about the number of employees employed.*

Deliberateness of the breaches

40. *As to whether the breaches were deliberate, the evidence from the complaints to the applicant demonstrates that the respondent was consistently involved in employees not being paid for all hours worked; non payment of annual leave on termination and non issue of payslips.³⁶*

41. *The respondent was in a practical sense the controller of the employer and its operations³⁷. This control extended to human resources and personnel issues such as setting up the Praxio system, determining the rate of pay and personally making the payments to Ms Burns, Ms Nady and Ms Gordon.*

Involvement of senior management

42. *The Respondent was a Director and Secretary of Wash & Go. The procedures Wash & Go had in place were deficient – for example, that there were no structures in place to inform Mr Litson about basic workplace arrangements such as recording hours and being paid for the work performed. At the time Mr Litson was employed, Mr Pucci had significant ongoing dealings with the applicant and was aware that the company had engaged in systematic breaches of the WR Act and WR Regulations. Accordingly he was aware of the existence of a statutory basis for ensuring the correct payment of entitlements to employees, and employer's obligations in that regard.*

43. *Further the respondent was well aware of the payments made to the Ms Nady and Ms Burns - he scrutinised all such payments on a weekly basis to ensure that they were correct.³⁸ At times Ms Burns and Ms Nady were responsible for the payment of*

³⁶ Roberts Affidavit in Reply Annexure A, pages 7, 28, 32, 41, 44, 45, 46, 54, 56, 59. See complaints from Mr Ibrahim, Mr Mohamed, Mr Fresneda, Mr Hayes, Mr Mehrab, Miss Jorey-Hughes, Mr Shahi, Mr Reader, Mr Menges, Mr Giri.

³⁷ Affidavit of Burns [14] to [18]; Nady Affidavit [19] and [20]; Roberts Affidavit in Reply [11] to [13]; Burns Affidavit in Reply [2], [4]; Nady Affidavit in reply [8].

³⁸ Burns Affidavit [17]; Nady Affidavit [14],[15], [16]

wages to other employees. They found it stressful being unable to make proper payments to other employees.³⁹

44. The respondent established the company and placed it in liquidation. The respondent determined the terms and conditions of employment of employees.⁴⁰ He was the decision maker in regard to resolving complaints from employees to the Applicant.⁴¹

45. The non provision of pay slips and non payment of wages and annual leave was not a random event but was a pattern across Wash & Go.⁴²

Conitron, corrective action, co-operation with authorities

46. The applicant acknowledges that the respondent provided assistance during the investigation and has participated in these legal proceedings.

47. There is no evidence of contrition or corrective action by the respondent before the Court such as an apology to the claim employees prior to the penalty hearing on 6 December 2011.

Ensuring compliance with minimum standards

48. One of the principal objects of the WR Act was to ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions.

49. Given that the employees were not paid annual leave at all and Mr Litson was not paid anything for work performed, it is important to reinforce that substantial penalties are set by the legislature for breach of such minimum entitlements.

General and specific deterrence

50. 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 WR Act. 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]:

³⁹ Affidavit of Debbie Burns in Reply [2] to [11]; Affidavit of Paola Nady [9], [13] to [20]; Affidavit of Paola Nady in Reply [7], [8], [10], [11].

⁴⁰ Burns Affidavit [9], [15], [16]

⁴¹ Roberts Affidavit in Reply [11] to [13].

⁴² Roberts Affidavit in Reply Annexure A, pages 7, 27, 28, 32, 41, 44, 45, 46, 54, 56 and 59.

"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."

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

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

52. *Specific deterrence is the most important consideration as the respondent continues to hold an employer role in the contract cleaning industry across Australia. The contract cleaning industry is a low paid industry that generally has high rates of people from non English speaking backgrounds and those with low skills who can be termed 'vulnerable employees'.*

12. The applicant made further oral submissions as to the maximum penalty payable by the respondent in respect of his involvement in each of the contraventions. They are summarised below.
- a) There are three contraventions for underpayment of wages, each attracting a maximum of \$6,600, making a total of \$17,800 in respect of the respondent's involvement in the contraventions by Wash and Go of its underpayment of wages to each of, Mr Litson, Ms Burns and Ms Nady.
 - b) In addition, the maximum penalty available to the Court to be imposed on the respondent in respect of the failure of Wash and Go to provide payments for annual leave to each of Ms Burns and

Ms Nady attracts a maximum of \$6,600 each, making a total of \$13,200.

- c) Further, the respondent was involved in the failure by Wash and Go to provide payslips to each of Ms Burns, Ms Nady and Mr Litson, the maximum penalty for which is \$5,500 in respect of the respondent's involvement in each of the 3 contraventions, making a total of \$16,500 for those breaches.

13. The total losses suffered by each of Ms Burns, Ms Nady and Mr Litson as a result of the failure by Wash and Go to underpay their wages pursuant to s.182 of the WRA and failure to pay their annual leave entitlement pursuant to s. 235 of the WRA are set out in a table prepared by the applicant in their written submissions as follows;

Name	Section 182 (underpayment of hourly rate)	Section 235 (annual leave)	Total
Debbie Burns	543.19	691.60	1,234.79
Paula Nady	333.46	1245.35	1,578.81
Andrew Litson	655.18	nil	655.18

14. The agreed penalty of \$4,400 will ensure that each of Ms Burns, Ms Nady and Mr Litson receive the money to which they are entitled under s.182 of the WRA and s. 235 of the WRA. After payment to each of Ms Burns, Ms Nady and Mr Litson, there remains from the \$4,400 agreed penalty an amount of \$931.22.

15. In considering whether the penalties agreed are appropriate in the circumstances, the Court has regard to the financial circumstances of the respondent.
16. The respondent informed the Court that he has given instructions to file for bankruptcy and that his personal losses have been significant, including the loss of his home. These submissions were accepted by the applicant.
17. The respondent offered an unreserved apology to each of Ms Burns, Ms Nady and Mr Litson for the hardship his conduct has caused them. The respondent told the Court that he never intended to be in a position of responsibility or control over employees again. He expressed contrition for his conduct. Although late in the piece, I accept the sincerity of the apologies proffered by the respondent to each of Ms Burns, Ms Nady and Mr Litson one of whom was in Court to hear the apology. The respondent offered to provide a written apology to each of Ms Burns, Ms Nady and Mr Litson, however, an order to that effect was not sought by the applicant.
18. Having regard to all the circumstances of the respondent's conduct and involvement in the breaches by Wash & Go referred to above, in the ordinary course, penalties in excess of the agreed amount would be appropriate. However, I am satisfied that to impose a penalty greater than the amount agreed upon by the parties is likely to crush the respondent and be oppressive having regard to his agreed impecuniosity.
19. Accordingly, I am satisfied that the following penalties are appropriate to impose on the respondent in respect of his involvement in each of the contraventions as follows:
 - i) In respect of the respondent's involvement in the underpayment of the hourly rate to Ms Burns, an amount of \$543.19;
 - ii) In respect of the respondent's involvement in the underpayment of the hourly rate to Ms Nady, an amount of \$333.46;

- iii) In respect of the respondent's involvement in the underpayment of the hourly rate to Mr Litson, an amount of \$655.18;
- iv) In respect of the respondent's involvement in the failure to pay annual leave to Ms Burns, an amount of \$691.60;
- v) In respect of the respondents involvement in the failure to pay annual leave to Ms Nady, an amount of \$1245.35;
- vi) In respect of the respondent's involvement in the failure to provide Ms Burns with pay slips, an amount of \$310.41;
- vii) In respect of the respondent's involvement in the failure to provide Ms Nady with payslips, an amount of \$310.41;
- viii) In respect of the respondent's involvement in the failure to provide Mr Litson with payslips, an amount of \$310.41.

20. Those amounts together make a total of \$4,400. I am satisfied that the total penalty is an appropriate response to the conduct which led to the breaches and is not oppressive or crushing (see *Kelly v Fitzpatrick* (2007) FCA 1080 at [30]; *Australian Ophthalmic Supplies Pty Ltd v McAlary –Smith* [2008] FCAFC 8 at [23] (per Grey J), [71] (per Graham J) , [102] (per Buchanan J).

21. Section 841 of the WRA provides that a court that imposes a pecuniary penalty under the WRA may order that the penalty, or part of the penalty, be paid to the Commonwealth or to a particular organisation or person. Having regard to the losses suffered by Ms Burns, Ms Nady and Mr Litson and the information provided to the court by the applicant that none of those persons has received any of the amounts due to them and referred to above, it is appropriate that the following amounts of the penalty be paid to the following persons:

- i) Debbie Burns \$1243.79;
- ii) Poala Nady \$1578.81;
- iii) Andrew Litson \$655.18.

22. The remainder of the penalty, being \$931.22 should be paid to the Commonwealth pursuant to s.841 of the WRA.
23. Whilst declarations were originally sought in the Statement of Claim against Wash and Go, they were not pressed by the applicant in circumstances where Wash and Go was not a party to the proceeding. The findings made by this Court in relation to the conduct of Wash and Go are findings as between the applicant and the respondent only.
24. Having regard to the impecunious state of the respondent, no costs were sought by the applicant against the respondent.

I certify that the preceding twenty four (24) paragraphs are a true copy of the reasons for judgment of Emmett FM

Deputy Associate:



Date: 16 DECEMBER 2011