

FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TRUE BLUE (SA) PTY LTD & FILOMENO RILLOTTA [2012] FMCA 535

INDUSTRIAL LAW – Application for declarations and penalties – agreed statement of facts and penalties – factors to consider

Workplace Relations Act 1996 (Cth) sub-paragraph 719(6)
Fair Work Act 2009 (Cth) sub-paragraph 545(2)

Hills v Sutton (2007) FCA 2033

Applicant: FAIR WORK OMBUDSMAN

First Respondent: TRUE BLUE (SA) PTY LTD

Second Respondent: FILOMENO RILLOTTA

File Number: ADG 138 of 2011

Judgment of: Simpson FM

Hearing date: 17 February, 15 March, 7 May 2012

Date of Last Submission: 7 May 2012

Delivered at: Adelaide

Delivered on: 21 June 2012

REPRESENTATION

Counsel for the Applicant: Mr Follett

Solicitors for the Applicant: Fair Work Ombudsman

Counsel for the Respondent: Mr Wells QC

Solicitors for the Respondent: Starke Lawyers

BY CONSENT THE COURT DECLARES THAT

(1) The First Respondent Contravened:

- (a) Subsection 182(1) of the *Workplace Relations Act 1996* (Cth) (the WR Act) by failing to pay at various times and to various employees, the basic periodic rate of pay required by the Australian Pay and Classification Scale (APCS) derived from the *Delicatessens, Canteens, Unlicensed Cafes and Restaurants etc. Award* (the Award);
- (b) Subsection 185(2) of the WR Act by failing to pay at various times and to various employees, the minimum casual loading required by the APCS derived from the Award;
- (c) Section 45 of the *Fair Work Act 2009* (Cth) (the FW Act) by failing to pay at various times and to various employees, the minimum rate of pay required by the *Restaurants Award 2010* (the Modern Award);
- (d) Section 45 of the FW Act by failing to pay at various times and to various employees, the minimum casual loading required by the Modern Award;
- (e) Sub-regulation 19.8(1)(b) of the *Workplace Relations Regulations 2006* (Cth) (the WR Regulations), by failing to make records containing the full name of each employee;
- (f) Sub-regulation 19.8(1)(e) of the WR Regulations by failing to make records containing the date on which each employee commenced employment;
- (g) Subsection 535(1) of the FW Act, by failing to make records of the kind prescribed by the *Fair Work Regulations 2009* (Cth); and
- (h) Subsection 712(3) of the FW Act, by failing to comply with a Notice to Produce.

(2) The Second Respondent was involved in each of the First Respondent's contraventions listed in subparagraphs (a) – (g) of paragraph 1 above,

within the meaning of section 728 of the WR Act and section 550 of the FW Act, and as such himself contravened;

- (a) Subsection 182(1) of the WR Act;
- (b) Subsection 185(2) of the WR Act;
- (c) Section 45 of the FW Act;
- (d) Sub-regulation 19.8(1)(b) of the WR Regulations;
- (e) Sub-regulation 19.8(1)(e) of the WR Regulations; and
- (f) Subsection 535(1) of the FW Act.

THE COURT ORDERS THAT:

- (3) The First Respondent pay on or before 30 June 2012 the amount owing to each of the following persons being employees or former employees of the First Respondent:

Employee	Total owed to employee
Melanie Williams	\$ 177.13
Daniel Gibbons	47.68
Daphne Athinodoru	98.11
Jessie Duval	198.50
Natasha Jacquier	301.88
Joe Dells	151.46
Danny Knobtauch	542.62
Alice Shnied	36.30
Mary Monony	343.09
Rochelle Babb	2,502.98
Grace Gligora	438.90

Emma Ludwig	2,871.33
Any Quatch	2,703.22
Thomas Radomanski	4,267.00
Stephen Fuss	7,287.53
Kimberley Aarts	104.78
Belinda Babb	3,617.57
Kristen Bell	554.04
Melissa Chapple	96.72
Harmony Crilly	2,876.56
Elisa D'netto	18.14
Cain Dalwood	1,265.21
Teresa Gibson	2,585.38
Tadayasu Handa	3,647.15
Frank Igllo	88.66
Hannah Melville	603.27
Chantelle Piller	112.84
Ian Rowe	1,078.03
Shiloh Rudolph	76.57
Robyn Sherwood	896.83
Jagdeep Singh	602.49
Belinda Spinella	3,741.47
Bogdan Unguranu	16.75
Sarah Wilson	495.30

Leigh Bell	4,492.08
Anita Parini	953.16
Nicole Osborn	153.58
Shayla Harrowfield	<u>192.73</u>
Total	<u>\$50,843.00</u>

- (4) In accordance with s.722(1) of the WR Act and s.546(1) of the FW Act, the First Respondent pay interest to each of the persons referred to in Order 3 hereof on the amount owed to each such person, on or before 30 June 2012.
- (5) An aggregate penalty of \$51,975 be imposed on the First Respondent by reason of its contraventions listed in declaration 1 hereof.
- (6) An aggregate penalty of \$4,125 be imposed on the Second Respondent by reason of his contraventions listed in declaration 2 hereof.
- (7) The penalties imposed on the Respondents in paragraphs 5 and 6 above be paid within 28 days into the Consolidated Revenue Fund of the Commonwealth.
- (8) There be no order as to costs.
- (9) There be liberty to the parties to apply within the next 14 days in relation to any consequential matters.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT ADELAIDE**

ADG 138 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

TRUE BLUE (SA) PTY LTD
First Respondent

And

FILOMENO RILLOTTA
Second Respondent

REASONS FOR JUDGMENT

1. In this matter, after protracted litigation, the parties have reached agreement about the declarations and orders that should be made. This includes:
 - declarations in relation to the contraventions that apply to each of the respondents;
 - the amounts that should be paid to each of the affected employees as a result of the first respondent's underpayment;
 - interest on the under payments; and
 - the aggregate penalties that should be imposed on each of the respondents.
2. The factual background is contained in an Agreed Statement of Facts and Matters to be found later in these reasons.

3. The applicant asks that the court make, with the consent of the respondents, certain declarations. The declarations relate to contraventions that occurred during the period 17 January 2007 to 31 December 2009. The contraventions relate to provisions of the *Workplace Relations Act 1996* (Cth) (“the WR Act”) and Regulations, the *Fair Work Act 2009* (Cth) (“the FW Act”) and Regulations and certain awards as specified in the declarations sought. I see no reason why I should not make the declarations sought by the parties. There will be orders accordingly.
4. Next, I am asked to make orders that the first respondent pay certain sums of money, being underpayments of wages, to specified employees (or, perhaps more accurately, former employees) of the first respondent. I have power to make such orders by reason of sub-paragraph 719(6) of the WR Act and sub-paragraph 545(2) of the FW Act. Those sub-paragraphs state:

719 Imposition and recovery of penalties

...

(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 AWA), the court may order the employer to pay to the employee the amount of the underpayment.

545 Orders that can be made by particular courts

...

(2) Without limiting subsection (1), orders the Federal Court or Federal Magistrates Court may make include the following:

(a) ...;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c)

5. Again, I see no reason why I should not make the orders sought by the parties for the reimbursement of employees’ wages.

6. The order sought is in the following terms:

“The first respondent pay the amount owing to each person listed in Attachment A of the Further Amended Statement of Claim dated 21 December 2011, being the amounts specified in the column titled “Total owed to each employee, on or before 1 June 2012.”

7. It is undesirable to express a final order by reference to an annexure to a pleading on the court file. I propose to make an order that extracts the information from the document on the court file and to include that information in the actual order. In addition it is necessary to amend the date that the first respondent has to pay the amounts to the relevant employees. There will be orders accordingly.

8. Next, the parties seek an order for the payment of interest on the underpayment amounts. The order sought is in the following terms:

“The first respondent pay interest to each employee on the amount owed to each of them in accordance with section 722(1) of the WR Act and 546(1) of the FW Act, on or before 1 June 2012.”

9. Those subparagraphs provide as follows:

722 Interest up to judgment

(1) In exercising its powers under subsection 719(5) or (6) or in a proceeding under section 720 or 721, the eligible court must, upon application, unless good cause is shown to the contrary, either:

(a) order that there be included in the sum for which an order is made or judgment given, interest at such rate as the Court or court of competent jurisdiction, as the case may be, thinks fit on the whole or any part of the money for the whole or any part of the period between the date when the cause of action arose and the date on which the order is made or judgment entered; or

(b) without proceeding to calculate interest in accordance with paragraph (a), order that there be included in the sum for which an order is made or judgment given, a lump sum instead of any such interest.

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.

10. The parties do not state in their proposed consent orders the interest rate that should apply nor for what period it should apply. In the circumstances I propose to make the order sought and to give the parties liberty to apply in the event that they can not reach some agreement on these outstanding matters.

11. Next, I am asked to make orders for aggregate penalties against each of the respondents. The orders as sought are in the following terms:

- *An aggregate penalty of \$51,975 be imposed on the first respondent by reason of its contraventions listed in declaration 1 above; and*
- *An aggregate penalty of \$4,125 be imposed on the second respondent by reason of his contraventions listed in declaration 2 above.*

12. The court's approach to orders by consent in relation to penalties is different from the court's approach to the other consent declarations and orders sought. In relation to agreement as to penalty the court should only make the orders requested if it is satisfied that the penalties are inside the appropriate range. This approach is supported by recent authority. In *Hills v Sutton* (2007) FCA 2033, a case also concerning an agreed penalty for a breach by an employer of the Act, Tracey J came to the same view stating as follows:

"The court is not bound to accept and impose these proposed penalties but will do so if persuaded that, in all the circumstances, they fall within the permissible range. NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285 at 290-1. In Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543 at 565, Jessop J expressed the view, at which I respectfully agree, that the phrase "permissible range" in this context "refers to a range which would be permitted by the court, that is, a range within

which the penalty is neither manifestly inadequate or manifestly excessive.”

13. It is clear from the authorities that the court bears ultimate responsibility for penalty, is not bound by the parties' agreement, and must consider for itself what constitutes an appropriate penalty.
14. Determining penalty quantum is not an exact science. Within a permissible range a particular figure is not necessarily more appropriate than another figure.
15. Promoting settlement of litigation (particularly as here lengthy and somewhat complex litigation) is in the public interest.
16. In determining an appropriate penalty the court will examine all the material provided by the parties including affidavits, statements of agreed facts, submissions provided by the parties and any further material provided. As was said in the Mobil Oil case¹ in cases where the parties reach agreement about penalty “... *the Court should be satisfied that it is being given accurate, reliable and complete information on credible questions*”. I am satisfied that the parties here have provided me with all necessary materials and assistance.
17. I have been provided with extensive affidavit material deposing to the factual background to these contraventions. Each of the parties has provided me with very detailed written submissions, albeit prepared provided to the court prior to the agreement as to penalty being reached. I also have a detailed Statement of Agreed Facts and Matters.
18. I note that the parties now jointly submit that the following approach to penalty fixing should be adopted:
 - That the first respondent's admissions give rise to eight separate contraventions which should be grouped into four groups for the purpose of fixing penalty, giving rise to a practical maximum penalty of \$115,500; and
 - The second respondent's admissions give rise to seven separate contraventions which should be grouped into three groups for the

¹ [2004] FCAFC 72

purpose of fixing penalty, giving rise to a practical maximum penalty of \$16,500.

19. I accept that the above approach is appropriate and note that the proposed penalties are 45% of the maximum for the first respondent and 25% of the maximum for the second respondent.
20. In all the circumstances I accept that the proposed penalties are inside the appropriate range.
21. I make the order to be found at the beginning of these reasons.

AGREED STATEMENT OF FACTS AND MATTERS

Definitions

1. *In this Statement of Facts and Matters the following definitions apply:*
 - 1.1 *the Affected Employees means the employees identified in Attachment A;*
 - 1.2 *Attachment A refers to a total underpayment of the Affected Employees, all of whom were paid less than sum of the applicable basic periodic rate of pay and the applicable casual loading;*
 - 1.3 *Attachment B refers to a subset of the Affected Employees who were paid less than the applicable minimum basic periodic rates of pay;*
 - 1.4 *Attachment C refers to the interest calculations applicable to the Affected Employees;*
 - 1.5 *Eastwoods Accountants means Eastwoods Accounting and Taxation Pty Ltd;*
 - 1.6 *FW Act means the Fair Work Act 2009 (Cth);*
 - 1.7 *FW Regulations means the Fair Work Regulations 2009 (Cth);*

- 1.8 **Modern Award** means the Restaurant Award 2010 [MA000119];
- 1.9 **Mr Rillotta** means Filomeno (Philip) Rillotta, the Second Respondent;
- 1.10 **the Notice** means the notice to produce records and documents issued to True Blue by Fair Work Inspector Joanne Latz pursuant to subsection 712(1) of the FW Act relating to the employees of True Blue dated 25 March 2011;
- 1.11 **Pay Scale** means the Australian Pay and Classification Scale (APCS) derived from the Delicatessens, canteens, Unlicensed Cafes and Restaurants etc. Award [AN150170];
- 1.12 **the Relevant Period** means 17 January 2007 and 30 June 2010;
- 1.13 **Transitional Act** means the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth);
- 1.14 **True Blue** means True Blue (SA) Pty Ltd ACN 123 052 746, the First Respondent;
- 1.15 **WR Act** means the Workplace Relations Act 1996 (Cth);
- 1.16 **WR Regulations** means the Workplace Relations Regulations 1996 (Cth).

The Applicant

2. The Applicant, the Fair Work Ombudsman (**FWO**), is and was at all relevant times:
- 2.1 a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument on 1 July 2009, pursuant to subsection 687(1) of the FW Act;
- 2.2 Fair Work Inspector (**FWI**) by force of section 701 of the FW Act;

- 2.3 *a statutory appointee of the Commonwealth appointed by the Governor-General by written instrument on 1 July 2007, pursuant to subsection 166D(1) of the WR Act;*
- 2.4 *a person appointed as a workplace inspector under subsection 167(1A) of the WR Act; and*
- 2.5 *a person with standing under subsection 718(1) of the WR Act, as it continues to apply by virtue of the Transitional Act after the WR Act repeal day, to apply for penalties and other remedies in relation to breaches of applicable provisions of the WR Act; and*
- 2.6 *a person with standing under section 539 of the FW Act to apply for orders in relation to contraventions of the FW Act.*

The Respondents and associated entities

3. *At all times during the Relevant Period, True Blue was:*
 - 3.1 *a corporation registered in accordance with the Corporations Act 2001 (Cth);*
 - 3.2 *a person capable of being sued;*
 - 3.3 *a constitutional corporation within the meaning of subsection 4(1) of the WR Act and section 12 of the FW Act;*
 - 3.4 *an employer within the meaning of subsection 6(1) of the WR Act;*
 - 3.5 *a national system employer within the meaning of subsection 14(1) of the FW Act; and*
 - 3.6 *in the business of operating an unlicensed café trading as Jamaica Blue – West Lakes at West Lakes Mall, 111 West Lakes Boulevard, West Lakes, SA 5021.*
4. *At all times between 8 December 2006 and 10 December 2010, Mr Rillotta was:*

- 4.1 *one of two directors of True Blue;*
- 4.2 *the company secretary of True Blue; and*
- 4.3 *a holder of one share in True Blue, representing 50% of the shares in True Blue.*

The business and Mr Rillotta's involvement generally

5. *Jamaica Blue West Lakes was part of the Jamaica Blue café franchise.*
6. *On or about 17 January 2007, True Blue bought into the Jamaica Blue café franchise by purchasing the business of Jamaica Blue West Lakes.*
7. *When the business was purchased, Jamaica Blue West Lakes was a going concern. The existing employees retained were casual employees.*
8. *The pay structures adopted by the previous owner were maintained in respect of the existing employees. Mr Rillotta assumed the existing employees he retained were paid correctly.*
9. *When new employees were employed, they were usually employed on a casual basis and the new employees were paid in accordance with the existing pay structures. Mr Rillotta was aware that all employees of True Blue were employed on a casual basis.*
10. *At all times during the Relevant Period, Eastwoods Accountants were the accountants of True Blue. At the request of True Blue (the request being made by Mr Rillotta), Eastwoods Accountants located a professional bookkeeping service, Adelaide and Hills Bookkeeping Service. True Blue engaged Adelaide and Hills Bookkeeping Service to keep records relating to the employees of True Blue, to calculate wages owing to employees and to prepare payslips and provide advice as to the amounts to be paid to employees. Eastwoods Accountants directed Adelaide Hills Bookkeeping Services as to what was required of them.*
11. *At all times during the Relevant Period, a professional bookkeeper was engaged by True Blue. Initially the professional*

bookkeeper engaged by True Blue was Adelaide and Hills Bookkeeping Service. From November 2007 onwards, and for the remainder of the Relevant Period, Eastwoods Accountants itself took over the functions previously performed by Adelaide Hills Bookkeeping.

12. *At the direction of Mr Rillotta, Adelaide Hills Bookkeeping Service (and later Eastwoods Accountants) calculated employee entitlements, generated employee records and payslips based upon information about the employees' names and ages, the duties and hours of work performed by the employees provided to them by employees of True Blue.*
13. *When Mr Rillotta first became involved in the business of Jamaica Blue West Lakes, Charlie Esposito and Tony Esposito took a leading role in the management of the business.*
14. *Among other duties prior to May or June 2007, Tony Esposito would also telephone Adelaide and Hills Bookkeeping Service on a regular basis in order to inform them of the employees' names and ages, the duties and hours of work performed by the employees.*
15. *In about May or June 2007, Charlie Esposito and Tony Esposito retired from the business. Following this, it became necessary for Mr Rillotta to manage the business. Accordingly, he:*
 - 15.1 *rostered employees to open the café in the morning;*
 - 15.2 *attended to the payment of employee entitlements as described below;*
 - 15.3 *worked behind the coffee machine during the day as required, for up to a few hours each day;*
 - 15.4 *attended to the payment of tax invoices; and*
 - 15.5 *attended to banking.*
16. *Mr Rillotta was aware that the Affected Employees performed duties which included:*

16.1 preparing and serving food and beverages, receiving monies, washing dishes and general waiting duties; and/or

16.2 the cooking of food (other than as a qualified chef or senior cook).

17. Upon the retirement of Charlie Esposito and Tony Esposito from the business in about May or June 2007, at the general direction of Mr Rillotta, one of the senior employees of True Blue took over the function of telephoning Adelaide and Hills Bookkeeping Service to inform them of the employees' names and ages, the duties and hours of work performed by the employees. Later in the Relevant Period, at the general direction of Mr Rillotta, a second senior employee of True Blue also performed this function.

18. On or about 31 August 2007, Theodore Pasmin Broikus (**Mr Broikus**) became involved in True Blue as one of two directors.

19. Mr Broikus also worked in the café behind the coffee machine for a few hours at a time, and counted the money at the end of the day.

Involvement of Mr Rillotta in conduct amounting to contraventions

20. At the general direction of Mr Rillotta, employees of True Blue attended to the ordering of stock and prepared staff rosters.

21. Employees completed their own timesheets.

22. Each fortnight, either late on Monday or early on Tuesday, Mr Rillotta attended the offices of Adelaide and Hills Bookkeeping Service (or, later, Eastwoods Accountants) on his way either to or from the café. Adelaide and Hills Bookkeeping Service (and later Eastwoods Accountants) provided Mr Rillotta with a payslip and a printout of wage entitlements relating to each employee, based on the information that had been provided to Adelaide and Hills Bookkeeping Service (or later Eastwoods Accountants) by the senior employees of True Blue.

23. *Mr Rillotta relied on the printout of wage entitlements and payslips for the amount, and denominations (ie, the particular notes and coins), that he was required to withdraw from the bank in order to pay the employees. Mr Rillotta withdrew the requisite amounts and then returned to the café and made up pay packets comprising the pay slip and money for each employee. The payments were made in cash.*
24. *On most occasions, Mr Rillotta left the pay packets in the safe in the storeroom for the employees to collect. As the employees arrived they collected their pay packet from the safe. The safe was not locked. Other times Mr Rillotta gave the pay packets to employees himself or a senior employee of True Blue gave the pay packets to employees. The distribution of the pay packets to the employees by these methods was authorised by Mr Rillotta.*
25. *Mr Rillotta was aware that True Blue was legally obliged to pay the Affected Employees certain minimum entitlements set by industrial instruments and legislation, but did not know and did not ascertain what those minimum entitlements were.*
26. *Mr Rillotta was aware of the amounts being paid by True Blue to each of the employees because the amounts were identified in the pay slips and printouts of wage entitlements relating to each employee, which were provided to him by Adelaide and Hills Bookkeeping and by Eastwoods Accountants respectively.*
27. *When new employees were engaged, the senior employee working in the café at the time usually required them to complete a Tax File Number Declaration form. Mr Rillotta then provided these forms to Adelaide and Hills Bookkeeping Service (and, later, Eastwoods Accountants).*
28. *Mr Rillotta did not usually personally engage new employees on behalf of True Blue and did not usually personally record or oversee the recording of information relating to new employees. Mr Rillotta was aware of the nature of the records kept by True Blue and, in particular, the fact that, in the case of some employees, surnames and starting dates were not recorded by*

True Blue. Mr Rillotta did not ascertain what minimum record-keeping obligations applied to True Blue.

Industrial legislation, regulations and instruments applicable to True Blue

Pay rate provisions

29. *Between 17 January 2007 and 31 December 2009 (the period for which the WR Act and the Transitional Act applied), True Blue was bound by the following at respective times:*

29.1 *the Australian Fair Pay and Conditions Standard established under Part 7 of the WR Act, which relevantly required True Blue to pay the Affected Employees:*

29.1.1 *a **basic periodic rate of pay** at least equal to the guaranteed basic periodic rate of pay payable to the Affected Employees under the Pay Scale (subsection 182(1) of the WR Act);*

29.1.2 *a **casual loading** at least equal to the guaranteed casual loading payable to the Affected Employees under the Pay Scale (subsection 185(2) of the WR Act).*

Pursuant to item 5(1) of Schedule 9 of the Transitional Act, the wages provisions of the Australian Fair Pay and Conditions Standard continued to apply on and after the WR Act repeal day, with Pay Scales continuing as transitional minimum wage instruments in accordance with item 5(3) of Schedule 9 of the Transitional Act.

29.2 *the Pay Scale derived from the Delicatessens, Canteens, Unlicensed Cafes and Restaurants Etc Award [AN150170]:*

29.2.1 *pursuant to subsection 208(1) of the WR Act, on 27 March 2006 the provisions of the Award providing for basic periodic rates of pay and casual loadings became basic periodic rates of pay and*

casual loadings in the Pay Scale derived from the Award;

29.2.2 clause S1.2.3 of the Award included rate provisions for determining junior rates of pay based on a percentage of the basic periodic rate for an adult Food and Beverage Assistant; and

29.2.3 clause 4.3.2 of the Award provided for a casual loading of 20% in addition to the basic periodic rate of pay.

30. From 1 January 2010, True Blue was bound by the Modern Award.

31. The Transitional Provisions in Schedule A of the Modern Award preserved the application of the minimum rates and casual loadings in the Pay Scale (as a relevant transitional minimum wage instrument) until the first full pay period on or after 1 July 2010.

32. The Modern Award rates of pay and casual loadings are phased in from the entitlements in the transitional minimum wage instrument (the Pay Scale) from the commencement of the first full pay period on or after 1 July 2010 in accordance with Schedule A of the Modern Award.

33. From 1 January 2010, True Blue was required by section 45 of the FW Act not to breach a term of the Modern Award.

Record-keeping provisions

34. Until 30 June 2009, True Blue was required:

34.1 by subregulation 19.8(1)(b) of the WR Regulations to make, or cause to be made, a record containing the name of each of its employees;

34.2 by subregulation 19.8(1)(e) of the WR Regulations to make, or cause to be made, a record of the date on which each of its employees' employment began.

35. *On and from 1 July 2009, True Blue was required by subsection 535(1) of the FW Act to make records of the kind prescribed by the FW Regulations in relation to each of its employees. Relevantly, the kind of records required to be kept included records that specified:*
- 35.1 *each of its employees' names (subregulation 3.32(b) of the FW Regulations); and*
 - 35.2 *the date on which each of its employees' employment began (subregulation 3.32(e) of the FW Regulations).*

The Affected Employees

36. *At various times during the period 17 January 2007 to 30 June 2010, True Blue employed each of the Affected Employees.*
37. *Each of the Affected Employees:*
- 37.1 *was employed by True Blue on a casual basis; and*
 - 37.2 *performed duties within the industry and classifications covered by:*
 - 37.2.1 *the APCS until 31 December 2009;*
 - 37.2.2 *the Modern Award from 1 January 2010;*
 - 37.2.3 *were not employees with disabilities; and*
 - 37.2.3 *were not employees to whom training arrangements applied.*

Underpayment of wages by True Blue

38. *The total underpayment of minimum wage entitlements to the Affected Employees by True Blue is shown in Attachment A. As at the date of this Agreed Statement of Facts and Matters, the total underpayment shown in Attachment A, together with the interest payable on these sums shown in Attachment C, remain wholly outstanding.*

Contraventions by True Blue arising from underpayments

39. *By reason of the facts stated in paragraph 38 above and set out in Attachment A, in the period 17 January 2007 to 31 December 2009 (inclusive), in respect of the Affected Employees, True Blue contravened:*

39.1 subsection 182(1) of the WR Act by failing to pay the Affected Employees in Attachment B an amount at least equal to the guaranteed basic periodic rate of pay to which they were entitled to pursuant to the Pay Scale;

39.2 subsection 185(2) of the WR Act by failing to pay the Affected Employees in Attachment A an amount equal to the guaranteed basic periodic rate of pay plus the guaranteed casual loading percentage payable to the Affected Employees under the Pay Scale.

40. *By reason of the fact stated in paragraph 38 above, in the period 1 January 2010 to 30 June 2010 (inclusive), in respect of the Affected Employees, True Blue contravened section 45 of the FW Act by:*

40.1 failing to pay the Affected Employees in Attachment B an amount at least equal to the correct minimum wage in accordance with Schedule A of the Modern Award;

40.2 failing to pay the Affected Employees in Attachment A an amount at least equal to the correct minimum wage plus the correct casual loading in accordance with Schedule A of the Modern Award.

Mr Rillotta's involvement in underpayment contraventions

41. *By reason of the facts stated in paragraphs 22-26 and 38 above, in the period 17 January 2007 to 31 December 2009 (inclusive), Mr Rillotta was involved in True Blue's contraventions of subsections 182(1) and 185(2) of the WR Act identified in paragraph 39 within the meaning of section 728 of the WR Act.*

42. *By reason of the facts stated in paragraphs 22-26 and 38 above, in the period 1 January 2010 to 30 June 2010 (inclusive), Mr Rillotta was involved in True Blue's contraventions of section 45 of the FW Act identified in paragraph 40 within the meaning of section 550 of the FW Act.*

The keeping of records by True Blue

Recording of surnames

43. *The records kept by True Blue included the first name and surname of most of its employees, but did not include the employee's surname in the case of the following employees:*

43.1 *Amanda (commenced 18/05/2009);*

43.2 *Antonella (commenced 17/01/2007);*

43.3 *Cathy (commenced 15/06/2009);*

43.4 *Daniel (commenced 15/12/2008);*

43.5 *Donna (commenced 13/08/2007);*

43.6 *Hayley (commenced 16/07/2007);*

43.7 *Justine (commenced 10/03/2008);*

43.8 *Macey (commenced 15/12/2008);*

43.9 *Nicole (commenced 25/08/2008);*

43.10 *Rosie (commenced 10/03/2008);*

43.11 *Sean (commenced 17/01/2007);*

43.12 *Steven (commencement date not recorded);*

43.13 *Vicky (commenced 7/10/2008);*

43.14 *Rachel (commenced 21/09/2009) and*

43.15 *Langley (commenced September 2009).*

44. *By reason of the facts stated in paragraphs 43.1 to 43.13, True Blue contravened subregulation 19.8(1)(b) of the WR Regulations by failing to keep employee records that contained all the matters referred to in that regulation.*
45. *By reason of the facts stated in paragraphs 43.14 and 43.14, True Blue contravened subsection 535(1) of the FW Act by failing to keep employee records that specified all the matters contained in subregulation 3.32(b) of the FW Regulations.*

Recording of commencement dates

46. *True Blue recorded commencement dates for most of its employees, but did not record a commencement date for the following employees:*

46.1 Stephanie Alessio;

46.2 Dimitri Loulakis; and

46.3 Steven (no surname).

47. *With respect to Langley (no surname), True Blue only recorded the commencement month and not the complete commencement date. Accordingly, True Blue did not adequately record a commencement date for this employee.*
48. *By reason of the facts stated in paragraph 46, True Blue contravened subregulation 19.8(1)(e) of the WR Regulations, by failing to keep employee records that contained all the matters required by that subregulation to be recorded.*
49. *By reason of the fact stated in paragraph 47, True Blue contravened subsection 535(1) of the FW Act by failing to keep employee records that specified all the matters contained in subregulation 3.32(e) of the FW Regulations.*

Mr Rillotta's involvement in the record-keeping contraventions

50. *By reason of the facts stated in paragraphs 17, 21-28, Mr Rillotta was involved in the contraventions by True Blue identified in*

paragraphs 44, 45, 48 and 49, within the meaning of section 728 of the WR Act and section 550 of the FW Act respectively.

Failure to comply with Notice to Produce Documents

51. *By notice dated 25 March 2011, pursuant to subsection 712(1) of the FW Act, Fair Work Inspector Joanne Latz required True Blue to produce records and documents in relation to its employees.*
52. *The Notice was served upon True Blue in writing via facsimile on 25 March 2011 at approximately 4:16pm.*
53. *The Notice required the following documents and records to be produced at Level 2, 148 Frome Street, Adelaide, SA by 4:00pm on Tuesday 12 April 2011:*
 - 53.1 *any and all time records, including but not limited to, timesheets or timebooks for all employees (past and present) from 27 March 2006 or from the date of the purchase of the business (whichever is earlier), exclusive of the time records previously provided;*
 - 53.2 *any and all payroll records for all employees (past and present) from 27 March 2006 or from the date of the purchase of the business (whichever is earlier), including but not limited to the following detail for each pay period:*
 - 53.2.1 *ordinary hours worked;*
 - 53.2.2 *overtime or penalty hours worked;*
 - 53.2.3 *pay rates and gross payment for all hours worked;*
 - 53.2.4 *allowance payments;*
 - 53.2.5 *pay period and date paid;*
 - 53.2.6 *deductions.*
 - 53.3 *any and all records or documents related to the purchase of the business, including but not limited to a contract of sale, correspondence between the Company and the vendor*

concerning the transferring employees, their entitlements and terms and conditions of employment

54. *True Blue did not produce the requested documents and records at the place and time specified in the Notice.*

55. *By reason of the fact stated in paragraph 54, True Blue contravened subsection 712(3) of the FW Act.*

56. *As a result of communication between the Office of the Applicant and the Respondents' then representatives, the Applicant was provided with the following information and material in response to a Notice to Produce documents or records dated 20 November 2009 and delivered on or about 23 November 2009:*

56.1 payroll records for the periods 1 October 2008 to 31 October 2008 and 1 July 2009 to 31 July 2009.

57. *Following further communication between the Office of the Applicant, True Blue, and the Respondents' then representatives, by letter dated 22 October 2010, Eastwoods Accountants, on behalf of True Blue, provided the Applicant with the following information and material:*

57.1 Draft payroll adjustments based on the payroll records of True Blue held by Eastwoods Accountants and adjusted in line with the pay rates determined by the FWO. The draft payroll adjustments were in the form of a spreadsheet. The information provided by Eastwoods Accountants on behalf of True Blue is the main source of information by reference to which Attachment A has been prepared;

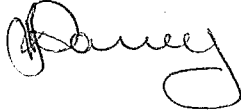
57.2 Financial statements of True Blue for the year ending 30 June 2009;

57.3 Report from True Blue highlighting "employee theft" amounting to in excess of \$100,000; and

*57.4 Australian Taxation Office (ATO) "Portal print out"
highlighting that True Blue owed the ATO \$96,129.31.*

**I certify that the preceding twenty-one (21) paragraphs are a true copy of
the reasons for judgment of Simpson FM**

Associate:



Date: 21 June 2012