FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN V HUMIDIFRESH INDUSTRIES PTY LTD & ANOR [2012] FMCA 954

INDUSTRIAL LAW – Unpaid wages – pecuniary penalty – *Fair Work Act 2009* (Cth) – first respondent in liquidation – determination of penalty – whether the breaches arose out of a single course of conduct – consideration of appropriate penalty – nature and extent of the conduct – reasons for termination – whether the conduct was amplified by a lack of change in the personal circumstances of the second respondent – application of the General Employee Entitlements and Redundancy Scheme – loss borne by the Commonwealth – specific deterrence – deliberateness of the breach – whether there should be a discount in penalty – specific deterrence required – maximum penalty imposed.

Fair Work Act 2009 (Cth), ss.14, 546(1)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Workplace Relations Act 1996 (Cth), s.6

CPSU v Telstra Corporation Ltd (2001) 108 IR 228
Kelly v Fitzpatrick (2007) 166 IR 14
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	HUMIDIFRESH INDUSTRIES PTY LTD
Second Respondent	GARY NORTH
File Number:	BRG 851 of 2011
Judgment of:	Burnett FM
Hearing date:	18 September 2012
Date of Last Submission:	18 September 2012

Delivered at:	Brisbane
Delivered on:	18 September 2012

REPRESENTATION

Counsel for the Applicant:	
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the First Respondent:	
Solicitors for the First Respondent:	
Counsel for the Second Respondent:	Mr J. Stavris
Solicitors for the Second Respondent:	

ORDERS

THE COURT DECLARES THAT:

(1) By failing to pay John Paul Condie and Stephen David Sellick payment in lieu of notice, as required by clause 4.7.2(c) of the Notional Agreement Preserving State Awards derived from the *Engineering Award – State 2002* (Engineering NAPSA), the First Respondent contravened Item 2(1) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (Transitional Act).

(2) By failing to pay John Paul Condie, Stephen David Sellick, Michael Luke Jazvic and Michael Danger Patterson severance pay, as required by clause 4.9.6 of the Engineering NAPSA, the First Respondent contravened Item 2(1) of Schedule 16 of the Transitional Act.

(3) The second respondent, by reason of section 550(1) of the *Fair Work Act* 2009 (Cth) (FW Act), was involved in the contraventions at paragraphs 1 and 2 above and has contravened the provisions in paragraphs 1 and 2 above.

THE COURT ORDERS THAT:

(4) Pursuant to section 546(1) of the FW Act, the second respondent pay:

(a) $6,600 as a pecuniary penalty in respect of the contravention identified in paragraph 1 above (failure to pay payment in lieu of notice); and

(b) $6,600 as a pecuniary penalty in respect of the contravention identified at paragraph 2 above (failure to pay severance pay).

(5) The penalties payable by the second respondent referred to in paragraph 4 above, be paid to the Commonwealth Consolidated Revenue Fund on or before 18 December 2012.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

No. BRG 851 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

HUMIDIFRESH INDUSTRIES PTY LTD
First Respondent

GARY MARTIN NORTH
Second Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. In this application, the applicant, the Fair Work Ombudsman, seeks orders against the second respondent, Gary Martin North. Those orders include declarations and orders for the imposition of pecuniary penalties. The declarations sought are as follows:

    a) That the first respondent, by failing to pay John Paul Condie and Stephen David Sellick payment in lieu of notice, as required by clause 4.2.7(c) of the Notional Agreement Preserving State Awards derived from the *Engineering Award - State 2002* (Engineering NAPSA), contravened item 2(1) of schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act); and

    b) By failing to pay Condie, Sellick, Michael Luke Jazvic and Michael Danger Patterson severance pay on termination as

required by clause 4.9.6 of the Engineering NAPSA, the first respondent contravened item 2(1) of schedule 16 of the Transitional Act.

2. Declarations are also sought that the second respondent contravened the provisions of those paragraphs.

3. Consequently, the applicant seeks orders against the second respondent under s.546(1) of the *Fair Work Act 2009* (Cth) (FW Act) to impose pecuniary penalties. I should note at this time that the first respondent is now in liquidation and, accordingly, the applicant no longer proceeds against it.

4. The second respondent has admitted to his involvement in the contraventions in his capacity as one of the directors of the first respondent and as a member of the first respondent's management team. He accepts that there has been a contravention of clause 4.7.2 of the Engineering NAPSA in the failure to make payment in lieu of notice of termination in relation to Condie and Sellick, and also that there was a contravention of clause 4.9.6 of the Engineering NAPSA involving a failure to pay severance pay on termination to Condie, Sellick, Jazvic and Patterson. It is also admitted that the sum total of salary and benefits owed by reason of the contraventions was $18,019.82.

5. At all relevant times the first respondent was a national system employer within the meaning of s.14 of the FW Act and an employer within the meaning of s.6 of the *Workplace Relations Act 1996* (Cth). It carried on business as a refrigeration and cold room designer, installer and repairer. Its business was based at Acacia Ridge, Queensland. It employed each of the four relevant employees, they being:

   a) John Paul Condie, who was employed from 15 September 2003 to about 4 November 2009;

   b) Stephen David Sellick from about 1 October 2007 to about 11 November 2009;

   c) Michael Luke Jazvic from about 1 February 2007 to about 11 November 2009; and

d) Michael Danger Patterson from about 2 January 2008 to about 11 November 2009.

6. All these events occurred well before the company was placed under external administration and into the hands of a liquidator on 18 October 2011. It is worthy of note, as was submitted on behalf of the applicant, that despite the lengthy period that passed between the time of termination and the appointment of the liquidator almost two years later, no payment was ever made by either of the respondents or others involved with the enterprise to any of the employees.

7. The second respondent was one of two directors of the first respondent. I am informed by the second respondent's counsel that the other director was Scott North, his brother. The shareholders were the second respondent, his brother and his father. There were also involved in the management of the company various employees, including Mr Sellick. Mr Sellick was a refrigeration mechanic and Condie, Jazvic and Patterson acted as apprentices or refrigeration mechanics for all or part of that period.

8. They were classified under the applicable industrial instruments which were relevant at the time. The relevant provisions were essentially those of the Engineering Australian Pay and Classification Scale (APCS), which derived from schedule 1 of the Engineering Award, or alternatively the APCS which derived from schedule 22, clause 2.1.1 of the *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) Order 2003* (Apprentices Order). The Engineering Award applied to Condie and Sellick and the Apprentices Order to Jazvic and Patterson.

9. The underpayments themselves are expressed in Attachment A to the Statement of Claim, which notes the various periods of employment, the hourly rates, the entitlement to pay in lieu, the sums that were paid, severance pay paid, severance pay owed and a total for each employee. In broad terms, Condie was owed $8,466.40 on termination; Sellick, $5,281.24 on termination; Jazvic, $2,869.38 on termination; and Patterson, $1,402.81 on termination.

10. The basis for calculation of those amounts can be seen from a review of Attachment A and the Statement of Agreed Facts. Broadly, those

sums are made up of the payments that the respective employees were entitled to in terms of payment in lieu of notice on termination and/or severance pay which varied according to the length of service provided by each of the employees, a detail which is not necessary to be closely examined for the purpose of this exercise.

11. The first respondent terminated the employment of each of the employees because of redundancy. They were not terminated as a function of the ordinary and customary turn over of labour. In letters that were written by the first respondent to the employees on 28 October 2009, the first respondent relevantly stated:

> *"It is with regret that I have to advise that due to slow economic times and a downturn in business for the later part of this year, your services will no longer be required with this company. As I can't see this changing in the short term I have few options but to release you from your services with this company.*
>
> *Your efforts have been appreciated till today but we have to gear back to survive the current down turn [sic]."*

12. I have already noted that the letter was written on 28 October 2009. I point that out for two reasons: firstly because submissions were made on behalf of the second respondent that the global financial crisis played a significant role in these matters and secondly because it was submitted that the business survival of the first respondent was impacted by the floods that had affected Brisbane and, in particular, the Rocklea region in January 2011. Plainly, the January floods had no bearing upon the downturn in business, although it is arguable that any effect of the floods may have borne upon the appointment of the liquidator in October 2011.

13. When it comes to determining penalty, the established approach for the court is to consider four matters, the first being to identify the separate contraventions involved. I have earlier addressed those in broad terms. They are contraventions in respect of the failure to pay payments in lieu as well as contraventions in respect of payments of severance pay. Secondly, there is a need to consider the extent to which two or more contraventions of common elements should be grouped together. In this instance, the first group involved two employees and the second

involved four, and I proceed on the basis that they are grouped in that manner.

14. Thirdly, the court will need to consider an appropriate penalty to impose in respect of the course of conduct, having regard to the circumstances of the case and then, finally, having fixed an appropriate penalty for each group of contraventions, the court should then look at the totality of that penalty. At the outset, it is important to note that the maximum penalty that can be imposed in this matter in respect of each contravention, because it involves an individual, is 300 penalty units, which has a value of $6,600 and totals $13,200 for both contraventions.

15. The contraventions where they have common elements ought be grouped together, although where there are contraventions of two distinct terms of an industrial instrument, they are not to be treated as a single contravention, even if they arise out of the one course of conduct. That is apposite here, remembering that the contraventions effectively occurred on the same occasion but they relate to separate award obligations.

16. It has been previously determined, and I accept, that there is a non-exhaustive list of factors potentially relevant to the imposition of penalty, and I will touch upon those that I think are relevant in this instance. First, concerning the nature and extent of the conduct, the applicant became aware of the contraventions between November and December of 2009 when it received complaints of underpayments of wages by the employees. I have already noted that the total of the underpayments is approximately $18,000. It is, of course, noteworthy that the complaint was made soon after the time of termination and well before the company was put into liquidation.

17. It is further noted that the underpayments affected four employees, two of whom could be regarded as vulnerable because of their age and status as apprentices. In addition, one of the employees was a member of the management team. I note also that the second respondent was a member of the management team and that he was responsible for the day to day management, direction and control of the first respondent's operation, including setting wages and conditions for the employees and terminating their employment.

18. Arguably, as is contended by the applicant, the circumstances suggest that he demonstrated a complete disregard for the first respondent's obligations to pay the employees their entitlements on termination of employment. Given the submissions that were made following inquiry by me, this is a factor amplified by the fact that at the time of these events the second respondent was in receipt of a salary of $1,600 per week plus the benefit of a car for his employment.

19. The circumstances, according to the respondent, are generally that the need to terminate these employees arose because of a downturn in business following the global financial crisis. I accept that submission, although it does puzzle me somewhat, given that the business was involved in the refrigeration of fresh foods, a part of the economy not as adversely affected by the global financial crisis as other parts of the economy that involve discretionary expenditure related businesses. As food is a staple product, enterprises in that industry sector would have been somewhat more immune to the effects of the global economic crisis; nevertheless they are the submissions and I take them at face value.

20. As far as the loss is concerned, underpayment to all the employees totals $18,019.82. I am informed by the applicant that, thanks to the General Employee Entitlements and Redundancy Scheme (GEER Scheme), the employees will not lose out by reason of the conduct of the first respondent, that is, that non-payment will be funded by the taxpayer through the GEER Scheme. It follows that the loss will ultimately be borne by the Australian taxpayer rather than by the individual employees themselves. Because of the scheme of the FW Act the directors will not be required to indemnify the loss.

21. In my view that matter is of particular moment, especially given the structure of the Act, which does not permit me to impose any reparation award or compensation award against the second respondent to account for the GEER payments. He is simply to be subject to penalty on the basis of his involvement as a director. For directors and shareholders of small enterprises to abandon their obligations in the process of closing one company and then, phoenix-like, to rise with the next, continuing what is in essence the same style of business, is unacceptable. To allow them to leave in their wake a trail of unpaid

wages and benefits damages, in the knowledge that there would be no direct recourse, to me seems counterintuitive. It would incentivise directors to fail in the fulfilment of a director's proper obligations in the conduct of enterprises under their control, particularly in circumstances such as this where the value of unpaid wages and benefits far exceeded the maximum penalty that could be imposed.

22. There is no evidence of any similar previous conduct in this instance and I take that factor into consideration. The breaches, as I have earlier noted, arose out of two breaches of the Engineering NAPSA and I need say no more about that. So far as the size of the business is concerned, it is agreed that the first respondent was not a large employer. It was, I am told, a company which had two directors and three shareholders. It was a closely held corporation in that sense. The shareholders and directors were all related. However, the size ought not be a matter of great moment, as was observed by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14:

> *"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]."*

23. Likewise, in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412, it was said by a member of this Court, and I agree, that:

> *"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."*

24. I move now to the question of the deliberateness of the breach. In the applicant's submissions, it is contended that it is not clear whether there was a deliberate campaign on behalf of the respondents to underpay the employees. However, and I accept, it can be said that the respondents were either reckless or negligent in showing a complete

disregard of their obligations to pay the employees their minimum entitlements on termination.

25. This factor, I think, is amplified by the fact that the second respondent does not appear to have suffered terribly at all during this period. His wage was $1,600 per week plus a car before and during the course of these events. It appears that his current enterprise pays him $1,600 per week plus a car. It does not seem to me that the events, apart from the trouble in winding up one enterprise and starting another, have had a significant personal affect upon the second respondent at all.

26. The fact that a complaint was made by the employees shortly after the termination occurred, and within two years the enterprise had been wound up and another stood up, suggests that there may have been something more along the lines contended for by the applicant, that is, that there was recklessness or negligence in the respondents' disregard of obligations.

27. There is no question in this instance that the action of the enterprise involved senior management. It is no answer to that to suggest, as I think is to be inferred from the submission made by the respondent's counsel, that one of the employees was himself employed as a manager. Perhaps it was only intended to be an innocent reference to the differential pay rates, and for that purpose and that purpose only I accept that submission as relevant.

28. I certainly do not accept as relevant any submission to the effect – if it was intended – that Mr Sellick's role in management would have had any bearing upon this matter. I doubt very much that Mr Sellick would have been inclined to engage in a contravention that would have impacted materially and adversely upon him in the way in which these contraventions plainly did.

29. The only involvement of senior management is that of the second respondent and his co-director, Mr Scott North, who for reasons best known to the applicant has not been joined as a party to the proceedings. That is not to ignore the fact that the second respondent himself could have made application under the Court's rules to have that other party joined, notwithstanding the complications in the Act, so that the responsibility for these events could have been shared in the

manner in which I infer the second respondent says ought to occur as a matter of fairness.

30. So far as contrition, corrective action and cooperation with the authorities is concerned, it is urged upon me by both parties that there should be some discount to recognise the fact that there has been an early plea. The range is between the 25 to 30 per cent, which is provided for in the Fair Work Ombudsman Litigation Policy at clause 17.3. A 20 per cent discount is contended for by the applicant. I am also mindful of the observations made by Branson J in *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70, where her Honour said that:

> *"... 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 v R (2002) 209 CLR 339], that a discount should not be available simply because a respondent has spared the community the cost of a contested trial. Rather, the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability: (a) has indicated an acceptance of wrongdoing and a suitable and credible expression of regret; and/or (b) has indicated a willingness to facilitate the course of justice."*

31. In this case, there are two contraventions which would permit a maximum penalty of $13,200, but the taxpayer has been left with a bill of $18,000 in respect of underpaid wages. To allow a discount in these circumstances, notwithstanding the fact that the parties have come to the court inviting it to consider a discount, would simply send the wrong economic or price signal to those who wish to engage in this sort of behaviour. In my view, a discount is entirely is entirely inappropriate in a case of this kind, and I do not intend to apply a discount. My conclusion is, in part, informed by the following matters which concern both general and specific deterrence. In *CPSU v Telstra Corporation Ltd* (2001) 108 IR 228, 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 ..."*

32. In my view, this is such a case. Again, without restating the obvious, the economic signal that would be sent by a penalty which is manifestly lower than the sum of actually avoided underpaid wages would be inappropriate. This is particularly pertinent in a circumstance where the director of a closed corporation, who has the potential to gain directly because of his shareholding, permits the corporation to neglect its statutory obligations. In my view, this circumstance invites a court to mark its disapproval of such conduct, and my penalty in this instance will reflect that fact.

33. Finally, in terms of specific deterrence – and I think this is an occasion that calls for specific deterrence – I note the observations of Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357, where his Honour observed:

> *"... 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."*

34. As I have earlier noted, the second respondent is now the alter ego of a phoenix enterprise, which has arisen from the ashes of Humidifresh, and appears, from the description given by his counsel, to be engaged in much the same sort of business. Indeed, its name is not a lot different from that of the first respondent. The new business is called Firm N Fresh Industries International Pty Ltd.

35. In this instance, it is appropriate that the second respondent be the subject of an order that will invite him to specifically consider this sort of conduct in the future. The circumstances, as I have indicated, suggest that there is something at the very least involving recklessness or negligence in his complete disregard for the obligations to pay employees their minimum entitlements on termination, and I rather hope that the penalty will serve to specifically deter him from like conduct in the future.

36. Finally, the court is required to undertake the exercise of the instinctive synthesis test, which requires the court to have regard to the penalty for each contravention, look at the aggregate penalty and determine whether it is appropriate for the conduct which led to the breaches and

is not of itself oppressive or crushing. It would be plain from the observations I have made earlier that I consider the appropriate penalty in this instance to be the maximum that I am permitted to impose, that is, $13,200.

37. When one has regard to the group of contraventions, the circumstances of the contravention and whether or not it represents an appropriate response, I am of the view that it does, particularly because I think it is important, as I have already emphasised, that an economic signal be sent to those who wish to engage in this sort of behaviour to at least inform them that they may save a little, but not a lot, if they choose to adopt the course that was followed in this instance.

38. In the circumstances, I will make the declarations which are sought and I will impose a penalty of $6,600 in respect of each penalty, which will give a total of $13,200.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Burnett FM.

Date: 1 November 2012