FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TAJ PALACE TANDOORI INDIAN RESTAURANT PTY LTD & ANOR [2012] FMCA 258

INDUSTRIAL LAW – Application under Fair Work Act – Underpayment – Failure to keep proper records – Failure to provide payslips – Overseas worker on a work visa – Small family business – Penalties – No matter of principle.

Crimes Act 1914, s. 4AA
Fair Work Act 2009, ss. 3, 12, 535, 539, 546, 557
Fair Work Regulations 2009, rr. 3.40
Fair Work (Transitional Provisions and Consequential Amendments) Act 2000, cl.11(1) Part 3 of Schedule 2
Workplace Relations Act 1996, ss. 3, 4(1), 182(1), 234(2), 235(2), 717, 718(1), 719, 846(2)(g)
Workplace Regulations 2006, rr. 14.2, 19.1, 19.9(1), 19.11, 19.12, 19.20
Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998, cl. 22.2.1, 25.3.1, 25.3.2, 25.3.3, 25.4, 26.1.1, 26.1.2, 26.3.1, 26.3.2, 27.2, 31.2.1, 31.6.1(a)

Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 5] [2009] FCA 1586; (2009) 264 ALR 201; (2009) 76 ACSR 506
Australian Securities and Investments Commission v Fortescue Metals Group Ltd [2011] FCAFC 19; (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563
Fair Work Ombudsman v Bosen Pty Ltd & Anors at 33 (unreported, Magistrates Court of Victoria)
Fair Work Ombudsman v Centennial Financial Services Pty Ltd [2010] FMCA 863; (2010) 245 FLR 242
Fair Work Ombudsman v Orwill Pty Ltd & Ors [2011] FMCA 730
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298
Kelly v Fitzpatrick [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70; (2008) 168 FCR 383; (2008) 247 ALR 714; (2008) 171 IR 455
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	TAJ PALACE TANDOORI INDIAN RESTAURANT PTY LTD
Second Respondent:	NATHI SINGH RAWAT
File Number:	MLG 1749 of 2010
Judgment of:	Riethmuller FM
Hearing date:	15 December 2011
Date of Last Submission:	15 December 2011
Delivered at:	Melbourne
Delivered on:	30 March 2012

REPRESENTATION

Counsel for the Applicant:	Mr Kirkwood of Counsel
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Galbally QC
Solicitors for the Respondents:	Madgwicks

ORDERS

THE COURT DECLARES THAT:

(1) The First Respondent breached:

(a) Clauses 25.3.1, 25.4, 25.3.2, 25.3.3, 26.3.2, 26.3.2, 26.1.1, 26.1.2, 31.2.1, 31.6.1(a), 22.2.1 and 27.2 of the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998;*

(b) Subsections 182(1) and 235(2) of the *Workplace Relations Act 1996* (Cth);

(c) Regulation 19.9(1), 19.11(1), 19.11(4), 19.12(1) and 19.20 of the *Workplace Relations Regulations 2006* (Cth); and

(d) Section 535(1) of the *Fair Work Act 2009* (Cth) and regulation 3.40 of the *Fair Work Regulations 2009* (Cth).

(2) The Second Respondent was involved in the following breaches by the First Respondent:

(a) Section 182(1) of the *Workplace Relations Act 1996* (Cth);

(b) Clause 25.3.1, 25.4, 25.3.2, 25.3.3, 26.3.1, 26.3.2, 26.1.1, 26.1.2, 31.2.1, 31.6.1(a) and 22.2.1 of the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998*; and

(c) Regulations 19.9(1) and 19.20 of the *Workplace Relations Regulations 2006* (Cth).

THE COURT ORDERS THAT:

(3) Pursuant to section 719(1) of the *Workplace Relations Act 1996* (Cth), section 546(1) of the *Fair Work Act 2009* (Cth) and regulation 14.4 of the *Workplace Relations Regulations 2006* (Cth), the First Respondent pay into the Consolidated Revenue Fund of the Commonwealth a penalty of $60,000 for breaching the *Workplace Relations Act 1996* (Cth), the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998*, section 535 of the *Fair Work Act 2009* (Cth),

regulation 3.40 of the *Fair Work Regulations 2009* (Cth) and *Workplace Relations Regulations 2006* (Cth).

(4) Pursuant to section 719(1) of the *Workplace Relations Act 1996* (Cth), regulation 14.4 of the *Workplace Relations Regulations 2006* (Cth) and section 546(1) of the *Fair Work Act 2009* (Cth), the Second Respondent pay into the Consolidated Revenue Fund of the Commonwealth a penalty of $12,000 for breaching the *Workplace Relations Act 1996* (Cth), the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998* and the *Workplace Relations Regulations 2006* (Cth).

(5) Payment of the pecuniary penalties referred in orders 3 and 4 above be made within 45 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1749 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

TAJ PALACE TANDOORI INDIAN RESTAURANT PTY TLD
First Respondent

And

NATHI SINGH RAWAT
Second Respondent

REASONS FOR JUDGMENT

1. The First Respondent is a company that conducts an Indian restaurant business in Footscray ('the business'). From about 15 May 2006 to about 10 July 2009 the company employed the complainant employee ('the employee') as a cook on a subclass 457 visa. As one of the two directors of the company, the Second Respondent was responsible, amongst other things, for setting and adjusting the employee's wage rates and hours. On 16 December 2010 the Applicant filed an application at the Federal Magistrates Court against the Respondents seeking the imposition of penalties for breaches of the *Fair Work Act* and the *Workplace Relations Act.*

2. The First Respondent has admitted, through a Statement of Agreed Facts, to contravening the following provisions in relation to the employee:

a) Subsection 182(1) of *Workplace Relations Act* (failure to pay basic periodic rate of pay);

b) Clause 25.3.1 and 25.4 of the *Liquor and Accommodation Industry – Restaurants – Victoria – Award 1998* ('the Award') (failure to pay overtime, Monday to Friday);

c) Clause 25.3.2 of the Award (Failure to pay overtime, Saturday);

d) Clause 25.3.3 of the Award (Failure to pay overtime, Sunday);

e) Clause 26.3.1 and 26.3.2 of the Award (Failure to pay penalty rates);

f) Clause 26.1.1 of the Award (Failure to pay Saturday penalty rates);

g) Clause 26.1.2 of the Award (Failure to pay Sunday penalty rates);

h) Clauses 31.2.1 and 31.6.1(a) of the Award (Failure to pay public holiday penalty rates and provide a day off on public holidays);

i) Clause 22.2.1 of the Award (Failure to pay split shift allowance);

j) Subsection 235(2) of the *Workplace Relations Act* (Failure to pay out accrued annual leave on termination);

k) Clause 27.2 of the Award (Failure to pay annual leave loading);

l) Regulation 19.9(1) of the *Workplace Regulations* (Contents of records (overtimes hours));

m) Regulation 19.11(1) and 19.11(4) of the *Workplace Regulations* (Contents of records (leave));

n) Section 535 of the *Fair Work Act* and regulation 3.40 of the *Fair Work Regulations* (Records (termination of employment)); and

o) Regulation 19.20 of the *Workplace Regulations* (pay slips).

3. These contraventions resulted in $24,217.90 in unpaid wages for the employee. The Respondents admitted to these contraventions and rectified them on 28 September 2010. The Second Respondent also

admitted to being involved in the company's breaches and therefore is treated as having himself breached each of the provisions.

The Law

The Court's powers

4. With respect to breaches that occurred prior to the repeal of the *Workplace Relations Act* on 1 July 2009, that Act continues to apply to conduct that occurred before it was repealed: cl.11(1) Part 3 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ('Transitional Act').

5. Subsection 719(1) of the *Workplace Relations Act* sets out the Court's power to impose a penalty for a breach of an 'applicable provision':

> ***719 [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.* (emphasis added)

6. Section 717 of the *Workplace Relations Act* defines an 'applicable provision' to include the Australian Fair Pay and Conditions Standard and an award:

> ***717 [Definitions]***
>
> *In this Part:*
>
> ***"applicable provision" , in relation to a person, means:***
>
> *(a) a term of one of these that applies to the person:*
>
> *(i) an ITEA;*
>
> ***(ii) the Australian Fair Pay and Conditions Standard;***
>
> ***(iii) an award;***
>
> *(iv) a collective agreement;*

(v) an order of the Commission (except one made under Division 4 of Part 9); and

(aa) section 346ZG (no- disadvantage test compensation); and

(b) section 607 (meal breaks); and

(c) section 612 (public holidays); and

(d) section 689 (extended entitlement to parental leave); and

(e) subsection 691B(1) (prohibition of unauthorised stand downs).

Note 1: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 506). Undertakings are treated the same way (see section 394). Preserved redundancy provisions are treated as if they were workplace agreements (see for example section 399A). This means that a term of one of these is an applicable provision for the purposes of this Part.

Note 2: Division 4 of Part 9 deals with protected action ballots. Breaches of orders made under that Division are dealt with under section 471.

"eligible court" means:

(a) the Court; or

(b) the Federal Magistrates Court; or

(c) a District, County or Local Court; or

(d) a magistrate's court; or

(e) the Industrial Relations Court of South Australia; or

(f) any other State or Territory court that is prescribed by the regulations.

(emphasis added).

7. Similarly, under s.546(1) of the *Fair Work Act 2009* the Court may impose a pecuniary penalty if the provision breached is a 'civil remedy provision':

546 [Pecuniary penalty orders]

(1) The Federal Court, ***the Federal Magistrates Court*** *or an eligible State or Territory court* ***may****, on application,* ***order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.***

Note: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

…(emphasis added)

8. Each of the contraventions are applicable provisions or civil remedy provisions for the purposes of ss.718(1) of the *Workplace Relations Act* and s.539 of the *Fair Work Act* respectively. I note that ss. 535 of the *Fair Work Act* was contravened by the Respondents and is listed as a civil penalty provision in s.539 of the *Fair Work Act.*

The maximum penalties

9. The maximum penalty that the Court may impose is 60 penalty units for an individual and 300 penalty units for a body corporate: see ss. 546(2) and 539 of the *Fair Work Act.* With respect to breaches that occurred prior to 1 July 2009, s.719(4) of the *Workplace Relations Act* sets the maximum penalty for both an individual and a body corporate at the same amount.

10. This means that the First Respondent, as a body corporate, may be liable for up to $33,000 for each contravention and the Second Respondent, as an individual, may be liable for up to $6,600 for each contravention: see s.12 of the *Fair Work Act*, s.4(1) of the *Workplace Relations Act* and s.4AA of the *Crimes Act 1914* where a 'penalty unit' is defined to be $110.

11. The maximum penalty that the Court may impose for a breach of the *Workplace Relations Regulations* is $1,100 for individuals and $5,500 for a body corporate: see r.14.2 of the *Workplace Relations Regulations 2006* and s.846(2)(g) of the *Workplace Relations Act.*

Determining penalty

The contraventions

12. The First Respondent has admitted to 16 separate contraventions (see paragraph [5.2] of the Applicant's Submissions filed on 16 May 2011):

    a) Subsection 182(1) of the *Workplace Relations Act*;

    b) Clauses 25.3.1 and 25.4 of the Award;

    c) Clause 25.3.2 of the Award;

    d) Clause 25.3.3 of the Award;

    e) Clauses 26.3.1 and 26.3.2 of the Award;

    f) Clause 26.1.1 of the Award;

    g) Clause 26.1.2 of the Award;

    h) Clauses 31.2.1 and 31.6.1(a) of the Award;

    i) Clause 22.2.1 of the Award;

    j) Clause 27.2 of the Award;

    k) Regulation 19.9(1) of the *Workplace Relations Regulations;*

    l) Regulations 19.11(1) and 19.11(4) of the *Workplace Relations Regulations*;

    m) Regulation 19.12(1) of the *Workplace Relations Regulations*;

    n) Regulation 19.20 of the *Workplace Regulations;*

    o) Subsection 235(2) of the *Workplace Relations Act*; and

    p) Subsection 535 of the *Fair Work Act* and regulation 3.40 of the *Fair Work Regulations*.

13. With the exception of ss.234(2) of the *Workplace Relations Act*, s.535 of the *Fair Work Act* and reg.3.40 of the *Fair Work Regulations*, the

Applicant submits that each provision was breached repeatedly by the First Respondent.

14. The Second Respondent has admitted to being involved with twelve separate contraventions:

a) Subsection 182(1) of the *Workplace Relations Act*;

b) Clauses 25.3.1 and 25.4 of the Award;

c) Clause 25.3.2 of the Award;

d) Clause 25.3.3 of the Award;

e) Clauses 26.3.1 and 26.3.2 of the Award;

f) Clause 26.1.1 of the Award;

g) Clause 26.1.2 of the Award;

h) Clauses 31.2.1 and 31.6.1(a) of the Award;

i) Clause 22.2.1 of the Award;

j) Regulation 19.9(1) of the *Workplace Relations Regulations*; and

k) Regulation 19.20 of the *Workplace Relations Regulations*.

15. The Applicant has accepted that some of the contraventions can be treated as one single contravention due to their commonality. Section 719(2) of the *Workplace Relations Act* provides:

> *(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.

(emphasis added)

16. Similarly s.557 of the *Fair Work Act* provides:

557 [Course of conduct]

(1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:

(a) the contraventions are committed by the same person; and

(b) the contraventions arose out of a course of conduct by the person.

The provisions ensure that the Respondents are not penalised more than once for the same conduct.

17. I therefore turn to the grouping of the contraventions as set out in the Applicant's submissions. The Applicant submits that the First's Respondent's contraventions can be categorised into six distinct groups:

a) Failure to pay basic periodic rate of pay (ss.182(1) of the *Workplace Relations Act*);

b) Failure to pay the required overtime rates under the Award (clauses 25.3.1, 25.4, 25.3.2, 25.3.3 of the Award);

c) Failure to pay the required penalty rates under the Award (clauses 26.3.1, 26.3.2, 26.1.1, 26.1.2, 31.2.1, 31.6.1(a) and 22.2.1 of the Award);

d) Failure to pay accrued annual leave and annual leave loading (clause 27.2 of the Award and section 235(2) of the *Workplace Relations Act*);

e) Failure to keep employment records (regulations 19.9(1), 19.11(1), 19.11(4) and 19.12(1) of the *Workplace Relations*

Regulations, section 535 of the *Fair Work Act* and regulation 3.40 of the *Fair Work Regulations*; and

f) Failure to provide pay slips (regulation 19.20 of the *Workplace Regulations*).

18. The Second Respondent's contraventions can be grouped in the same categories except for the failure to pay accrued annual leave and annual leave loading as the Applicant has not alleged that the Second Respondent was involved in these contraventions.

19. On the Applicant's calculations, the maximum penalty that the Court may impose would be as follows:

a) For the First Respondent:

($33,000 × 4) + ($5,500 × 2)

= **$143,000**

b) For the Second Respondent:

($6,600 × 3) + ($1,100 × 2)

= **$22,000**

20. The Respondents have accepted these calculations.

Witnesses

21. Two witnesses were called for cross-examination on limited issues, the investigator Mr Tan and the Second Respondent's daughter, Ms Shashila Rawat. Whilst the significant issues in dispute related to the conduct of the second respondent he was not called to give evidence.

22. Mr Tan, the investigator with the Fair Work Ombudsman, was cross-examined about the nature and extent of any warning that he gave to the second respondent before interviewing him. He presented as forthright witness. Whilst his demeanour displayed a little nervousness, I note that he has only been an investigator since 2008. He openly admitted that he failed to warn the Second Respondent of his right to remain silent when conducting the interview. What the

Second Respondent actually believed about whether he was obliged to participate in a record of interview was not the subject of evidence from the Second Respondent. In this case, the Second Respondent did not seek to have the record of interview excluded as he relies upon some of its contents.

23. Mr Tan was also cross-examined about a conversation that he had with the second respondent's daughter, Ms Rawat, prior to the second respondent attending for the interview. Ms Rawat said that she asked Mr Tan 'Can my Dad have a legal representative or his accountant present at the interview?' and was advised to the effect that it wouldn't be necessary, and that there would be an interpreter present. Mr Tan said that he told Ms Rawat that the Second Respondent could bring a lawyer or accountant along for moral support, but that they would not be able to discuss matters with him or speak on his behalf during the interview.

24. Ms Rawat presented as a pleasant and co-operative witness. She was called to give evidence of the conversation with Mr Tan, and to give evidence as to the financial affairs of the business. Ms Rawat said that she had full knowledge of both respondents' affairs. However, it became clear that she did not have a real understanding of the financial affairs of the Respondents. For example, she had no understanding of the role that the family trust played in the structure, nor did it appear that she had a clear understanding of her father's net asset position, nor how much was owing on his home mortgage.

25. I did not find Ms Rawat's evidence as to the financial affairs of the Respondents of any real assistance, given the lack of knowledge she had of their affairs. I prefer Mr Tan's version of what was actually said in the conversation. However, it appears that what Mr Tan said to her could easily have been misunderstood. The references to 'moral support' and not being able to speak on the Second Respondent's behalf give the clear impression that there is no role for a lawyer in the process. It is clear that a person is entitled to have a lawyer present, and to take advice at any point. In this context I accept that Ms Rawat's version of the discussion is what she understood was the substance of Mr Tan's statement.

Relevant factors

26. In *Kelly v Fitzpatrick* [2007] FCA 1080 at [14] Tracey J of the Federal Court adopted the non-exhaustive list of relevant considerations that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7:

> *[14] 14 In* Mason v Harrington Corporation Pty Ltd *[2007] FMCA 7 Mowbray FM identified "a non-exhaustive range of considerations to which regard may be had in determining whether particular conduct calls for the imposition of a penalty, and if it does the amount of the penalty". Those considerations were derived from a number of decisions of this Court. I gratefully adopt, as potentially relevant and applicable, the various considerations identified by him. They were:*
>
> • *The nature and extent of the conduct which led to the breaches.*
>
> • *The circumstances in which that conduct took place.*
>
> • *The nature and extent of any loss or damage sustained as a result of the breaches.*
>
> • *Whether there had been similar previous conduct by the respondent.*
>
> • *Whether the breaches were properly distinct or arose out of the one course of conduct.*
>
> • *The size of the business enterprise involved.*
>
> • *Whether or not the breaches were deliberate.*
>
> • *Whether senior management was involved in the breaches.*
>
> • *Whether the party committing the breach had exhibited contrition.*
>
> • *Whether the party committing the breach had taken corrective action.*
>
> • *Whether the party committing the breach had cooperated with the enforcement authorities.*
>
> • *The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*

• *The need for specific and general deterrence.*

27. The list provides a useful template but does not limit the relevant considerations.

Nature and extent of the conduct

28. The lawyers for the Respondents have presented the matter as one in which the Respondents had simply and mistakenly believed that they had complied with their obligations by applying the minimum annual salary conditions set out in the visa. On the Respondents' version, this was not a situation in which they ignored their obligations or failed to turn their mind to the obligations owed to the employee. However, I note that the Second Respondent did not give evidence. Evidence of the minimum annual salary conditions as allegedly set out in the visa was also not before the Court. In her affidavit, the Respondents' solicitor stated that the employee's migration lawyer was subpoenaed but the migration lawyer was not able to locate the employee's file for the Taj Palace Tandoori Indian Restaurant. Nor did a freedom of information request to the Department of Immigration produce many documents relevant to the proceeding. However, the Department did release the employment agreement dated 23 January 2006.

29. The Department's notification of its approval of the employee's visa application (see Ms Clancy's affidavit of 14 December 2011, annexure FEC-1) provided (at page 2):

> *EMPLOYER/SPONSOR'S UNDERTAKINGS:*
>
> ***The sponsor/employer has signed undertakings that include that they will comply with Australian Industrial Relations law and provide at least Australian levels of payment for the work that the primary visa holder does in Australia****.*
>
> *The sponsor/employer has also undertaken to meet the health and medical costs for the sponsored/nominated visa holders while the primary visa holder works for them, or has undertaken to ensure that all sponsored/nominated visa holders have acceptable medical insurance arrangements.*
>
> ***The sponsor's undertakings are specified on the sponsorship form.*** *For further details on the sponsor's undertakings go to*

http://www.immi.gov.au and select "Sponsoring Someone to Australia as a Business Person". (emphasis added)

30. I note that the annexure FEC-1 was an email from the Department to Mr Clark, the migration lawyer and that there was no evidence before the Court as to whether the Second Respondent saw the document or whether he was informed of its contents. However, the undertakings were apparently specified on the sponsorship form, which would put the Respondents on notice of their legal obligations.

31. The employment agreement (see Ms Clancy's affidavit of 14 December 2011, annexure FEC-11) was on a letterhead from the Taj Palace Tandoori Indian Restaurant and at paragraph [11] provides:

> *11. Salary and Working Hours****…There will not be any extra salary entitlements for working on the weekends or public holidays****.…*(emphasis added)

32. The agreement on its face demonstrates a disregard for their legal obligations owed to the employee under Australia's industrial laws. However, I do note that paragraph [11] goes on to provide for at least some limited form of overtime remuneration:

> *…Should the employee be required to work more than 160 hours in any four week period, then* ***he will be paid at a rate of one and a half times the normal salary level mentioned above for the extra hours.***
>
> *…(emphasis added)*

Counsel for the Applicant pointed out that while the agreement cannot bear on the Respondents' obligations under the relevant award, it did refer to an obligation to pay a penalty rate for extra hours. In light of the Respondents' own contractual documents, I find it difficult to accept that the Respondents did not know of the obligation to pay penalty rates. In any event, the First Respondent did not make payments even in accordance with paragraph [11] of the employment agreement.

33. Whilst the agreement appears to be signed by the Second Respondent's son, rather than the Second Respondent himself, I accept that it was nevertheless signed on behalf of the First Respondent and with the Second Respondent's imprimatur.

34. From when the employment ceased (around 10 July 2009) to when the underpayment was fully rectified (29 September 2010), the Respondents received the benefit of the underpayment amount for just over a year. On the Applicant's version, the First Respondent also failed to pay the correct tax and superannuation for the employee, having only paid the tax to the ATO on 10 February 2010 and the superannuation contribution on 18 February 2010. The Respondent's disregard for these obligations is evidenced by paragraphs [14] to [15] of the employment agreement:

> *14.* ***The employer will pay that part of superannuation contributions he is required to make by law.*** *The employee may have deducted from his salary that part superannuation contributions he may wish to make. Superannuation funds will be deposited with a superannuation fund or other body as required by law.*
>
> *15.* ***The employer is required by law in Australia to deduct Pay As You Earn Tax payments from the employee's salary and to forward these to the Australian Tax Office.*** *The salary will be paid by cheque each week and no part will be paid "as cash" so as to avoid income tax.* (emphasis added)

35. The Applicant submitted that the employee only kept records of his hours from 22 September 2008 onwards, which meant his underpayment could be only be calculated from this date even though he commenced work around 15 May 2006. The Respondents' failure to keep records does show a disregard for their legal obligations. This is particularly the case in light of paragraph [11] of the employment agreement:

> *11*. …
>
> ***The record keeping of the precise hours of work will be done by the employer*** *who will provide a system of signing in and out time to keep track. At all times during the normal work day, these records will be available for the employee to look at and to make comments about.* (emphasis added)

36. It is argued that the difficulty in pursuing the claims against the Respondents was aggravated by the Respondents' failure to keep records. This failure was said to have prejudiced the Applicant's ability to potentially recover the full amount owing to the employee. The

Respondents argue that the Court should only address conduct specific to the time periods the breaches are said to have occurred in the Statement of Agreed Facts and not to any other alleged conduct

37. As set out in the Statement of Agreed Facts the Second Respondent was responsible for setting and adjusting the employee's wage rates and hours, for the making and keeping of records concerning the employee's hours and the issuing of pay slips. I accept that it is not appropriate to assume further underpayments, beyond those proved, however the lack of appropriate record keeping cannot be seen as a limited failure, but rather, the standard operating arrangements of the Respondents.

38. In light of this evidence, it is difficult to accept the Respondents' submissions that they had not disregarded their obligations. On the material as a whole I accept that the conduct of the Respondents was not simply borne of confusion as to their obligations.

Circumstances in which that conduct took place

39. At the relevant times the First Respondent carried on the business of Taj Palace Tandoori Indian Restaurant. The employee was engaged as a cook on a subclass 457 visa and his period of employment lasted for 3 years and 2 months.

40. It is put that the Second Respondent does not speak English, nor has he attended English language classes. He is said to rely heavily upon his children as interpreters. However, a feature of Australian society that is particularly attractive to immigrants from around the world is the industrial law system that attempts to ensure fair wages and working conditions for employees. The employee in this case was more vulnerable that the average Australian worker as his visa was conditional upon his employment, and he came from a country where wages and working conditions are very poor.

41. In the context of this case it appears that this was simply an exploitation of a foreign worker.

Nature and extent of loss or damage

42. I note that the Respondents have made full restitution of the underpayments to the employee. However, I also have regard to the fact that the employee affected was a 37 year old Indian national engaged on a subclass 457 visa and spoke limited English (see paragraph [9] of the Statement of Agreed Facts). Given these facts, I accept that the employee was a vulnerable person and it was likely that his ability to understand and exercise his rights would have been hampered. The loss suffered by this employee is exacerbated by the Applicant's submission that he received a weekly wage of $752 regardless of the number of hours he worked and that he worked up to 71 hours per week. I accept that the underpayment in the amount of $24,217.90 for a ten month period was gross, particularly for a vulnerable employee who was reliant on the minimum wage.

43. There have been 16 contraventions by the First Respondent with the Second Respondent being involved in 12 of the contraventions, which are significant.

44. The Applicant submitted that the Respondents' failure to keep records have affected the loss or damage suffered by the employee as the Applicant has been prevented from determining the full extent of the underpayments. However, there is no evidence (in admissible form) of greater loss to the employee. For the purpose of assessing a penalty I do not have regard to what is really speculation as to possible past losses.

Similar previous conduct

45. The Applicant does not allege any previous findings of breaches by the Respondents. The Respondents submit that they have never breached any Commonwealth workplace laws, nor been under investigation for any alleged breaches prior to this matter. I therefore approach the case on the basis that this is the first offending behaviour of the Respondents.

Whether the breaches arose out of the one course of conduct

46. It is conceded that the breaches arose out of the one course of conduct. However, the course of conduct in this case involved multiple breaches

of penalty provisions, annual leave and similar provisions which are "notorious" in the Australian workplace culture (see *Fair Work Ombudsman v Bosen Pty Ltd & Anors* at 33 (unreported, Magistrates Court of Victoria, Industrial Division, 21 April 2011, Magistrate Hawkins).

The size of the business enterprise involved

47. The First Respondent is a small, family-run business operating in Footscray. I take into account Driver FM's observation in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 stated at paragraph [27]:

> *[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****. Such a factor should be of limited relevance to the Court's consideration of penalty…*

48. The Respondents argue that *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 does not apply in this case as the Respondents were not under the impression that because of their size, they were able to breach the provisions. The Respondents submit that the breaches arose out of their mistaken belief that compliance with the visa conditions was sufficient to meet their obligations, which I have rejected. I note that Driver FM in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 went on to quote *Kelly v Fitzpatrick* [2007] FCA 1080:

> *[27]* …***As stated recently, by Tracey J in*** **Kelly v Fitzpatrick** [2007] *FCA 1080, at [28]:*
>
> > ***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.*
>
> (emphasis added)

49. The emphasis here is that the obligation to meet minimum employment standards is imposed upon all businesses, large and small. However, the resources available to larger business to establish systems to ensure compliance with workplace laws must be recognized, as must the practical reality that there are numerous regulatory obligations upon businesses that must be juggled by small business operators around their primary day-to-day work in running the business.

Whether or not the breaches were deliberate

50. It is not clear that the breaches were deliberate. The Respondents point to the transcript of the Second Respondent's interview with the Fair Work Inspector to demonstrate his misunderstanding of the visa conditions and of his legal obligations. For example, the Respondents point to the Second Respondent's statement that despite times when the employee only came into work for 10 or 20 hours in a week, he was still paid his full weekly wage as obligated to do so under the visa conditions (see Daniel Tan's affidavit filed on 16 May 2011, annexure DT-5 at question 10). Notably, there are no records to demonstrate this proposition. The limited records that were produced contained no entry showing that the employee ever worked in excess of 38 hours in a week, although did contain numerous entries showing less than 38 hours from July 2008 to July 2009. The records that the Respondents did keep are inconsistent with the Second Respondent's rationale for allowing the employee to work greater hours at times for the same weekly rate on the basis that he worked less hours at other times.

Involvement of senior management

51. The Second Respondent has admitted to his involvement in 12 contraventions. In this case the Second Respondent was not only responsible for the day to day management, direction and control of the First Respondent's operation but he was also responsible for setting and adjusting the employee's rates and hours and for the making and keeping of records (see paragraph [7] of the Statement of Agreed Facts).

52. However, this case involves a small family-run restaurant, and as such there is no 'senior management' in the sense that the term refers to much larger companies.

Whether the Respondents had exhibited contrition

53. The Respondents have ensured that the underpayments claimed have been met, as set out above. The Second Respondent was not frank in the record of interview, however nor did he have the benefit of legal advice before that record of interview. The Respondents did ultimately admit the breaches. The payments and admissions should be reflected in the penalty, however in this case I do not accept that this reflects remorse or contrition on behalf of the Respondents.

Whether the Respondents have taken corrective action

54. There is no evidence before the Court that the First Respondent has implemented any systems in the business to ensure that it is now complying with its obligations to any employees. I note, however, the Respondents' submission that they have sought legal advice as to their ongoing obligations under the Commonwealth workplace law.

Whether the Respondents cooperated with the enforcement authorities

55. The Respondents dispute the Applicant's submission that the Respondents were initially uncooperative. During the interview on 28 January 2010 the Second Respondent, on the Applicant's version, sought to mislead them by indicating that the employee was only required to work 38 hours per week and was provided with payslips (see paragraphs [10]-[15] of Inspector Daniel Tan's affidavit filed on 16 May 2011). The Respondents later admitted that the employee was only provided with a payslip once and was required to work up to 60 hours per week on many occasions (see paragraph [5.42] of the Applicant's submissions).

56. During the cross-examination of the Fair Work Inspector Mr Tan, Counsel for the Respondents pointed to the various procedural failings of the interview. This included the Inspector's failure to inform the Second Respondent of his right to remain silent and the right to have legal advice. It was submitted that when the Second Respondent's son, being the support person, left the interview the interview recommenced without the son being present (see paragraph [6.3] of the Respondents' submissions). However, it is apparent from the transcript that the son was only absent for three out of over 170 questions, being questions 73 to 75. In the circumstances, I do not accept that the submission of the

Respondents' lack of cooperation was "unfairly made" (see paragraph [6.2] of the Respondents' submission). While I accept that the Second Respondent's legal rights were not fully explained and that his first language is not English, I note that he was assisted by an interpreter and the Fair Work Inspector explained to him the following (at page 2 of the transcript):

> *Q6. I will be asking you questions in relation to the alleged contraventions of the Acts and Liquor and Accommodation Restaurants Award. Before I do so* ***I must warn you that anything you do or say will be recorded and may be used as evidence in a court of law****.* (emphasis added)

57. Whilst it was unfair that the Second Respondent was not clearly told of his right to legal advice, that does not seem to me to be an explanation or excuse for him lying to Mr Tan. Honesty is a fundamental value, the absence of which is not explained by a lack of legal advice. Whilst I have viewed the interview critically due to the lack of warning about the right to legal advice, it nonetheless demonstrates a lack of honesty from which it is appropriate to draw an adverse inference against the Second Respondent that he was initially uncooperative. Had the Second Respondent been completely honest and frank there is little doubt that the submission would have been that he co-operated and shown remorse in making frank admissions even without legal advice as to the benefits of doing so.

58. The Applicant also submitted that there was a second incident in which the Respondents were not cooperative. In his affidavit filed on 16 May 2011, the Inspector annexed a file note of his telephone conversation with the daughter (see annexure DT-6):

> ***Ms Singh Rawat advised that all his [the employee's] allegations are false.*** *She said "he said we didn't give him pay slips but when he asked for one when he was applying to rent a house, we gave him a pay slip then". I advised that this was not a contravention I had identified in the letter I had sent as I did not have evidence that pay slips were not provided. I advised that Mr Singh had not hidden the fact that he received one pay slip from the company for the purposes of renting a property. I advised that she had just however advised me that this was the only time a pay slip was provided. She said "no, this is not the case. He was given pay slips other times too". I advised that this is not what she had just*

> *stated. Ms Singh Rawat mumbled "oh shit". She advised that they were in the process of engaging a lawyer as they are disputing this payment…*(emphasis added)

I am not satisfied that this conduct of Ms Rawat ought to be attributed as conduct of the Second Respondent. However, I do accept the inference that can be drawn from this file note is that the First Respondent, through the daughter as its agent, had accused the employee of making false allegations.

59. The Applicant has acknowledged that the Respondents have cooperated since the underpayment was rectified and noted that the payment was made before proceedings were filed on 16 December 2010. By 14 February 2011 Consent Orders were made with a notation that the Respondents admitted to the contraventions. The Applicant has acknowledged that this has considerably shortened the litigation process, allowing the matter to proceed to a penalty hearing only.

60. In *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383; (2008) 247 ALR 714; (2008) 171 IR 455 Stone and Buchanan JJ stated:

> *76 As Branson J has pointed out (see Alfred v Walter Construction Group Limited [2005] FCA 497) the rationale for providing a discount for an 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 be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice****.* (emphasis added)

61. In the circumstances, the Applicant submitted that while the Respondents are entitled to a discount, they are not entitled to the maximum discount of 25% to 50% given that they were not cooperative from the start of the investigation and have not indicated an expression of regret. The Applicant has submitted that their

recommendation of a penalty being 50% to 60% of the maximum has already factored in a partial discount for the Respondents.

62. I accept that there has been only a partial willingness to facilitate the course of justice.

Ensuring compliance with minimum standards

63. The need to ensure compliance with minimum standards by providing an effective means for investigation and enforcement of employee entitlements is set out in the objects of both the *Workplace Relations Act* and the *Fair Work Act.* The objects of the *Workplace Relations Act* are set out in section 3:

> ***3 [Objects]***
>
> *The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:*
>
> …
>
> *(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:*
>
> *(i) employee entitlements; and*
>
> *(ii) the rights and obligations of employers and employees, and their organisations; and*

64. Similarly, the objects of the *Fair Work Act* include:

> ***3 [Object of this Act]***
>
> *The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> …
>
> *(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and*

…

65. I also have regard to one of the objects of the *Workplace Relations Regulations 2006*:

> ***Part 19 Records relating to employees and pay slips***
>
> ***Division 1 Preliminary***
>
> ***19.1 [Purpose of Part 19]***
>
> *(1) For sections 836 and 846 of the Act, these Regulations provide for:*
>
> > *(a) the making and retention by employers of records relating to the employment of employees; and*
> >
> > *(b) the inspection of records by workplace inspectors; and*
> >
> > ***(c) the issue of pay slips to employees by employers.***
>
> *(2) This Part also provides for transitional matters arising out of the reform commencement.* (emphasis added)

66. The need to ensure compliance, particularly with respect to vulnerable workers, such as those on work visas, those who come to Australia without strong language skills, and those with little education is crucial to a just society, and the avoidance of exploitation.

67. Whilst the record keeping obligation with respect to pay slips only appears in the Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated.

The need for specific and general deterrence

68. I accept that there is a need for general deterrence and to send a message to the community, and in particular to small employers, that employers must take steps to ensure correct employee entitlements are

paid. As Tracey J stated in *Kelly v Fitzpatrick* [2007] FCA 1080 (at paragraph [28)]:

> *[28] The respondents have expressed contrition and have put in place mechanisms which are designed to ensure that there will be no repetition of the breaches which have led to the present proceeding. Specific deterrence does not, therefore, loom large as a consideration in determining penalty. It does not follow that the need for general deterrence may be disregarded. As Finkelstein J said in* CPSU v Telstra Corporation Limited *(2001) 108 IR 228 at 231: "**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 to act as a warning to others not to engage in similar conduct ..." 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":** see* Australian Competition and *Consumer Commission v ABB Transmission and Distribution Ltd [2001] ATPR 41-815 at [13]*. (emphasis added)

69. I accept that general deterrence is important in this case. The contraventions involved a foreign worker engaged on a subclass 457 visa. It is important that employers of such workers take real care to comply with workplace laws. With this respect I have regard to Lucev FM's statements in *Fair Work Ombudsman v Orwill Pty Ltd &* Ors [2011] FMCA 730:

> *[32] …As for general deterrence, it is appropriate in circumstances where there has been a failure to provide records over a prolonged period, and, on the evidence, that has occurred in relation to foreign workers who have entered Australia on a sponsored business visa scheme, for there to be a significant element of general deterrence. The Court ought leave no room for doubt as to its view that foreign workers who enter Australia on business sponsored visas ought to have their employment records maintained as required by Commonwealth workplace relations legislation.*

70. I also accept that the need for specific deterrence is also high given that the contraventions involved a vulnerable employee on a subclass 457

visa with limited English. I have regard to the Applicant's submission that the First Respondent is still trading and that in the future it is possible that the company may engage staff to work in the business.

Additional considerations

71. Tracey J also sets out in *Kelly v Fitzpatrick* [2007] FCA 1080 the approach in ensuring the aggregate penalty is not oppressive (see paragraph [30]):

> *[30]* ***Another factor which must be taken into account in the fixing of pecuniary penalties for multiple breaches of statutory stipulations is the totality principle. This principle is designed to ensure that the aggregate of the penalties imposed is not such as to be oppressive or crushing.*** *Different views have been expressed as to the manner in which the principle ought properly to be applied. On one view the starting point should be the determination of an appropriate total penalty. That figure would then be divided by the number of breaches to produce a penalty for each breach: see* CPSU v Telstra Corporation Limited *(2001) 108 IR 228 at 230[7].* ***The orthodox position, however, which I consider should be adopted, is that the starting point is the determination of appropriate penalties for each contravention of the statutory norm. The aggregate figure is then considered with a view to ensuring that it is an appropriate response to the conduct which led to the breaches****: see* Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36 at 53. See also* Ponzio v B & P Caelli Constructions Pty Ltd [*2007] FCAFC 65 at [145] per Jessup J…*

(emphasis added)

72. The Applicant submit that the penalty should be "at the high end of the mid range", being 50% to 60% of the maximum penalty that can be imposed. In their submissions, this translated into the following ranges:

a) The First Respondent: $71,500 to $85,000;

b) Second Respondent: $11,000 to $13,000.

73. On the Respondent's version, the First Respondent's penalty would be 17.5% to 24.5%, being $25,000 to $35,000 and for the Second Respondent a range of 27.3% to 43.2%, which is $6,000 to $9,500.

74. A further unusual issue that arises in this case is that the family operating the business has a disabled child. There can be no issue with the fact that a child with disabilities often brings significant financial and emotional pressures for many families.

75. The Respondents have made submissions about the company's financial hardship and the expense associated with a medical condition suffered by one of the Second Respondent's other daughters. These submissions are to support the proposition that the penalty recommended by the Applicant would impose significant hardship on the Respondents. It was apparent from the daughter's cross-examination that, despite claiming to have full knowledge of the Respondents' affairs, she had little knowledge of the business She was not able to explain about the business' balance sheets, for example why the assets and liabilities balanced to the dollar in every year. Nor did she explain how the company funded an approximately $62,000 loss in a particular year. No substantive evidence was given as to the financial position or operation of the family trust. The real financial position of the Respondents and the family remains unclear.

76. I note that the Second Respondent is one of the directors of the company and is responsible for the day-to-day management, direction and control of the company's operations (see paragraph [7] of the Statement of Agreed Facts). In spite of his position, the Second Respondent was not called to give evidence on the company's financial affairs at the hearing. Counsel for the Applicant submitted that the Second Respondent's unexplained failure to give evidence should lead to a *Jones v Dunkel* inference that his evidence would not have assisted the Respondents' case. Following a review of the authorities, Gilmour J stated in *Australian Securities & Investments Commission v Fortescue Metals Group Ltd [No 5]* [2009] FCA 1586; (2009) 264 ALR 201; (2009) 76 ACSR 506:

> *[96]* ***Further, in my view, nothing that has been said by the High Court in*** **Dyers** ***[2002] HCA 45; 210 CLR 285 and the other authorities discussed above supports the proposition that the general rule proscribing the making of inferences from a defendant's failure to give evidence in criminal proceedings should be extended to civil penalty proceedings in the form of a prohibition against applying the rule in*** **Jones v Dunkel,** *notwithstanding that pursuant to Rich s 1317L also obliges the*

court to apply the body of law which has developed in relation to the privileges against penalties and forfeitures when deciding whether an order for discovery should be made.

[97] Further authority for the availability of the rule in Jones v Dunkel in civil penalty proceedings is found in Australian Competition and Consumer Commission v Universal Music Australia Pty Ltd *(2001) 115 FCR 442, where Hill J stated at [33]:*

> *Where the proceedings are criminal (and the present proceedings are not; they are proceedings, inter alia, for the recovery of a civil penalty) it might be thought that the failure of the accused to go into evidence should not lead to the drawing of* Jones v Dunkel *inferences. After all it is clear that a witness can not be compelled to give evidence which is likely to incriminate the witness or expose the witness to a penalty. However, even in criminal cases it has been held that the failure of the accused, who is in a position to deny, explain or answer the evidence adduced by the prosecution, to give evidence will permit the jury to draw inferences adverse to the accused more readily: see* Azzopardi v R *[2001] HCA 25; (2001) 179 ALR 349, affirming* Weissensteiner v R *[1993] HCA 65; (1993) 178 CLR 217. A fortiori, therefore,* ***the failure of a respondent to proceedings for recovery of a pecuniary penalty to give evidence on a matter relevant to an issue in the proceeding and deny, explain or answer the evidence adduced against the respondent will permit the Court more readily to draw the inferences to which the decision in*** **Jones v Dunkel** ***refers***.

(emphasis added)

Counsel for the Applicant pointed out that while the matter went on appeal, Gilmour J's discussion of the *Jones v Dunkel* inference was not an issue on appeal (see *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* [2011] FCAFC 19; (2011) 190 FCR 364; (2011) 274 ALR 731; (2011) 81 ACSR 563 at paragraphs [79] to [81]) and therefore his Honour's statements stand.

77. I also have regard to Cameron FM's words in *Fair Work Ombudsman v Centennial Financial Services Pty Ltd* [2010] FMCA 863; (2010) 245 FLR 242:

> *[133] The rule in* Jones v Dunkel *is also relevant to that conclusion. As Mr Mertes observed,* **Jones v Dunkel *inferences are available against parties in civil remedy proceedings***. *It was said in* CEPU v ACCC *at 490 [76] that there is no reason to deny the applicability of the principles in* Jones v Dunkel *in civil proceedings for pecuniary penalties provided that in doing so the Court proceeds in accordance with the principles applicable to s.140 of the* Evidence Act 1995*. Further, Giles JA said* in Adler v Australian Securities & Investments Commission *(2003) 179 FLR 1:*
>
> > *... civil penalty proceedings are expressly to be maintained by civil law processes, not by criminal trial with its fundamental features. (at 147 [659])*
>
> (emphasis added)

78. In this case it is not alleged that the Respondents have significant wealth. In light of the authorities, I proceed on the basis that the financial position of the Respondents, and the Second Respondent's family, has not been made clear, and do not take into account that the family may be suffering financial hardship.

Penalty

79. In light of the circumstances I find that the appropriate penalties to be:

    a) The First Respondent: $60,000; and

    b) The Second Respondent: $12,000.

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

Date: 28 March 2012