FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v PERFUME HEALTH CARE PTY LTD & ANOR *[2012] FMCA 567*

INDUSTRIAL LAW – declarations about and civil penalties for breaches of industrial awards under the *Workplace Relations Act* and the *Fair Work Act.*

Australian Pay and Conditions Scale
Fair Work Act 2009; s.45, s.44(1), s.96(2), s.535, s.536, s.546, s.546(3)(a)
Fair Work (Transitional and Consequential Amendments) Act 2009; Item 5, Schedule 16
Workplace Relations Act 1996; s.182(1), s.232(2), s.236(1), s.246(1), s.719(1), s.841(a)
Fair Work Regulations 2009; regs. 3.32(2), 3.33(2), 3.33(3), 3.36, 3.46
Health and Allied Services – Private Sector – Victoria Consolidated Award 1998; Clauses 19.10(2), 22.2, 31.1, 32.1, 40.1, 40.5.1, 33.3(2), 33.3(3), 33.4.1, 33.6
Social, Community, Home Care and Disability Services Award 2010; Clauses 25.7, 31.1, and Items A.2.3 & A.5.2 of Schedule A
Workplace Relations Regulations 2006; regs. 14.1, 14.4, 19.4(1), 19.20(3)

Attorney-General (SA) v Tichy (1982) SASR 84
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 2) (2010) 199 IR 373
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560
Construction, Forestry, Mining and Energy Union v Williams (2009) 191 IR 445
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No. 3) [2011] FCA 579
Gibbs v The Mayor, Councillors and Citizens of the City of Altona (1992) 37 FCR 216
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd T/AS Pangaea Restaurant & Bar [2007] FMCA 7
McDonald v R (1994) 48 FCR 555
Mornington Inn Pty Ltd v Jordan (2008) 247 ALR 714
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	PERFUME HEALTH CARE PTY LTD
Second Respondent:	PENG FEI LIN
File Number:	MLG 1400 of 2011
Judgment of:	O'Dwyer FM
Hearing date:	8 March 2012
Date of Last Submission:	8 March 2012
Delivered at:	Melbourne
Delivered on:	29 June 2012

REPRESENTATION

Counsel for the Applicant:	Ms Hall
Solicitor for the Applicant:	Ms Krins of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Ireland

ORDERS

THE COURT DECLARES THAT:

(1) The First and Second Respondents each contravened:

(a) during the period from 12 March 2007 to 31 December 2009, s.182(1) of the *Workplace Relations Act 1996* (WR Act) and Item 5 of Schedule 16 of the *Fair Work (Transitional and Consequential Amendments) Act 2009* (Transitional Act), by failing to pay Ms Hope Madison (the Employee) the guaranteed basic periodic rate of pay contained in the preserved *Australian Pay and Conditions Scale* (APCS) derived from the *Health and Allied Services – Private Sector – Victoria Consolidated Award 1998* (the Pre-Modern Award);

(b) during the period from 1 January 2010 to 28 February 2011, s.45 of the *Fair Work Act* 2009 (FW Act) by failing to pay the Employee no less than the minimum wage in the relevant transitional minimum wage instrument (that being the preserved APCS derived from the Pre-Modern Award), in accordance with clause A.2.3 of Schedule A of the *Social, Community, Home Care and Disability Services Award 2010* (Modern Award);

(c) clause 19.10.2(a) of the Pre-Modern Award and s.45 of the FW Act (clause 25.7 of the Modern Award), by failing to pay the Employee the required sleep-over allowance;

(d) clause 31.1 of the Pre-Modern Award and s.45 of the FW Act (clause A.5.2 of Schedule A of the Modern Award), by failing to pay the Employee a shift penalty;

(e) clause 32.1 of the Pre-Modern Award and s.45 of the FW Act (clause A.5.2 of Schedule A of the Modern Award), by failing to pay the Employee weekend penalty rates;

(f) clause 40.5.1 of the Pre-Modern Award and s.45 of the FW Act (clause A.5.2 of Schedule A of the Modern Award), by failing to pay the Employee public holiday rates;

(g) clauses 33.3, 33.4.1, 33.6 of the Pre-Modern Award, s.232(2) of the WR Act, s.236(1) of the WR Act and s.45 of the FW Act (clause 31.1 of the Modern award), by failing to accrue and pay amounts of annual leave in respect of the employee's employment;

(h) s.246(1) of the WR Act and s.44(1) and s.96(2) of the FW Act, by failing to accrue and grant the Employee amounts of accrued paid personal/carer's leave;

(i) regulation 19.4(1) of the *Workplace Relations Regulations 2006* (WR Regulations), s.535 of the FW Act, regulations 3.32(2), 3.33(2), 3.33(3), 3.34 and 3.36(1) of the *Fair Work Regulations 2009* (FW Regulations), by failing to make and keep required records in relation to the Employee's employment;

(j) regulation 19.20(3) of the WR Regulations, s.536 of the FW Act (regulation 3.46 of the FW Regulations) by failing to issue the Employee with payslips; and

(k) clause 22.2 of the Pre-Modern Award by failing to provide the Employee with a statement setting out the required details on each occasion she received a payment.

THE COURT ORDERS THAT:

(1) Pursuant to s.719(1) of the WR Act, regulation 14.4 of the WR Regulations, and s.546(1) of the FW Act, that the First Respondent pay an aggregate penalty of $12,650 in respect of the contraventions referred to in declarations 1(a) to 1(k) above;

(2) Pursuant to s.719(1) of the WR Act, regulation 14.1 of the WR Regulations, and s.546(1) of the FW Act, that the Second Respondent pay an aggregate penalty of $2,530 in respect of the contraventions referred to in declarations 1(a) to 1(k) above;

(3) Pursuant to s.841(a) of the WR Act and s.546(3)(a) of the FW Act that each of the Respondents pay the penalties into the Consolidated Revenue Fund of the Commonwealth.

(4) The payment of penalties referred to in orders 1 and 2 above be made within 28 days of the date of this order.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 1400 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

PERFUME HEALTH CARE PTY LTD
First Respondent

PEN FEI LIN
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This proceeding comes to me on the question of what civil penalties should be imposed upon the Respondents in respect of their breaches of indentified industrial awards and obligations imposed on them, where relevant, by the *Workplace Relations Act 1996* (WR Act), the *Workplace Relations Regulations 2006* (WR Regulations), the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act), *the Fair Work Act 2009* (FW Act), the *Health and Allied Services – Private Sector – Victoria Consolidated Award 1998* (Pre-Modern Award) and the *Social, Community, Home Care and Disability Services Award 2010* (Modern Award).

2. In reaching my determination I have had the benefit of submissions, both oral and written, from both parties, together with an agreed statement of facts and the affidavit of Ms Sally McLeod, sworn on

20 December 2011. I also was given the financial statements of the First Respondent for the financial years ending 30 June 2009, 30 June 2010 and 30 June 2011.

Background

3. The First Respondent was the corporate employer of Ms Hope Madison (the Employee) and the Second Respondent is the sole Director and Secretary, and controlling mind of the First Respondent responsible for its daily management.

4. The First Respondent owns and conducts a nursing home which the Employee, an adult, was employed as a part-time personal care worker. She commenced her employment on 12 March 2007. She ceased her employment approximately one week prior to the hearing. The relevant period, however, in respect of when the agreed contraventions occurred was from 12 March 2007 to 28 February 2011 (the relevant period). It is to be noted that after 28 February 2011, the Employee continued her employment for another 12 months in circumstances where she was paid her full entitlements under the applicable industrial award.

5. The nursing home is the only one conducted by the First Respondent. The Second Respondent has no interest or involvement with any other. To all intents and purposes, it is the family business of the Second Respondent in which he is fully occupied, with assistance from other members of his family. The nursing home has 30 beds and caters primarily for clients incapable of caring for themselves and is generally people under the administration of the State Trustee because of their infirmities.

6. When the Employee first commenced her employment, she was paid $50 per shift which increased to $60 per shift after a few months of employment when the Second Respondent was informed, albeit incorrectly, that the appropriate amount was $60.

7. When the Employee was first employed she was also provided, together with her children, with accommodation as well as the flat rate for shiftwork.

8. The agreed statement of facts sets out the chronology of the involvement of the Applicant and the response of the Respondents to the demands made and the issues raised by the Applicant. It is not unfair to say, that once informed of the complaint and of the Applicant's involvement, the Second Respondent diligently and cooperatively assisted the determination of the matter, complying in a timely manner with requests and, in my view, in a timely manner in paying the calculated underpayments due to the Employee, once known. I note that in a letter sent to the Applicant's Inspector the Second Respondent stated that he was "very disappointed to find that he had underpaid" the Employee. He went on to say that the "underpayment was unintentional".

The nature of the contraventions

9. In summary, the Respondents employed the Employee to do two to three night shifts per week for which she was provided with a flat rate per shift, and accommodation. She was not provided with an hourly rate of pay, sleepover allowance, shift penalties, weekend penalty rates, paid accrued annual leave or paid accrued personal/carer's leave, and she was never provided with payslips. The Respondents did not keep proper employment records, nor did they provide payslips as required. Declarations setting out the breaches and contraventions of these legislative requirements concerning the Employee's employment are set out in the agreed consent declarations.

Legislative Framework

10. For the purposes of this determination, the significant legislative framework is that which provides for the maximum penalties applying to corporations and individuals for each breach of the WR Act, the Pre-Modern Award and contravention of the FW Act and the Modern Award. In respect of the First Respondent, the maximum penalty for each breach is $33,000 and in respect of the Second Respondent, the maximum penalty is $6,600. In relation to penalties associated with the failures to keep proper employee records and provide payslips, the maximum penalties are $16,500 for the First Respondent and $3,300 for the Second Respondent for each

contravention. And for those breaches governed by the Workplace Relations Regulations, the maximum penalty is $5,500 for the First Respondent and $1,100 for the Second Respondent. If one applies those maximum penalties for each one of the admitted breaches and contraventions (23 in total) then the First Respondent would be liable for a penalty of $671,000 and the Second Respondent to a maximum penalty of $134,200.

The legal principles governing the setting of penalties

11. The Applicant's submissions set out the principles of law applying with which the Respondents agree. In summary, a significant consideration is that the penalty overall imposed is appropriate and the sum of the penalties imposed for civil contraventions does not result in the total of penalties exceeding what is proper, having regard to the totality of the contravening conduct involved. (See *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd*[1]; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith*[2] ("McAlary-Smith"); *Mornington Inn Pty Ltd v Jordan*[3] ("Mornington Inn")).

12. In *ACCC v Safeway*, Goldberg J cited with approval the comments of Spencer J in *McDonald v R*[4] where he said that the sentence for each offence should be "properly calculated in relation to the offence for which it is imposed", by which statement it is taken to imply that before imposing a final penalty, an initial step should be to impose a penalty proportionate for each contravention and thereafter as a check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved.

13. Goldberg J's approach has been regularly followed in the Federal Court (see *Ponzio v B & P Caelli Constructions Pty Ltd & Ors*[5]; *Kelly v Fitzpatrick*[6]).

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1 (1997) 145 ALR 36 at 53 per Goldberg J
2 (2008) 165 FCR 560 at 567 per Gray J; and 581-583 per Buchanan J
3 (2008) 247 ALR 714 at 727
4 (1994) 48 FCR 555
5 (2007) 158 FCR 543 per Jessup J
6 (2007) 166 IR 14 at [30] per Tracey J

14. In *McAlary-Smith*, Buchanan J referred to the list of factors approved by Tracey J in *Kelly v Fitzpatrick* as "potentially relevant and applicable". In doing so, Tracey J approved the factors as set out by Mowbray FM in *Mason v Harrington Corporation Pty Ltd T/AS Pangaea Restaurant & Bar*[7]. That list of factors is important in the determination of penalty in this particular case; but they are by no means an exclusive list or a prescriptive list. They are as follows:

- The nature and extent of conduct which led to the breaches;
- The circumstances in which the conduct took place;
- The nature and extent of the loss sustained by the Employee;
- Whether there had been similar previous conduct by the respondent;
- Whether the breaches are 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;
- The party committing the breach had exhibited contrition;
- Whether the party committing the breach had given 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 of investigation and enforcement of employee entitlements; and
- The need for specific and general deterrence.

15. In *McAlary-Smith,* Buchanan J noted that the above considerations are a useful checklist but at the end of the day the Court's task is to fix a

[7] [2007] FMCA 7

penalty which pays appropriate regard to the circumstances in which the contraventions have occurred, and the need to sustain public confidence in the statutory regime which imposes the obligations (see *McAlary-Smith* at 580 per Buchanan J).

16. In *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No. 3)*[8] (*"Kentwood"*), McKerracher J applied a four-step approach to determining the appropriate penalty as follows:

> *(i) Each contravention of each separate obligation is a separate contravention and it is necessary to identify the maximum penalty for each separate contravention;*
>
> *(ii) it is necessary then to consider an appropriate penalty to impose with respect of each contravention (whether a single contravention alone or as part of a course of conduct), having regard to all of the circumstances of the case;*
>
> *(iii) to the extent that two or more contraventions have common elements, this may be taken into account when considering what the appropriate penalty for each contravention. The respondents should not be penalised more than once for the same conduct and the penalties imposed should be an appropriate response to the respondents' actions; and*
>
> *(iv) having fixed an appropriate penalty for each separate contravention, group of contraventions or course of conduct, a final review of the aggregate penalty is necessary to determine whether it is an appropriate response to the conduct which led to the contraventions.*

17. However, in all of this, an overriding principle is to ensure that the sentence is proportionate to the gravity of the contravening conduct (*Attorney-General (SA) v Tichy*[9]).

18. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No. 2)* [10] at [6] Barker J stated:

> *The purpose to be served by the imposition of penalties is at least threefold:*

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8 [2011] FCA 579
9 (1982) SASR 84 at 92-93
10 (2010) 199 IR 373

(1) *punishment, which must be proportionate to the offence and in accordance with prevailing standards;*

(2) *deterrents, both personal (assessing the risk of reoffending) and general (a deterrent to others who might be likely to offend); and*

(3) *rehabilitation.*

19. When considering whether the contraventions arose from the one course of conduct, even if embodying multiple breaches, the Court can have regard to whether there is an inter-relationship between the legal and factual elements of the contraventions (see *Construction, Forestry, Mining and Energy Union v Williams*[11]).

20. Finally, on the question of the grouping of breaches, where appropriate, Gray J in *Gibbs v The Mayor, Councillors and Citizens of the City of Altona*[12], explained the operation of 719(2) of the WR Act (before it was renumbered) in the following terms:

> *The object of s.178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breaches of one obligation merely because it has a acted in breach of another. This reasoning leads to the conclusion that each separate obligation found in an award is to be regarded as "term", for the purposes of s.178 of the Act. The ascertainment of what is a term should depend not on matters of form, such as how the award maker has chosen to designate by numbers or letters the various provisions of an award, but on matters of substance, namely, the different obligations which can be spelt out. For these reasons, I incline to the view that each separate obligation imposed by an award is to be regarded as a "term", for the purposes of s.178 of the Act. If the different terms impose cumulative obligations or obligations that substantially overlap, it is possible to take into account the substance of the matter by imposing no penalty, or a nominal penalty, in respect of breaches of some terms, but a substantial penalty in respect of others.*

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[11] (2009) 191 IR 445 at 454
[12] (1992) 37 FCR 216 at 233

Submissions on penalty

21. The first significant issue between the parties was how the various admitted contraventions should be grouped. It was the contention of the Applicant that there are nine distinct groupings in respect of the 23 admitted breaches, they being as follows:

- failure to pay minimum wage;
- failure to pay sleepover allowance;
- failure to pay shift penalty;
- failure to pay weekend penalty rates;
- failure to pay public holidays;
- failure to provide accrual and grant of annual leave;
- failure to provide personal/carer's leave;
- failure to keep proper records of employment; and
- failure to provide payslips.

22. The Respondents, however, maintain that all of the 23 contraventions flow from a single course of action; that the calculation of the appropriate penalty should be based upon the grouping as one, which would have resulted in a maximum penalty of $33,000 for the First Respondent, and $6,600 for the Second Respondent.

23. I do not accept the Respondents' submission in relation to how the various breaches should be grouped, and it is clear that the Applicant's submissions in that regard is correct, having regard to the authorities on these matters. Accordingly, when the accumulated maximum penalty for the nine groupings is aggregated, the total penalty for the First Respondent is $253,000, and for the Second Respondent, $50,600.

24. When asked, the Applicant indicated to the Court that in respect of those maximum penalties, the Applicant was seeking a penalty in the range of 20% - 40%. In monetary terms, that would result in an imposition on the First Respondent of a penalty of $50,600 - $101,200,

and for the Second Respondent, $10,120 - $20,240. Even at the lower end of the range proffered by the Applicant, for the reasons addressed below, I am persuaded that such penalties would be oppressive and not proportionate to the admitted breaches and contraventions.

25. In saying that, however, I am very conscious of the seriousness of the breaches in that they occurred over an extensive period of time, the Employee was underpaid 55% of her entitlements over the relevant time, and that the amount underpaid of $51,706.17 was significant. However, in the exercise of my discretion and after having regard to some of the relevant factors as set out below, when considering the totality of the circumstances of these contraventions and the Respondents' circumstances, I am of the view that the appropriate penalty should be set at the rate of 5% of the maximum penalty for each of the Respondents; namely, $12,650 for the First Respondent and $2,530 for the Second Respondent.

Consideration of factors

Nature and extent of conduct which led to the breaches

26. The Respondents admit the contraventions and breaches that arose from their conduct in paying the Employee a flat rate per night shift without any regard to hourly rates and other penalties associated with sleepovers, public holidays, weekend penalties, shift penalties, the accrual of annual leave and person/carer's leave. It is very evident that they failed to keep adequate records of employment and provide payslips. This conduct was over a period of approximately four years. This conduct represents a significant failure on the part of the Respondents to comply with statutory employment obligations, and it happened in an industry which is notorious for its low rates of minimum pay. Whilst the Second Respondent set a rate, I accept in ignorance, of $50 per shift, which he increased to $60 per shift when advised by friends in the industry that that was the appropriate rate, they manifestly failed to undertake the task imposed upon every employer to ensure that he complies with employment laws, and provide the minimum level of wage, benefits and conditions dictated by relevant industrial awards. His plea of ignorance and

overwork which were made through his Counsel, do not carry any weight in the mitigation in respect of this basic obligation on all employers.

27. Whilst, as discussed below, the Second Respondent has a very significant, ongoing workload and has to cater for the demands of many people in a small business where margins are tight, and capacity to demand higher fees is restricted by a requirement that his charges be peaked to a figure lower than the income of his clients who are in receipt of Social Security, there is no getting away from this overarching responsibility which demands priority when engaging staff.

The circumstances in which the conduct took place

28. The First Respondent conducted a "supported residential service" with a facility for 30 clients, all of whom are under the administration of the State Trustee pursuant to VCAT Administrative Orders, and all of whom suffer a disability, principally in respect of mental capacity. I accept that the Second Respondent, his wife, and another family first purchased the business some years ago, and thereafter, as two families conducted the business working together. However, the other family withdrew leaving the burden to fall to the Second Respondent and his wife which necessitate the employment of two to five part-time staff.

29. However, at a time ill-defined, it appears the Second Respondent's wife set up her own business, and her involvement in the subject business ceased, leaving the burden to fall squarely on the Second Respondent's shoulders, and thereafter, to assist, the employment of the Employee. Some of the administrative burden that did fall to the Second Respondent included the organisation and attendance to medical care for his clients, the housing and feeding of his clients, the supervision of the distribution of prescribed medicines, the provision of two external trips for the clients each week, and the provision of entertainment - to name but a few of the burdens, obligations and tasks that fell, and continue to fall, upon his shoulders.

30. That being so, however, one cannot lose sight of the fact that the Employee was vulnerable by reason of the fact that she was a

low-skilled worker who was largely reliant on minimum terms and conditions of employment offered by the respective industrial instruments. It appears the Employee came to the notice of the Second Respondent as a prospective employee through a mutual contact. At the time of the commencement of her employment, the Employee was required by Centrelink to undertake further work, and retraining, and part of that process was her work with the First Respondent.

31. Indeed, it appears that the reason for her ceasing employment one week prior to the hearing arose from the fact that Centrelink required her to extend her times of employment, and although the Second Respondent offered increased hours, they were not sufficient and her employment ceased as a consequence. The Second Respondent advises that he was unable to offer her more time than what he did. There was no suggestion by either party that there was any malice between the Employee and the respondent, which is perhaps evidenced by her continued employment for over a year after the Applicant became involved.

Nature and extent of loss or damage

32. The Applicant submits that the underpayment, $51,706.17, is significant in that it applies to only one employee, and the failure to pay the minimum entitlements of the Employee at the basic hourly rate, in respect of an employee that is not highly paid and is reliant on minimum terms and conditions of relevant industrial instruments which adds, perhaps, a sense of exploitation of the vulnerable and an obligation on an employer when considering the employment of a prospective employee to ensure that minimum wages are paid.

33. As stated earlier, in percentage terms the underpayment represented 55% of the Employee's entitlement during the relevant period.

34. The Applicant also makes issue about the number of contraventions (23 in total), but it is fair to say that the number, beyond 9, represents changes in legislation and, but for those changes the true number of contraventions would be 9. Nonetheless, 9 in itself is a significant number, and it reflects the Respondents' failure to comply with their obligation to ensure that they meet their legal obligations and that their

grossly simplistic approach to payment of the Employee's wages is reflected in the non-payment of, first, minimum hourly rates, secondly, all those extra penalties and allowances properly due to the Employee for the periods of time she worked.

35. In similar fashion, the failure to keep records in respect of the Employee's employment, and to provide her with payslips can only be described as grossly inadequate in the context of generally understood obligations within the community in relation to record-keeping by businesses of wages paid at times worked.

36. The Respondents, it must be noted, received a benefit from the underpayments during the period 12 March 2007 to 28 February 2011. The underpayments are significant, and the benefit during the relevant period to the Respondents is also significant. The detriment, however, to the Employee, particularly having regard to her dependence on her low income, is very significant. To have had that money to hand at the time she was entitled to it would no doubt have been of great assistance to her. The amount underpaid was approximately $10,000 per financial year.

37. Against that, however, once the Respondents were informed of the underpayment amount, it was paid within one month by the raising of finance, which finance has incurred a monthly commitment of $500.

Similar previous conduct

38. The Respondents have not previously been prosecuted in relation to any non-compliance with Australian workplace laws. However, the affidavit of Ms McLeod informs the court that the Applicant's records show that a complaint was made to the Applicant by an employee in January 2005, and a further complaint was made by the same employee in October 2007. These two complaints were rectified in a timely fashion, and no prosecutions ensued. However, the nature of the first complaint was that the employee had not been paid the correct minimum rate of hours worked, and had not received a shift allowance to which she was entitled.

39. Her second complaint also alleged that she hadn't received the correct hourly rate of pay. In light of these two earlier complaints, it ill

behoves the Second Respondent to plead ignorance of his liabilities and obligations under workplace laws. He cannot complain that he was ignorant of the requirement for minimum hourly rates, as he does in respect of the Employee in these proceedings. The distinction between how the Employee was paid relative to those other part-time employees he has, is that he believed that night shift was to be differently categorised, facilitated by a sleepover with demands placed upon the Employee would not be regular, only that there be someone on the premises to provide assistance when required.

40. These two previous complaints, in my view, diminished the contention by the Second Respondent of his lack of knowledge more generally about workplace laws and obligations. At the very least he should have been warned that employment of staff requires of the employer to be fully informed by a reliable source as to what legal obligations arise, and this, I would suggest, although employing the Employee in a different capacity, would have required him, as a matter of prudence, to inquire as to what industrial instrument governed the Employee's employment, and having informed himself of that, what would be the minimum payment to be made, how it is to be calculated and what other obligations are imposed in relation to the employment of the Employee.

Whether the breaches arose out of the one course of conduct

41. I have already indicated that the Respondents argue that there was one principal course of conduct; namely, the employment of the Employee two to three nights per week on a flat nightly rate and in doing so, the Respondents suggest that they were not aware there was any other obligation.

42. But as stated, that argument has been rejected and the Applicant's categorisation and groupings on the breaches and contraventions has been accepted.

Size of the business

43. The Applicant suggests that the evidence leads to a conclusion that the First Respondent is not a large employer and does not have dedicated

human resources personnel, but argues that no reduction should be afforded to the Respondents because of this. The Applicant further contends that regardless of the size of the business or its financial structures or position, the First Respondent is not absolved of its legal responsibilities to comply with the law in relation to the employment of its employees. That contention cannot be cavilled with, but the size of the business and the resources open to the business, nevertheless, is a consideration and factor to be taken into account when determining penalty. For instance, a large company with human resources personnel would indeed attract less sympathy from the courts and be more worthy of condemnation than an individual employer employing one employee. Indeed, as Tracey J in *Kelly v Fitzpatrick* at [28] stated:

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

44. The statement by Tracey J above is apposite to the present case but the question here, as in other cases, is the setting of an appropriate monetary sanction and at a "meaningful level".

45. Again, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [13] at [27], it was said:

> *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.*

46. On the basis of the above, the Applicant contends that the size of the business provides no excuse for noncompliance. However, in my view, there is more than the size of the business to be taken into account. Certainly, it cannot be said that size alone dictates whether there should be special consideration on penalty, but size in conjunction with other factors such as its continued viability, the obligation to third parties that may be affected by its continued viability and the benefits more

[13] [2007] FMCA 1412

generally given to the community by its continued existence as a viable business, are also factors to be taken into account in the context of size, where size may dictate capacity to pay penalties. This aspect also has to be seen in the context of providing a general deterrent as well as a specific deterrent, which is discussed in more detail below.

47. As stated earlier, this business, based upon the admitted financial statements of the First Respondent for the years ending 30 June 2010 and 30 June 2011, is a small business with limited margins, and more importantly, limited capacity to increase its source of income because of the nature of its clients and the restrictions imposed on the fees to be charged to its clients, as stated above.

48. I am satisfied on the perusal of the financial statements, after allowing wages to staff which include wages to the Second Respondent, fringe benefits by way of provision of car and depreciation allowed on various listed items, both the First Respondent and the Second Respondent do not have a great liquid money capacity to pay the range of the penalties sought by the Applicant, which, if imposed, may cause financial distress to the business and to the Second Respondent, which should that happen, may put at risk the clients of the business who are in special need of accommodation at the facility offered by the Respondents.

49. Whilst Counsel for the Respondents argued about how the imposition of heavy penalties would impost upon the continuing conduct of the business, it was not put so high as to suggest its foreclosure, but it was put with the suggestion that in order to meet the penalties, something may have to give in relation to the service offered by the First Respondent. I say this only by way of highlighting that there are ramifications and flow-ons from imposing harsh and onerous penalties in that there is the potential to hurt others which should be given some consideration in these matters. As opposed to that consideration, however, there is the reality of the hurt and loss caused to the Employee, who herself, for reasons previously stated, was a vulnerable individual. The dilemma created by these circumstances is one that has been taken into consideration in considering the totality principle discussed below.

Deliberateness of the breaches

50. The Second Respondent has maintained throughout the involvement of the Applicant that he was "very disappointed to find that he had underpaid" the employee, stating also that the underpayment was "unintentional". Despite this, the evidence shows that, in respect of the "overnight shift", the Employee was present at work for periods of up to 14 hours. For this she was paid a flat rate initially of $50 and later $60 per shift. The Applicant acknowledges that although she was not required to perform duties for the entire period, the Respondents nevertheless, because of their previous dealings with the Applicant, knew of obligations in respect of other employees working during the day to pay per hour for active duty in accordance with the appropriate industrial instruments.

51. The Applicant suggests that the Respondents were either reckless or negligent in showing a complete disregard of their obligations to pay the employee her minimum entitlements in accordance with the law. In this regard, I agree totally with the categorisation of the Applicant. It needs to be noted however that there is no evidence that would support a finding that the Respondents acted deliberately and with malice in respect of setting the wage for the Employee. And after being informed of their error, they freely made admissions and cooperated fully with the Applicant and reimbursed the Employee in respect of her underpayment in a timely manner.

Involvement of senior management

52. The Second Respondent does not contest his involvement as the sole director and secretary of the First Respondent and that he was "the directing mind and will" of the First Respondent. He also accepts that he was responsible for the day-to-day management, direction and control of the First Respondent. There is no evidence before the Court that the contraventions were attributable to any other person or agent, other than the Second Respondent. However, as stated earlier, the Second Respondent contends that it was the pressure and stress of work trying to run a small business on his own that caused him to be reckless or negligent in complying with his obligations.

Contrition, corrective action, cooperation with authorities

53. The Applicant concedes that the First Respondent provided available records and additional documents to the Applicant to enable the underpayments to be extrapolated. The Second Respondent also participated in a recorded interview to assist the Applicant in its investigation.

54. I am satisfied that shortly after commencing proceedings, the Respondents made full admissions to all contraventions alleged by the Applicant. The Respondents worked with the Applicant to file both consent orders and the statement of agreed facts. By these actions, the Respondents have reduced the drag on and use of resources and costs that would otherwise have been required by the Applicant in relation to a contested hearing as to their liability.

55. Again, the Applicant acknowledges that the Respondents have considerably shortened and assisted the litigation process, and reduced the cost to the public purse, by admitting liability in agreeing to the statement of agreed facts. This has led to the matter progressing to a hearing on penalty only.

56. In *Mornington Inn*, Stone and Buchnan JJ at [76] stated:

> *...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 fairly be said that an admission of liability (a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret and/or (b) has indicated a willingness to facilitate the course of justice.*

57. In my view, the conduct of the Respondents in this proceeding meets those two criteria and a discount on penalty is warranted in this particular instance.

58. Indeed, the Applicant acknowledges that the Second Respondent has shown a level of contrition and that the conduct of the

Second Respondent, as outlined above, may be considered a factor in the mitigation of penalty. In saying that, however, the Applicant also says that such conduct has already been factored into its assessment of penalties.

Ensuring compliance with minimum standards

59. The principal objects of the WR Act and the FW Act emphasise the importance of an effective safety net of minimum terms and conditions of employment, together with effective enforcement of those minimum standards.

60. The importance of this is reflected, not only in the magnitude of the maximum penalties imposed in respect of any breach of an applicable provision, but also in the legislative increase of those maximum penalties in August 2004, whereby the maximum penalty for individuals increased from $2,000 to $6,600, and the maximum penalty for bodies corporate increased from $10,000 to $33,000.

61. Those principal objectives of the WR Act and the FW Act underpin our industrial relations system to ensure employees are paid a fair and reasonable rate for their labour and not be subjected to exploitation. At first blush, a consideration of this case's bare essential elements may very well lead to a conclusion that these principal objectives have been disregarded in such a way as to advance the First Respondent's interests at the detriment of those of the Employee. This is not an unreasonable position to adopt, but there is no evidence before the Court of any malice on the part of the Respondents, as evidenced by a mistaken, but voluntary, increase in the payment made to the Applicant for shift work based upon a misunderstanding, the cooperation fully with the Applicant when notified of the breaches and the payment in a timely fashion of the underpayment, not to mention the fact that the Employee continued to work for another 12 months and, it would appear, only ceased her employment due to an inability of the employer to provide the extra work necessitated by a demand placed upon the Employee by Centrelink.

Specific and general deterrents

62. In *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union*[14] per Gray J at [37]:

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

63. The Applicant submits that there is a need for specific deterrence in this case. The Respondents continue to operate the business and continue to employ people. In doing so, the Applicant highlights the Respondents' noncompliance with industrial laws as set out above and suggests that that is an example which justifies the Respondents being penalised in such a manner as to leave no doubt that underpayment of wages will not be tolerated and this is particularly the case where vulnerable employees are involved.

64. In regard to the issue of specific deterrence, I am satisfied that the penalty I intend to impose as set out above, amounts to a significant impost upon the Second Respondent, and indeed, also the First Respondent. The likelihood of them reoffending, notwithstanding that they employ people who command relatively low minimum hourly rates and are generally less skilled, the experience of this litigation and the penalties imposed would significantly militate, in my view, against them reoffending.

65. The question of general deterrence, however, is a bit more problematic. In *Ponzio v B & P Caelli Constructions Pty Ltd*, Lander J at [93] stated:

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

[14] (2008) 171 FCR 357

section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson (1975) 11 SASR 217."

66. Now, the Applicant submitted that general deterrence is important in this particular case. The Respondents, it was contended, operate in an industry which employs, largely, low-skilled workers, relies on minimum entitlements set in Modern awards and the FW Act. In this context the Applicant submitted, there is a need to send a message to the community at large, and small employers in particular, that the correct entitlements for employees must be paid and that steps must be taken by employers (of all sizes) to ascertain and comply with minimum entitlements, as opposed to ignoring those obligations. It was emphasised that compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (such as accountants, consultants and lawyers).

67. I accept the purport and thrust of the Applicant's contentions in this regard, but in the exercise of my discretion, I am of the view that the penalty I intend to impose serves as that need. A penalty for the First Respondent of $12,650 is a penalty that alerts those in the Respondents' industry, in my view, to the need for compliance and the consequences of non-compliance, and also alerts that need in the minds of all small employers.

Totality principle and "instinctive synthesis"

68. As set out in *Kentwood* by McKerracher J as the fourth step to be followed, it falls to me to form a view as the penalty proposed is an appropriate response to the conduct which led to the contravention. In my view, to impose a penalty greater than the one I have already indicated would amount to an oppressive and crushing imposition on the Respondents.

Conclusion

69. It is very important that any penalty imposed underpins the strength and principles governing industrial law by setting an appropriate

penalty that acts as both a general and specific deterrent which also is not an oppressive or crushing penalty. In my view the penalties I have determined meet these objectives.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of O'Dwyer FM

Associate:

Date: 19 JUNE 2012