

FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Wongtas Pty Ltd (No 2) [2012] FCA 30

- Citation: Fair Work Ombudsman v Wongtas Pty Ltd (No 2)
[2012] FCA 30
- Parties: **FAIR WORK OMBUDSMAN v WONGTAS PTY LTD, DING GUO WANG and XIAO YU ZHANG**
- File number: NSD 793 of 2010
- Judge: **COWDROY J**
- Date of judgment: 2 February 2012
- Catchwords: **INDUSTRIAL LAW** – directors of company admitting breaches of the *Fair Work Act 2009* (Cth) – Court determination of penalty to be imposed – Court’s broad discretion to determine quantum of penalty to be imposed – relevant factors of mitigation – whether penalty is proportionate to the offence – whether the respondents displayed remorse or contrition
- Legislation: *Corporations Act 2001* (Cth) s 500(2)
Crimes Act 1914 (Cth) s 4AA
Crimes (Sentencing Procedure) Act 1999 (NSW) s 21A(3)(k)
Fair Work Act 2009 (Cth) ss 12, 340(1), 340(2), 341(1), 351(1), 545(2)(b), 546(1), 793(1)
Fair Work Regulations 2009 (Cth) sub-regulation 3.42(1)
- Cases cited: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Fair Work Ombudsman v Wongtas Pty Ltd [2011] FCA 633
Hoare v The Queen (1989) 167 CLR 348
John Holland Pty Ltd v Maritime Union of Australia (No 2) [2010] FCA 110
Kelly v Fitzpatrick [2007] FCA 1080
Markarian v The Queen (2005) 228 CLR 357
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
McDonald v Australian Building and Construction Commissioner [2011] FCAFC 29
McIver v Healey [2008] FCA 425
Mill v The Queen (1998) 166 CLR 59

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
R v Henry (1999) 46 NSWLR 346
R v Thomson; R v Houlton (2000) 49 NSW 383
Siganto v The Queen (1998) 194 CLR 656
*Stuart-Mahoney v Construction, Forestry, Mining and
Energy Union* [2008] FCA 1426
Tyler v Regina; Regina v Chalmers [2007] NSWCCA 247
Veen v The Queen (1979) 143 CLR 458
Veen v The Queen (No 2) (1988) 164 CLR 465
Warren v Coombes (1979) 142 CLR 531
Wong v The Queen (2001) 207 CLR 584

Date of hearing: 7 December 2011

Place: Sydney

Division: Fair Work Division

Category: Catchwords

Number of paragraphs: 70

Counsel for the Applicant: Ms K Nomchong

Solicitor for the Applicant: Holding Redlich

Counsel for the Second and
Third Respondents: Mr A Britt

Counsel for the Second and
Third Respondents: Kiong Low & Co

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION**

NSD 793 of 2010

BETWEEN: **FAIR WORK OMBUDSMAN**
 Applicant

AND: **WONGTAS PTY LTD**
 First Respondent

DING GUO WANG
 Second Respondent

XIAO YU ZHANG
 Third Respondent

JUDGE: **COWDROY J**

DATE OF ORDER: **2 FEBRUARY 2012**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. Pursuant to s 545(2)(b) of the *Fair Work Act 2009* (Cth) the second and third respondents, jointly and severally, pay compensation to Ms Jiongui Ye in the amount of \$2,207.42 before deducting any tax payable under that sum.
2. Pursuant to s 546(1) of the *Fair Work Act 2009* (Cth) the second respondent pay the following penalties:
 - (a) As to the contravention of sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth): a pecuniary penalty of \$1,188.00;
 - (b) As to the contravention of s 340(1) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00;
 - (c) As to the contravention of s 340(2) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00;
 - (d) As to the contravention of s 351(1) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00.
3. Pursuant to s 546(1) of the *Fair Work Act 2009* (Cth) the third respondent pay the following penalties:

- (a) As to the contravention of sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth): a pecuniary penalty of \$1,188.00;
 - (b) As to the contravention of s 340(1) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00;
 - (c) As to the contravention of s 340(2) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00;
 - (d) As to the contravention of s 351(1) of the *Fair Work Act 2009* (Cth): a pecuniary penalty of \$3,564.00.
4. The second and third respondents pay the penalties ordered above to the Consolidated Revenue Fund of the Commonwealth in accordance with s 546(3) of the *Fair Work Act 2009* (Cth).

THE COURT DECLARES THAT:

- 1. The first respondent contravened ss 340(1), 340(2) and 351(1) of the *Fair Work Act 2009* (Cth) and sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth).
- 2. The second respondent contravened ss 340(1), 340(2) and 351(1) of *Fair Work Act 2009* (Cth) and sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth).
- 3. The third respondent contravened ss 340(1), 340(2) and 351(1) of the *Fair Work Act 2009* (Cth) and sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth).

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION**

NSD 793 of 2010

BETWEEN: FAIR WORK OMBUDSMAN
Applicant

AND: WONGTAS PTY LTD
First Respondent

DING GUO WANG
Second Respondent

XIAO YU ZHANG
Third Respondent

JUDGE: COWDROY J

DATE: 2 FEBRUARY 2012

PLACE: SYDNEY

REASONS FOR JUDGMENT

1 In these proceedings the Fair Work Ombudsman ('the FWO') as applicant alleged that the first respondent, Wongtas Pty Ltd (now in liquidation) ('Wongtas') contravened s 340(1) and/or s 351(1) of the *Fair Work Act 2009* (Cth) ('the FWA') and sub-regulation 3.42(1) of the *Fair Work Regulations 2009* (Cth) ('the FW Regulations'). In June 2010 after these proceedings were commenced, Wongtas was placed in liquidation and as a consequence pursuant to s 500(2) of the *Corporations Act 2001* (Cth) the proceedings against Wongtas are stayed.

2 The second and third respondents accept that pursuant to s 550 of the FWA each of them aided, abetted, counselled, procured, induced, or were each knowingly concerned in, such contraventions of the FWA. An agreed statement of facts has been tendered and the findings hereunder are made on the basis of the admissions made in such statement.

3 Accordingly the Court is only required to determine the penalty to be imposed on each of the second and third respondents.

FACTS

4 Wongtas operated a printing business and provided designs, graphic work, printing and packaging. The business was located at 2/22-24 Wiggs Road, Riverwood NSW. The employment of persons engaged in the printing industry was governed by the Notional Agreement Preserving the Printing Industries (State) Award ('Printing NAPSA') and Wongtas was bound by the Notional Agreement Preserving the Clerical and Administrative Employees (State) Award ('Clerical NAPSA') with regard to the employment of persons engaged wholly or principally in clerical work. Thereafter from 27 March 2006 Wongtas was bound by the Preserved Australian Pay and Classifications Scale ('Preserved APCS') derived from the Clerical NAPSA and Preserved APCS derived from the Printing NAPSA.

5 The second and third respondents are the directors of Wongtas and were responsible for the day to day operation of the business and provided daily management, direction and supervision of its employees.

MS JIONGQUI YE

6 Ms Jiongqui Ye ('Ms Ye') first commenced employment in February 2006 at Wongtas to perform what were essentially office duties. She remained employed continuously until 7 February 2007 when she resigned to care for her ill son. Ms Ye was subsequently re-employed by Wongtas in July 2008 and continued to be employed, although in varying roles as set out below, until 22 December 2009.

7 In July 2009 Ms Ye informed the third respondent ('Ms Zhang') that she was pregnant and that she would need to take some of her sick leave. According to Ms Ye's version, she told Ms Zhang that she planned to keep working until Christmas 2009 which was approximately two months before she was due to give birth. Ms Zhang allegedly informed her that the job would remain open but that she would not be paid wages during her absence and that, upon her return to work, her previous position might not be available.

8 There is contention between the parties as to what was meant by such conversation. Ms Zhang contends that Ms Ye meant that she was intending to resign shortly before the birth of the baby. However, such controversy is immaterial since the admitted adverse action

engaged in by Wongtas against Ms Ye was motivated by Ms Ye's inquiry concerning her future employment and her pregnancy.

9 In late July 2009 Wongtas advertised for a full time office position and such position was filled by Ms Liuliu Ru ('Ms Ru'). The second respondent ('Mr Wang') informed Ms Ye that he needed to employ another person to undertake Ms Ye's work at that stage because he was uncertain whether it would be possible to engage such an employee in December 2009. Ms Ye assisted in training Ms Ru and facilitated interviews with two other potential applicants for the position.

10 Ms Ye suffered a miscarriage and underwent surgery on 12 August 2009. Ms Ye informed Ms Zhang and took sick leave between 12 and 17 August 2009.

11 In mid August 2009 Ms Ye returned to work. Ms Ye observed a change in attitude towards her by the second and third respondents. Such changes were manifested by the decision by Mr Wang and Ms Zhang to assign Ms Ye to different duties. Ms Ru had assumed the office duties formerly performed by Ms Ye. Although Ms Ye had performed such duties, and had in fact trained Ms Ru in the necessary administrative and office procedures, Ms Ye was assigned to packaging duties. Such work consisted essentially of manual labour in a portion of the workplace which was not as pleasant as that of her former office environment.

12 Thereafter the relationship between Ms Ye and her employers deteriorated. Mr Ye regarded her new duties as a '*demotion*' and she became fearful of losing her job entirely.

13 In response to her complaints, Mr Wang informed Ms Ye that '*many employees resign when they fall pregnant and then stay at home in bed*'. Such comment was treated by Ms Ye as offensive and patronising.

14 Ms Ye was also concerned that the transfer to packaging duties would adversely affect her future working prospects with other employers since it would appear that she had been performing manual labour rather than administrative tasks.

15 From mid September 2009 the relationship between Mr Wang and Ms Ye became more strained. On 22 September 2009 Ms Zhang provided Ms Ye with a warning letter

concerning her performance. Ms Ye refused to sign the letter. Shortly thereafter Ms Ye contacted the 'Fair Work Info Line' and discussed her concerns and the warning letter. Thereafter Ms Ye informed Mr Wang and Ms Zhang that she believed that she was being underpaid and had not been fairly treated. In response, Ms Zhang became aggressive, and 'screamed at' Ms Ye and told Ms Ye that she would not be returning to her office duties.

16 In September 2009 Ms Ye lodged a complaint with the FWO. Such complaint was not brought to the attention of the respondents for approximately a month, and in that period Ms Ye was provided with duties which were better than those of packaging, namely, making banners. Such work was carried out in a more pleasant environment but was not as favourable as her former office environment.

THE DISMISSAL

17 On 10 November 2009 inspectors from the FWO attended the premises of Wongtas and spoke to Mr Wang and issued the first respondent with a Notice to Produce. Thereafter Ms Zhang informed Ms Ye that he was unhappy that she had lodged a complaint and he took action to remove Ms Ye from banner making duties and directed that she be returned to full time packaging duties.

18 On 7 December 2009 Mr Wang wrote to Ms Ye advising her that her last day of employment would be 22 December 2009 and made reference to her 'resignation'. Ms Ye denies that she resigned or that she gave any indication to Mr Wang in July 2009 that she intended to resign. Notwithstanding this, on 22 December 2009 Mr Wang again wrote to Ms Ye referring to her resignation and enclosing two pay slips.

19 On 22 December 2009 Ms Ye requested a copy of her leave records, both from Mr Wang and Ms Zhang, but each refused to provide them. Ms Ye attempted to return to work in January 2010 following the Christmas shutdown but she was informed that she was no longer an employee.

20 Following an investigation by the FWO, it was found that Ms Ye had been underpaid and in February 2011 Wongtas paid Ms Ye \$6,037.03 representing the net amount of the underpayment.

STATUTORY REGIME

21 Section 793(1) of the FWA relevantly provides:

Any conduct engaged in on behalf of a body corporate:

- (a) by an officer, employee or agent (*an official*) of the body within the scope of his or her actual or apparent authority; or
- (b) ...

is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the body.

22 Section 341(1) of the FWA relevantly provides:

A person has a *workplace right* if the person:

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) ...
- (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee—in relation to his or her employment.

23 The conduct proscribed by the FWA is referred to in s 340(1) of the FWA. The following subparagraphs are relevant to the present proceedings:

- (1) A person must not take adverse action against another person:
 - (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.
- (2) A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

BREACHES OF THE FWA

24 By reason of the admissions made by the second and third respondents they acknowledge that they aided, abetted, counselled, procured, induced by their acts, were

knowingly concerned in or a party to breaches by Wongtas of the following provisions of the FWA.

(a) Failure to provide a copy of an employee record to an employee

25 By refusing Ms Ye a copy of her employee records, which she sought in December 2009 from Mr Wang and Ms Zhang, Wongtas contravened sub-regulation 3.42(1) of the FW Regulations. Such sub-regulation relevantly provides:

- (1) For subsection 535(3) of the Act, an employer must make a copy of an employee record available for inspection and copying on request by the employee or former employee to whom the record relates.

(b) Workplace rights

26 By reason of the operation of s 793 of the FWA, Wongtas injured Ms Ye in her employment and/or prejudicially altered her position in her employment by the following conduct:

- (a) changing Ms Ye's duties in that:
 - (i) Ms Ye was required to perform packaging duties instead of her usual office duties;
 - (ii) Ms Ye was required to cease performing banner making and invoicing duties and required to only perform packaging duties; and
 - (iii) Ms Ye was required to train Ms Ru to do Ms Ye's job;
- (b) significantly reducing contact and conversation with Ms Ye;
- (c) screaming at Ms Ye when she sought to query her minimum wages;
- (d) by the Second Respondent advising Ms Ye that he was unhappy that she had lodged a complaint with the Applicant;

27 By reason of the operation of s 793 of the FWA, Wongtas discriminated between Ms Ye and other employees of Wongtas by:

- (a) requiring Ms Ye to perform packaging duties instead of her usual office duties;
- (b) advising Ms Ye that she should not complain about her change of duties;
- (c) significantly reducing contact and conversation with Ms Ye;
- (d) screaming at Ms Ye when she sought to query her minimum wages;
- (e) imposing, or proposing to impose, a condition, requirement or practice that, in order for Ms Ye to retain the office duties and/or on-going employment,

Ms Ye:

- (i) continue performing her packaging duties; and/or
- (ii) not complain about the Second Respondent and/or
- (iii) not make a complaint to the Applicant;

28 It is an agreed fact that Wongtas engaged in the conduct referred to in [26] and [27] above for the following reasons:

- (a) because the Applicant initiated a process under a workplace law for the benefit of Ms Ye in that the Applicant commenced an investigation into the First Respondent with respect to Ms Ye's complaint; and/or
- (b) because Ms Ye made a complaint or inquiry to the Applicant; and/or
- (c) because Ms Ye made a complaint or inquiry to the First Respondent in relation to her employment.

29 Each of (a) to (c) inclusive were '*workplace rights*' within s 341 of the FWA.

(c) Discrimination

30 Additionally, by reason of the operation of s 793 of the FWA Wongtas discriminated against Ms Ye and injured and/or prejudicially altered her position in employment by:

- (a) employing another employee to perform Ms Ye's duties when she was pregnant;
- (b) requiring Ms Ye to perform packaging duties (after the [end] of her pregnancy) instead of her usual office duties after employing a replacement employee; and
- (c) subsequently significantly reducing contact and conversation with Ms Ye.

31 Further, by reason of the operation of s 793 of the FWA Wongtas discriminated between Ms Ye and another of its employees by:

- (a) requiring Ms Ye to perform packaging duties (after the [end] of her pregnancy) instead of her usual office duties after employing a replacement employee;
- (b) advising Ms Ye that she should not complain about her change of duties;
- (c) subsequently significantly reducing contact and conversation with Ms Ye; and
- (d) by advising Ms Ye that many employees resign when they fall pregnant and then stay at home in bed.

32 It is an agreed fact that the conduct engaged in by Wongtas as set out in [30] and [31] above resulted from Ms Ye's gender and pregnancy.

Breaches

33 By reason of the above (that is the matters referred to in [26]-[27]) the second and
third respondents admit that Wongtas breached s 340(1)(a)(i), (ii), (iii) and (b) and also
s 340(2) of the FWA.

34 By reason of the facts set out in [30] and [31] above, the second and third respondents
admit that Wongtas contravened s 351(1) of the FWA.

35 To supplement the agreed statement of facts, the FWO relies, relevantly, upon the
affidavit of Ms Ye. The second and third respondents each rely upon their affidavits sworn on
5 December 2011.

Compensation

36 It is an agreed fact that but for the contraventions of the FWA by the respondents, and
had the dismissal of Ms Ye not occurred, Ms Ye would have continued to perform her office
duties, banner making and invoicing duties which attracted a higher hourly rate of pay than
the packaging duties to which she was assigned upon her return to duties in August 2009. Her
economic loss represented the difference between her earnings in respect of performing
packaging duties and her earnings in respect of performing her previous duties. It is also an
agreed fact that the conduct of the respondents caused Ms Ye to suffer hurt, humiliation and
distress. The respondents have agreed to pay Ms Ye an amount of \$2,207.42 in
compensation, less applicable taxation.

Liability of the Second and Third respondents

37 The second and third respondents admit that they were involved in each of the above
breaches by Wongtas and also accept that they are to be treated as having themselves
breached those provisions in accordance with s 550 of the FWA.

MAXIMUM PENALTY

38 The maximum penalties which can be imposed upon the second and third respondents
are set out hereunder. Such penalties are specified by reference to penalty units, as defined in
'The Dictionary' of the FWA: see s 12 of the FWA. A penalty unit is defined as having the

meaning given by section 4AA of the *Crimes Act 1914* (Cth). Such section of that Act defines 'penalty unit' as \$110.

39 The penalties prescribed are as follows:

Contravention of sub-regulation 3.42(1) of the FW Regulations: See item 9 to the table to sub-regulation 4.01A(2) of the FW Regulations	20 penalty units (\$2,200)
Contravention of subsection 340(1) of the FWA: Breaches of ss 340(2) and 351(1) of the FWA attract the same penalties, pursuant to the same item as referred to for contraventions of s 340(1) of the Act.	60 penalty units (\$6,600)

CONSIDERATION

40 The Court exercises a wide discretion when determining the quantum of a penalty to be imposed. In *John Holland Pty Ltd v Maritime Union of Australia (No 2)* [2010] FCA 110 Graham J at [27] itemised numerous factors which the Court could take into consideration. The Court respectfully adopts such criteria as being appropriate and comprehensive. Similar tests to those have been referred to in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Kelly v Fitzpatrick* [2007] FCA 1080 at [14]-[30] per Tracey J; *McIver v Healey* [2008] FCA 425 per Marshall J at [24]; *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426 at [40] per Tracey J.

41 There are numerous authorities which guide the Court in its approach to the assessment of penalties: see, for example *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373; *McDonald v Australian Building and Construction Commissioner* [2011] FCAFC 29 at [4]-[11]. The considerations referred to will be considered separately hereunder.

42 The nature and extent of the conduct leading to the breaches represent a gross violation of the respondents' obligations under the FWA. Ms Ye's announcement of her pregnancy was the catalyst for the events which were to follow. The conduct acknowledged by the second and third respondents establishes that they engaged in abusive action against Ms Ye on the ground of gender and pregnancy. That adverse action has injured Ms Ye in her

employment and/or prejudicially altered her position in contravention of s 351(1) of the FWA as particularised above. By virtue of s 793(1) of the FWA, Wongtas is liable for the conduct of each of the second and third respondents.

43 Wongtas and the second and third respondents no doubt felt they were obliged to take steps to find a replacement to carry out the office duties of Ms Ye once she could no longer perform that role. However, whether the replacement was intended to be an interim measure during Ms Ye's absence or a permanent replacement at that stage is unclear. According to the evidence of Ms Ye, on or about 13 July 2009 she was pregnant and would need to take some leave from work because of morning sickness. Ms Ye states that Ms Zhang informed her that her job would remain open but that she would not be paid wages and that she may not be able to return to her previous position after the birth of her child. Ms Zhang testifies as to a similar conversation. However, Mr Wang deposed to a conversation in May or July 2009 with Ms Ye in which he said:

I said: "I understand that you will be leaving in December. I will need to hire a new employee and best to do so now rather than wait until December".

She said "Yes. I have to leave in December to look after the baby to be born and my elder son. I have told Sadie that I will help train the new person".

44 Ultimately this distinction is of little consequence in view of the fact that the second and third respondents have made admissions of discriminatory conduct towards Ms Ye.

45 The circumstances in which the conduct took place are relevant. Commencing with the discriminatory conduct, Ms Ye was prevented from resuming her office duties and was demoted to a lesser position. After her complaints she was treated aggressively by the second respondent and even though she was, in approximately September 2009, elevated to a slightly better position that was short lived due to her complaint to the FWO. The Court infers, in the absence of any evidence to the contrary, that her ultimate dismissal resulted from her seeking clarification of her position and her complaint to the FWO. The respondents' conduct was compounded by the refusal of the respondents to provide her employment records in contravention of the FW Regulations.

46 The nature and extent of loss and damage sustained as a result of the breach is an important consideration. Financially Ms Ye has been compensated for the wages which she should have been paid whilst she was undertaking banner making duties. However the

evidence establishes that Ms Ye would have continued on in her administrative position had she not been discriminated against, demoted and ultimately dismissed.

47 A prior history of conduct by the respondents is a matter for consideration. There is no evidence that the respondent had ever been engaged in any prior breaches of the employment law.

48 The size of the business enterprise involved is also relevant. The Court would treat the business of Wongtas as being a small business as it employed approximately seven persons.

49 The Court may also consider whether the contraventions were distinct or arose out of the one course of conduct. The Court finds that all of the contraventions arose out of the one course of conduct which was initiated by Ms Ye's announcement of her pregnancy.

50 The Court is required to determine whether the contraventions were deliberate. In this respect the second and third respondents maintain that they were not aware of the statutory obligations. Nevertheless, the Court is satisfied that the conduct directed against Ms Ye was intentional and did not result from any inadvertence or misunderstanding.

51 The Court may consider whether senior management was involved in the contraventions. Clearly, the second and third respondents were the effective mind of Wongtas and were directly involved in the contraventions.

52 The Court may also consider whether contrition or remorse has been exhibited. The executive minds of Wongtas, namely the second and third respondents, have expressed contrition for the breaches of the FWA but no apology has been extended to Ms Ye. In these circumstances the Court can infer that, but for the intervention of the FWO, Ms Ye would have been severely disadvantaged and the respondents would have ignored both the consequences of their actions and any loss or damage sustained by Ms Ye in consequence of those actions. It is obvious that the second and third respondents took no corrective action once an inquiry was made by the FWO, but rather the respondents ultimately dismissed Ms Ye.

53 The Court may also consider whether those responsible for the contravention co-operated with enforcement authorities. The evidence on this issue is not conclusive.

54 The Court may also consider whether general or specific deterrence is required. The Court will impose a penalty which will provide a salutary reminder not only to the present respondents, but should also serve the wider purpose of reminding those engaged in the employing of personnel that compliance with the FWA is mandatory.

55 The Court also takes into consideration the conduct of the respondents in these proceedings. The respondents initially challenged the power of the FWO to institute these charges, resulting in a contested hearing: see *Fair Work Ombudsman v Wongtas Pty Ltd* [2011] FCA 633.

56 The respondents also denied the contraventions until 21 October 2011 when the second and third respondents made the admissions. Such date was the Friday before the substantive hearing, which had been set down for hearing to commence on 24 October 2011. Such hearing dates had been allocated on 22 September 2011.

57 The Court also observes that the second and third respondents voluntarily determined to wind up the company in June 2010, after these proceedings had commenced. However the operations of Wongtas continued seamlessly because a new company named Wangtas Pty Limited ('Wangtas') was incorporated on 8 July 2010. The records of the Australian Securities and Investments Commission ('ASIC') show that Mr Hong Zhang is its sole director and that both the second and third respondents were directors of that company from 12 July 2010 to 11 November 2010.

58 The relationship between Wongtas and Wangtas Pty Limited is not explained but ASIC records show that Wangtas is the proprietor of a business known as 'Goldshining Print' which conducts printing services at 2/22-24 Wiggs Road, Riverwood, being the identical address of Wongtas. Further, Mr Hong Zhang and the third respondent are currently directors of another company known as GPS Cyberworld Pty Ltd.

59 Accordingly, the Court infers (*Warren v Coombes* (1979) 142 CLR 531 at 538) that there is a direct relationship between Wangtas and Wongtas. The Court also draws the inference that the winding up of Wongtas was carried out for the purpose of avoiding any pecuniary penalty for Wongtas' breaches of the FWA and FW Regulations.

MITIGATION OF PENALTY

60 The *Crimes (Sentencing Procedure) Act 1999* (NSW) allows for the mitigation of sentences by a New South Wales court where a plea of guilty has been entered: see s 21A(3)(k) of such act. Generally, a plea of such kind permits a reduction of penalty otherwise to be imposed between 10%-25%: see *R v Thomson*; *R v Houlton* (2000) 49 NSW 383 per Spigelman CJ at [160]; *Siganto v The Queen* (1998) 194 CLR 656; *Tyler v Regina*; *Regina v Chalmers* [2007] NSWCCA 247. The present proceedings are not criminal. Nevertheless, such principle can be applied by analogy since the Court is exercising its discretion in its assessment of the penalties to be imposed. The rationale for such a discount is the recognition that some remorse or contrition is offered.

61 Ultimately, the Court is required to determine a punishment which is proportionate to the offence, and where necessary incorporates an element for both specific and general deterrence and takes into account all relevant factors: see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [27]; *Wong v The Queen* (2001) 207 CLR 584 at [74]-[76] and *Markarian v The Queen* (2005) 228 CLR 357 at [37]. The determination of any penalty is wholly a matter in the discretion of the Court: see *R v Henry* (1999) 46 NSWLR 346 at [5] per Spigelman CJ.

62 In these proceedings no remorse or contrition can be inferred by the conduct of the second and third respondents with regard to their late plea. It is possible that the two former directors of Wongtas still have no fundamental understanding of their statutory duty as imposed upon employers by the FWA and FW Regulations. Further, the acknowledgements of the contraventions were made only after the FWO had prepared for a fully contested hearing, thus incurring avoidable expense. For this reason, the discount will be limited to 10% in recognition only that the costs of a prolonged hearing have, by the late acknowledgements of the breaches, been avoided.

63 The second and third respondents have raised cultural issues with regard to the decision concerning their actions in relation to Ms Ye. Both the second and third respondent, and Ms Ye, are former nationals of the People's Republic of China. Mr Wang has resided in Australia since 14 November 1987, having been born in the People's Republic of China on 22 March 1963. Mr Wang commenced trading as a sole trader in the printing business in 1993 but after 1996, when Wongtas was incorporated, Mr Wang operated the company with

the third respondent, his wife. The submission was made by them that they had traditional views concerning the importance of pregnancy and the need for rest and protection of pregnant women. Whilst the second and third respondents may well have held such traditional beliefs, they cannot prevail over the statutory requirements relating to the employment of personnel under the FWA and constitute no excuse for the contraventions.

64 Nevertheless, the Court is mindful of the submission that the respondents, when learning of the pregnancy of Ms Ye, found it necessary to implement plans to ensure that the work which would have been performed by Ms Ye was able to be performed by another employee. When Ms Ye's pregnancy came to an end, the respondents found themselves in the position of having engaged Ms Ru and having also to place Ms Ye in the small company structure. The Court also observes that but for Ms Ye's pregnancy, the parties had obviously enjoyed a cordial relationship from February 2006.

65 The Court considers that the principle of totality should apply which recognises the need to take into consideration the fact that more than one contravention arises out of the same or similar circumstances: see *Mill v The Queen* (1998) 166 CLR 59 at 62-63; *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [41]-[46].

66 The Court also gives recognition to the circumstance in which Wongtas found itself due to Ms Ye's unexpected early return to work and the fact that the second and third respondents were unaware of their statutory responsibilities. These considerations give rise to the question of proportionality since the objective seriousness and gravity of the offences sets the boundaries of the upper and lower limit of the proportionate punishment: see *Veen v The Queen* (1979) 143 CLR 458 at 468; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472; 485-486. See also *Hoare v The Queen* (1989) 167 CLR 348 at 354.

67 The Court observes that character references have been supplied in support of the second and third respondents. However, they are very general, and the Court cannot be satisfied that any of the referees had any understanding of the contraventions. One referee, for example, refers to the 'falsity' of the charges, the referee apparently not being aware that the impugned conduct has been acknowledged by the second and third respondents.

68 For these reasons the maximum penalty is not warranted. Instead, the appropriate range is two thirds of the maximum penalty. This will be reduced by 10% in recognition of the acknowledgements of the breaches; and a further 10% to reflect the application of the totality principle to reflect that each of the four charges essentially arose from the same circumstances.

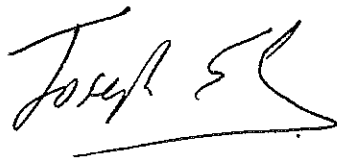
69 The Court notes that the second and third respondents have agreed to pay compensation to Ms Ye pursuant to s 545(2)(b) of the FWA in the amount of \$2,207.42 (gross).

70 Taking all of these matters into consideration, the Court considers that the following penalties should be imposed in respect of each of the second and third respondents pursuant to s 546(1) of the FWA:

1. As to the contravention of sub-regulation 3.42(1) of the FW Regulations: a pecuniary penalty of \$1,188.00;
2. As to the contravention of s 340(1) of the FWA: a pecuniary penalty of \$3,564.00;
3. As to the contravention of s 340(2) of the FWA: a pecuniary penalty of \$3,564.00;
4. As to the contravention of s 351(1) of the FWA: a pecuniary penalty of \$3,564.00.

I certify that the preceding seventy (70) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Cowdroy.

Associate:



Dated: 2 February 2012