**FEDERAL CIRCUIT COURT OF AUSTRALIA AT MELBOURNE**

**MLG 1018 of 2012**

**FAIR WORK OMBUDSMAN**
Applicant

And

**HONGYUN CHINESE RESTAURANT PTY LTD (IN LIQUIDATION) (ACN 131 069 084)**
First Respondent

And

**ZHU CHANG RONG**
Second Respondent

And

**TAO MOQIN**
Third Respondent

# REASONS FOR JUDGMENT

## Introduction

1. This matter concerns contraventions of various industrial laws. The parties filed a statement of agreed facts on 4 December 2012, in which admissions were made by all three respondents. On 30 January 2013, the first respondent went into voluntary liquidation. The liquidator considers that it is unlikely that a dividend will be paid to creditors.

Because of the liquidation, the applicant did not pursue the application against the first respondent.

2. The first respondent is a corporation. The second and third respondents were directors of the first respondent. The second respondent held 30% of the shares in the first respondent. The third respondent held 40% of the shares in the first respondent.

3. The first respondent conducted a Chinese restaurant. Between about 1 January 2009 and 13 May 2011, the first respondent employed Mr Xiliang Su in the restaurant's kitchen. Mr Xiliang Su is a Chinese national who was in Australia on a bridging visa. Mr Xiliang Su was classified as a cook grade 1 under the *Restaurant Industry Award 2010* ("the Award").

4. The second and third respondents, in relation to Mr Xiliang Su, admitted their involvement within the meaning of s.550 of the *Fair Work Act 2009* ("the FW Act") in the first respondent's contraventions of s.45 of the FW Act as a result of first respondent's contraventions of the following provisions of the Award:

   a) clause A.7.3 of Schedule A and clause 34.1 in relation to penalty rates;

   b) clause 20.1 in relation to minimum wages;

   c) clause 33.1(a) in relation to overtime; and

   d) clause 38.2 in relation to a public holiday.

5. In addition, the second respondent, in relation to Mr Xiliang Su, admitted being involved within the meaning of s.550 of the FW Act in the first respondent's contraventions of:

   a) s.44 of the FW Act as a result of the first respondent's contraventions of a provision of the National Employment Standards, namely, s.92 of the FW Act in relation to annual leave upon termination; and

   b) s.45 of the FW Act as a result of the first respondent's contravention of clause 35.2(b) of the Award in relation to annual leave loading.

6. The first respondent also contravened its obligations in relation to superannuation contributions and record keeping. However, the second and third respondents were not involved in those contraventions.

## The detail of the contraventions

### a. the penalty rate contraventions

7. The parties agreed in their statement of agreed facts that:

> *35. For the period from 1 July 2010 to 13 May 2011 the First Respondent was required by clause 34.1 of the Modern Award and clause A.7.3 of Schedule A of the Modern Award to pay the Employee $20.83, being a penalty rate of 30% in addition to the Employee's Minimum Wage (the **Penalty Rate**), where the hours worked by the Employee were:*
>
> *(a) worked on a public holiday;*
>
> *(b) within the first 38 hours of work performed by the employee in a week; and*
>
> *(c) not subject to Overtime Rates,*
>
> *(collectively, **Penalty Hours**).*
>
> *36. The First Respondent contravened section 45 of the FW Act by virtue of contravening clause 34.1 of the Modern Award and clause A.7.3 of Schedule A of the Modern Award by failing to pay the employee the Penalty Rate for Penalty Hours worked by the Employee (the **Penalty Rate Contraventions**).*
>
> *37. The Penalty Rate Contraventions resulted in the First Respondent underpaying the Employee **$276.88** ... .*

### b. the minimum wage contraventions

8. The parties agreed in their statement of agreed facts that:

> *22. On and from the first full pay period on or after 1 July 2010 the First Respondent was required to pay the Employee $609.00 per week for work performed pursuant to clause 20.1 of the Modern Award (the **Employee's Minimum Wage**).*

23. *For the period 5 July 2010 to 13 May 2011 the First Respondent contravened section 45 of the FW Act by virtue of contravening clause 20.1 of the Modern Award by failing to pay the Employee the Employee's Minimum Wage (the **Underpayment Contraventions**).*

24. *The Underpayment Contraventions resulted in the First Respondent underpaying the Employee **$5,806.52** ... .*

## c. the overtime contraventions

9. The parties agreed in their statement of agreed facts that:

29. *At all material times the First Respondent by was required by clause 31.1 of the Modern Award to ensure the Employee's arrangement of ordinary hours met all of the following requirements:*

(a) *minimum of six hours and maximum of 11 and a half hours may be worked on any one day. The daily minimum and maximum hours are exclusive of meal breaks;*

(b) *no more than 10 hours per day for three consecutive days without a break of at least 48 hours;*

(c) *no more than eight days of more than 10 hours may be worked in a four week period;*

(d) *a minimum break of 10 hours between the finish of ordinary hours on one day and the commencement of ordinary hours on the next day; and*

(e) *a minimum of eight full days off per four week period,*

*(collectively, the **Arrangement of Ordinary Hours**).*

30. *For the period from on or about 1 January 2010 to 13 May 2011 the First Respondent was required by clause 33.1(a) of the Modern Award to pay the Employee the following overtime rates set out at clause 33.2 of the Modern Award for all hours worked outside the Arrangement of Ordinary Hours (**Overtime Hours**):*

(a) *between midnight Friday and midnight Saturday – 175% of the Employee's base rate of pay for the first two Overtime Hours, then 200% of the Employee's*

*base rate of pay for the remaining Overtime Hours; and*

*(b) between midnight Saturday and midnight Sunday – 200% of the Employee's base rate of pay for all Overtime Hours,*

*(collectively, the **Overtime Rates**).*

*31. Overtime rates on any one day stand alone pursuant to clause 33.3 of the Modern Award.*

*32. For the period from 27 December 2010 to 13 May 2011 the Employee worked seven days per week with the exception of the week ending 2 January 2011 where the Employee had the RDO.*

*33. The First Respondent contravened section 45 of the FW Act by virtue of contravening clause 33.1(a) of the Modern Award by failing to pay the Employee Overtime Rates for any Overtime Hours worked (the **Overtime Contraventions**).*

*34. The Overtime Contraventions resulted in the First Respondent underpaying the Employee **$5,051.04** ... .*

**d. the public holiday contravention**

10. The parties agreed in their statement of agreed facts that:

*25. At all material times, when a rostered day off for the Employee fell on a public holiday, the First Respondent was required by clause 38.2 of the Modern Award to either:*

*(a) pay the Employee an extra day's pay;*

*(b) provide the Employee with an alternative day off within 28 days; or*

*(c) provide the Employee with an additional day's annual leave.*

*26. The Employee had a rostered day off on 1 January 2011 which was a public holiday (the **RDO**).*

*27. In relation to the RDO the First Respondent contravened section 45 of the FW Act by virtue of contravening clause 38.2 of the Modern Award by failing to:*

(a) *pay the Employee an extra day's pay;*

(b) *provide the Employee with an alternative day off within 28 days; or*

(c) *provide an additional day's annual leave to the Employee,*

*(the **Public Holiday Contravention**).*

28 *The Public Holiday Contravention resulted in the First Respondent underpaying the Employee **$99.73** ... .*

**e. the annual leave contraventions**

11. The parties agreed in their statement of agreed facts that:

*38. Upon termination of the Employee's employment, the First Respondent was required by:*

(a) *section 90(2) of the FW Act to pay to the Employee an amount that would have been payable to the Employee for any untaken annual leave that the First Respondent would have been obliged to pay the Employee had the Employee taken that period of untaken annual leave; and*

(b) *clause 35.2(b) of the Modern Award to pay an additional loading of 17.5% of any payments made pursuant to section 90(2) of the FW Act.*

*39. For the period from 5 July 2010 to about 13 May 2011 the Employee:*

(a) *accrued annual leave; and*

(b) *did not take any annual leave.*

*40. The Employee resigned his employment on or about 13 May 2011 without providing any notice to the First Respondent **(Termination)**.*

*41. As at the date of the Employee's Termination, the Employee had 131.42 hours of untaken annual leave.*

*42. The First Respondent contravened:*

(a) *section 44(1) of the FW Act by virtue of contravening section 90(2) of the FW Act; and*

*(b) section 45 of the FW Act by virtue of contravening clause 35.2(b) of the Modern Award,*

*(c) by failing to make any payment in relation to the Employee's outstanding accrual of annual leave upon the Termination (the **Annual Leave Contraventions**).*

*43. The Annual Leave Contraventions resulted in the First Respondent underpaying the Employee **$2,475.38** ... .*

12. The parties agreed that the first respondent underpaid Mr Xiliang Su $14,927.83, after taking into account the amount the first respondent was entitled to withhold because Mr Xiliang Su did not give notice of termination. The second respondent was involved in contraventions that resulted in underpayments to Mr Xiliang Su that totalled $13,709.55. The third respondent was involved in contraventions that resulted in underpayments to Mr Xiliang Su that totalled $11,234.17.

## Declarations

13. There has been authority in the past to the effect that it is not appropriate for a court to make declarations based on admissions. However, there is more recent authority that in certain cases it is appropriate for the court to make declarations in such circumstances.

14. In particular, in *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665; [2008] ASAL 55-176; [2007] ATPR 42-138; [2006] FCA 1427, Kiefel J, at paragraphs 52 to 59, considered the rationale for the previous approach taken by the courts. Her Honour came to the view the previous that approach may no longer be warranted, particularly in public interest cases such as this, and particularly if the declarations are preceded by a statement that they are made upon admissions.

15. In all the circumstances of this case, I am satisfied that it is appropriate to make the declarations sought by the applicant on the basis of the admissions made by the respondents, provided that the declarations are preceded by an appropriate preamble. Those declarations are:

a) The second respondent was involved in a contravention by the first respondent of, and pursuant to s.550 of the *Fair Work Act 2009*, is taken himself to have contravened:

i) section 90(2) of the *Fair Work Act 2009* and therefore section 44(1) of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct annual leave entitlements upon termination;

ii) clause 20.1 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct minimum rate of pay;

iii) clause 33.1(a) of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su overtime rates;

iv) clause 34.1 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su penalty rates;

v) clause 35.2(b) of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct annual leave entitlements upon termination;

vi) clause 38.2 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct public holiday entitlements; and

vii) clause A.7.3 of Schedule A of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su penalty rates; and

b) The third respondent was involved in a contravention by the first respondent of, and pursuant to section 550 of the *Fair Work Act 2009* is taken herself to have contravened:

i) clause 20.1 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct minimum rate of pay;

ii) clause 33.1(a) of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su overtime rates;

iii) clause 34.1 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su penalty rates;

iv) clause 38.2 of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su the correct public holiday entitlements; and

v) clause A.7.3 of Schedule A of the *Restaurant Industry Award 2010*, and therefore section 45 of the *Fair Work Act 2009* by failing to pay Mr Xiliang Su penalty rates.

## Approach to determining penalty

16. The proper approach to determining penalty in cases such as this is as follows. The first step for the court is to identify each separate contravention involved. Multiple breaches which occurred in a single course of conduct may be treated as a single breach.

17. The second step is for the court to consider an appropriate penalty to impose in respect of each breach, whether as a single contravention or as a course of conduct.

18. The third step is for the court to take into account the extent, if any, to which two or more contraventions have common elements. A person should not be penalised more than once for the same conduct. The penalty imposed by the court should be an appropriate response to the contravenor's conduct.[1] This is a separate process from the application of the totality principle.[2]

19. The fourth step is for the court to apply the totality principle. This requires the court to consider the aggregate penalty overall, and

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

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

determine whether it is an appropriate response to the conduct which led to the breaches.[3] The court, in this step, makes an "instinctive synthesis".[4]

## Maximum penalty

20. The applicant submitted, and the second and third respondents did not dispute, that:

> *3.11 Regulation 14.4 of the WR Regulations (in conjunction with section 846(2)(g) of the WR Act) provides that the maximum penalty that may be imposed by this Court in relation to contraventions of the WR Regulations, for bodies corporate is 50 penalty units and for individuals is 10 penalty units.*
>
> *3.12 Section 546(2) of the FW Act prescribes that the maximum penalty that may be imposed by this Court:*
>
> *(a) in relation to contraventions of sections 44(1) and 45 of the FW Act, for bodies corporate is 300 penalty units and for individual is 60 penalty units; and*
>
> *(b) in relation to contraventions of sections 535(1) and 536(2) of the FW Act, for bodies corporate is 150 penalty units and for individuals is 30 penalty units.*
>
> *3.13 Section 4 of the WR Act and section 12 of the FW Act provide that "penalty unit" has the same meaning as in the* Crimes Act 1914 *(Cth) (**Crimes Act**). At the relevant time, section 4AA of the Crimes Act defined "penalty unit" to be $110.*
>
> *3.14 Accordingly, the maximum penalty that can be imposed by the Court in relation to contraventions of:*
>
> *(a) a provision of the WR Regulations by:*
>
> *(i) the First Respondent is $5,500 (as a body corporate);*
>
> *(ii) the Second and Third Respondents is $1,100 (as individuals);*
>
> *(b) sections 44(1) and 45 of the FW Act by:*

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[3] See *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] (Tracey J) (Kelly); *Ophthalmic*, supra at [23] (Gray J), [71] (Graham J) and [102] (Buchanan J).
[4] *Ophthalmic*, supra at [27] (Gray J) and [55] and [78] (Graham J).

*(i) the First Respondent is $33,000 (as a body corporate);*

*(ii) the Second and Third Respondents is $6,600 (as individuals);*

*(c) sections 535(1) and 546(2) of the FW Act by:*

*(i) the First Respondent is $16,500 (as a body corporate); and*

*(ii) the Second and Third Respondents is $3,300 (as individuals).*

21. I accept those submissions.

22. The applicant accepted that the second and third respondents had the benefit of s.557(2) of the FW Act in relation to repeated breaches of civil remedy provisions and accepted that the second and third respondents' contraventions should be grouped in such a way that:

a) the maximum penalties that should be imposed on the second respondent total $33,000, consisting of:

i) $6,600 for the minimum wage contraventions;

ii) $6,600 for the overtime contraventions;

iii) $6,600 for the penalty rates contraventions;

iv) $6,600 for the public holiday contravention; and

v) $6,600 for the annual leave contravention; and

b) the maximum penalties that should be imposed on the third respondent total $26,400, consisting of:

i) $6,600 for the minimum wage contraventions;

ii) $6,600 for the overtime contraventions;

iii) $6,600 for the penalty rates contraventions; and

iv) $6,600 for the public holiday contravention.

23. I accept those submissions. Apart from the groupings set out above, which reflect courses of conduct, there are no common elements in the contraventions.

## The matters to be considered in determining penalty

24. A convenient checklist of the factors that the court might consider in determining penalty include the matters that were identified by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [26]-[59] and adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [14]. That list is as follows:

> *(a) The nature and extent of the conduct which led to the breaches.*
>
> *(b) The circumstances in which that conduct took place.*
>
> *(c) The nature and extent of any loss or damage sustained as a result of the breaches.*
>
> *(d) Whether there had been similar previous conduct by the respondent.*
>
> *(e) Whether the breaches were properly distinct or arose out of the one course of conduct.*
>
> *(f) The size of the business enterprise involved.*
>
> *(g) Whether or not the breaches were deliberate.*
>
> *(h) Whether senior management was involved in the breaches.*
>
> *(i) Whether the party committing the breach had exhibited contrition.*
>
> *(j) Whether the party committing the breach had taken corrective action.*
>
> *(k) Whether the party committing the breach had cooperated with the enforcement authorities;*
>
> *(l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and*
>
> *(m) The need for specific and general deterrence.*

25. The court must of course be mindful of the caution expressed by Buchanan J in *Australian Opthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8 at [91] as follows:

> *Check lists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a 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. There is no suggestion in the present case that the learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties.*

26. The court will firstly consider the circumstances of the case under the various headings suggested by Mowbray FM, and then consider whether any other matters are relevant.

## The nature and extent of the conduct which led to the breaches

27. The second and third respondents were involved in repeated underpayments of Mr Xiliang Su that continued over a prolonged period of time. The second and third respondents were involved in contraventions of multiple provisions which are designed to provide a safety net for vulnerable workers and an even playing field for employers.

## The circumstances in which that conduct took place

28. The second and third respondents managed the Chinese restaurant conducted by the first respondent. Mr Xiliang Su is a Chinese national with a limited grasp of the English language. As such, it is likely that Mr Xiliang Su would have had difficulty knowing and enforcing his rights under Australian workplace laws. At all material times, Mr Xiliang Su was on a bridging visa. For these reasons Mr Xiliang Su may be characterised as a vulnerable employee.

## The nature and extent of any loss or damage sustained as a result of the breaches

29. Mr Xiliang Su was underpaid $14,927.83 over a period of about 11 months. Overall, he was paid about 33% less than he should have been paid. For his overtime hours, Mr Xiliang Su received less than 50% of his correct wages.

## Whether there had been similar previous conduct by the respondent

30. The court was not told of any previous similar conduct by the respondents.

## Whether the breaches were properly distinct or arose out of the one course of conduct

31. The first respondent paid Mr Xiliang Su a flat rate of pay for all hours that he worked. The result was that the first respondent breached numerous different provisions. Gray J said in *Gibbs v the Mayor, Councillors and Citizens of the City of Altona* (1992) 37 FCR 216; (1992) 42 IR 255; [1992] FCA 374 at 223:

> *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 breach of one obligation, merely because it has acted in breach of another.*

32. Consequently, it is not appropriate to group the various breaches any more than has been indicated above.

## The size of the business enterprise involved

33. It appears that the respondents' business was a relatively small one, with no dedicated human resources personnel. Nevertheless, there is ample authority that such circumstances are no excuse for contraventions of laws providing for workplace entitlements. Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [28]:

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

*"must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13].*

34. Similarly, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412, Driver FM said at [27]:

> *Employers must not be left under the impression that because of their size or financial difficulty that they are able to breach an award. Obligations by employers for adherence to industrial instruments arise regardless of their size and such a factor should be of limited relevance to the Court's considerations of penalty.*

**Whether or not the breaches were deliberate**

35. There was no evidence that the second and third respondents intended to breach their obligations towards Mr Xiliang Su and no evidence that they knew what their obligations were. Nevertheless, it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates.

**Whether senior management was involved in the breach**

36. The second and third respondents were the first respondent's directors and shareholders, to the extent of 30% and 40% respectively. They both admitted to being aware of Mr Xiliang Su's working hours and the wages actually paid to him.

**Whether the party committing the breach has exhibited contrition, corrective action and co-operation with the authorities**

37. When these proceedings were commenced, the first respondent undertook to make full rectification. However, the first respondent has only made a partial rectification payment of $4,070.53, and has also paid the outstanding superannuation contributions of $2,464.85. There remains outstanding $8,420.74. The first respondent is now in liquidation.

38. There is no evidence of any apology by any of the respondents. The second and third respondents have not voluntarily made up the shortfall in the amount owing to Mr Xiliang Su.

39. The respondents eventually cooperated with the authorities by filing with the court an agreed statement of facts. Doing so substantially reduced the amount of court time that needed to be devoted to this case.

40. On the other hand, during the course of the investigation, the second respondent made inconsistent allegations regarding Mr Xiliang Su's hours of work and made false allegations about work restrictions imposed by Mr Xiliang Su's visa.

**The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements**

41. Clearly, the respondents in this case have not complied with minimum standards of employee entitlements.

**The need for specific and general deterrence**

42. In relation to specific deterrence, Gray J observed in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170 at [37] that:

> *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.*

43. In relation to general deterrence, Lander J noted in *Ponzio v B & P Caelli Constructions Pty Ltd and Others* (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65 at [93]:

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

*the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217.*

44. Similarly, in *Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 228; [2001] FCA 1364 at 230-231, Finkelstein J said:

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

45. More recently, Marshall J said *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557 at [29]:

> *It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected.*

46. In my view, there is a considerable need for general deterrence in this case. There is a significant risk of underpayments in the restaurant industry, and, as the employees in that industry are often vulnerable people, the prospect of detection is not great.

47. Although the first respondent is no longer trading, and the second and third respondents may well be suffering a financial setback, there is no reason to conclude that they will not employ people in the future. They have not demonstrated any remorse, or awareness that their conduct towards Mr Xiliang Su was wrong. Their participation in the filing of a statement of agreed facts may be no more than a recognition that the evidence against them was overwhelming. In these circumstances, I consider that the need for specific deterrence is considerable.

## Other issues

48. I do not consider that there are any other relevant matters.

## The amount of the penalties for the breaches

49. I note that the proper approach in determining penalty is to impose a penalty for each contravention, and then, as a check, to consider

whether the aggregate penalty is appropriate for all of the contraventions as a whole: *Ponzio v B & P Caelli Constructions Pty Ltd and Others* (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65.

50. The applicant submitted that the appropriate penalties are in the range of $14,025 to $19,635 for the second respondent and $11,220 to $15,708 for the third respondent, which are about 42.5% to 59.5% of the maximum penalties.

51. The second and third respondents did not propose any particular range of penalties, but sought a stay of ninety days. The applicant was agreeable to that.

52. In my view, the penalties to be imposed on the second and third respondents should be close to the top of the range proposed by the applicant. The second and third respondents were closely involved in the contravening conduct. They were directors and shareholders of the first respondent, but also its day to day managers. They might not have deliberately contravened workplace laws but there is no indication that they acted on their responsibility to ascertain the relevant entitlements of Mr Xiliang Su. For the reasons discussed above, there is a need in this case for significant levels of both general and specific deterrence. While some discount is appropriate for the willingness of the second and third respondents to agree to the filing of a statement of agreed facts, there is no real indication of remorse or an understanding of their wrongdoing. The first respondent, under the direction of the second and third respondents, made only partial rectification for the underpayments. The contraventions in this case resulted in a very significant underpayment of a particularly vulnerable worker.

53. In my view, the appropriate penalties for the second respondent are:

    i) $3,900 for the minimum wage contraventions;

    ii) $3,900 for the overtime contraventions;

    iii) $3,900 for the penalty rates contraventions;

    iv) $3,900 for the public holiday contravention; and

v) $3,900 for the annual leave contravention

making a total of $19,500.

54. In my view, the appropriate penalties for the third respondent are:

i) $3,900 for the minimum wage contraventions;

ii) $3,900 for the overtime contraventions;

iii) $3,900 for the penalty rates contraventions; and

iv) $3,900 for the public holiday contravention

making a total of $15,600.

## The totality principle

55. In relation to the check that is required by the totality principle, I consider that the aggregate penalties indicated above are appropriate for the whole of the contravening conduct engaged in by the second and third respondents. No admissible evidence of the financial position of the second and third respondents was proffered to the court. In the absence of any evidence about the financial circumstances of the second and third respondents, I do not consider these penalties to be crushing. I consider them to reasonably reflect the entirety of the second and third respondent's conduct.

## Payment of penalties

56. Part of the penalty payable by each of the second and third respondent will be payable to Mr Xiliang Su to make up for the existing shortfall in his wages.

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**I certify that the preceding fifty-six (56) paragraphs are a true copy of the reasons for judgment of Judge Riley**

Associate: Rose Hopkins

Date: 24 April 2013