

FEDERAL MAGISTRATES COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v NERD GROUP
AUSTRALIA PTY LTD & ANOR (No. 3)*

[2012] FMCA 891

INDUSTRIAL LAW – Failure to produce employment records – penalty.

Corporations Act 2001 (Cth), s.471B
Fair Work Act 2009 (Cth), ss.3(b) and (e), 546(1), 550, 557, 712
Fair Work Regulations 2009 (Cth)

Alcantara & Anor v Buildpower Pty Ltd (No.2) [2010] FMCA 763
Attorney-General v Tichy (1982) 30 SASR 84
*Australian Building and Construction Commissioner v Construction, Forestry,
Mining and Energy Union* [2011] FCA 810
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560;
[2008] FCAFC 8
*Construction, Forestry, Mining and Energy Union v Austral Bricks (Qld) Pty
Ltd* (2009) 178 IR 470; [2009] FMCA 143
Fair Work Ombudsman v Finetune Holdings Pty Ltd & Anor (No. 2) [2012]
FMCA 349
Fair Work Ombudsman v Industrial Roadpavers (WA) Pty Ltd (2010) 194 IR
436; [2010] FMCA 204
Fair Work Ombudsman v Nerd Group Australia Pty Ltd & Anor (No. 2) (2012)
262 FLR 315; [2012] FMCA 6
Johnson v R (2004) 205 ALR 346; [2004] HCA 15
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Klousia v TKM Investments Pty Ltd & Anor [2009] FMCA 208
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70
*NW Frozen Foods Pty Ltd v Australian Competition and Consumer
Commission* (1996) 71 FCR 285
Olsen v Sterling Crown Pty Ltd (2008) 177 IR 337; [2008] FMCA 1392
Pearce v R (1998) 194 CLR 610
Ponzio v B & P Caelli Constructions Pty Ltd and Ors (2007) 158 FCR 543;
[2007] FCAFC 65
Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd [2008]
FCA 1545
Workplace Ombudsman v Golden Maple (2009) 186 IR 211; [2009] FMCA 664

Applicant:

FAIR WORK OMBUDSMAN

First Respondent: NERD GROUP AUSTRALIA PTY LTD
Second Respondent: JACK CRAIG GARBER
File Number: PEG 38 of 2010
Judgment of: Lucev FM
Hearing date: On the papers
Date of Last Submission: 23 July 2012
Delivered at: Perth
Delivered on: 26 September 2012

REPRESENTATION

Counsel for the Applicant: Mr R L Hooker
Solicitors for the Applicant: Australian Government Solicitor
Counsel for the First and Second Respondents: Mr C P Stokes
Solicitors for the First and Second Respondent: Chris Stokes & Associates

ORDERS

- (1) In relation to the declarations on 11 May 2012 of contraventions by the second respondent, the second respondent pay a penalty of \$5,280 to the Commonwealth Consolidated Revenue Fund by 26 October 2012.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT PERTH**

PEG 38 of 2010

FAIR WORK OMBUDSMAN
Applicant

And

NERD GROUP AUSTRALIA PTY LTD
First Respondent

JACK CRAIG GARBER
Second Respondent

REASONS FOR JUDGMENT

Application and background

1. By an Amended Statement of Claim filed on 29 July 2010, the applicant, the Fair Work Ombudsman,¹ alleged that on two occasions the first respondent, Nerd Group Australia Pty Ltd² contravened s.712(3) of the *Fair Work Act 2009* (Cth),³ by failing to comply with a notice to produce⁴ records or documents.⁵
2. In the Amended Statement of Claim, the FW Ombudsman also alleged that the second respondent, Jack Craig Garber,⁶ was involved in the

¹ "FW Ombudsman".

² "Nerd Group".

³ "*FW Act*".

⁴ "NTP".

⁵ "the contraventions".

⁶ "Mr Garber".

contraventions,⁷ and was therefore to be treated as also having contravened s.712(3) of the *FW Act*.

3. On 11 May 2012 the Court handed down a judgment in favour of the FW Ombudsman.⁸ Declarations and orders against Nerd Group and Mr Garber were made. The declarations made were as follows:

1. The first respondent, by failing to comply with a Notice to Produce Records or Documents dated 9 November 2009 issued pursuant to s.712 of the Fair Work Act 2009 (Cth) to make available copies of the following records in relation to Tingka Lin:

(a) all time and wage records, including timesheets and pay slips;

(b) any documents relating to employment classification, job description, duties and employment status;

(c) documents relating to commencement date and termination details;

(d) signed Tax File Declaration Form; and

(e) contract of employment,

contravened s.712(3) of the Fair Work Act 2009 (Cth).

2. The second respondent has, in respect of the contravention of the Fair Work Act 2009 (Cth) referred to in paragraph (1) above:

(a) aided, abetted, counselled or procured the first respondent to engage in the contraventions; and

(b) was directly or indirectly, knowingly concerned in, or party to the contraventions;

for the purposes of s.550 of the Fair Work Act 2009 (Cth), and has therefore contravened s.712(3) of the Fair Work Act 2009 (Cth).

3. The first respondent, by failing to comply with a Notice to Produce Records or Documents dated 30 March 2010 issued pursuant to s.712 of the Fair Work Act 2009 (Cth) to make

⁷ *FW Act*, s.550.

⁸ *Fair Work Ombudsman v Nerd Group Australia Pty Ltd & Anor (No 2)* (2012) 262 FLR 315; [2012] FMCA 6 (“*Nerd Group (No. 2)*”).

available copies of the following records in relation to Craig Blackie:

- (a) all time and wage records, including timesheets and pay slips;*
- (b) any documents relating to employment classification, job description, duties and employment status;*
- (c) documents relating to commencement date and termination details;*
- (d) signed Tax File Declaration Form; and*
- (e) contract of employment,*

contravened s.712(3) of the Fair Work Act 2009 (Cth).

4. The second respondent has, in respect of the contravention of the Fair Work Act 2009 (Cth) referred to in paragraph (3) above:

- (a) aided, abetted, counselled or procured the first respondent to engage in the contraventions; and*
- (b) was directly or indirectly, knowingly concerned in, or party to the contraventions,*

for the purposes of s.550 of the Fair Work Act 2009 (Cth), and has therefore contravened s.712(3) of the Fair Work Act 2009 (Cth).

4. On or about 29 November 2011, and unknown to this Court until submissions in respect of penalty were filed, an order was made by the Federal Court of Australia in Perth to wind up Nerd Group and appoint a liquidator.⁹ The FW Ombudsman therefore does not seek orders relating to the imposition of penalties against Nerd Group as any action against a wound up company is stayed.¹⁰
5. The FW Ombudsman now seeks orders pursuant to s.546(1) of the *FW Act* that Mr Garber pay pecuniary penalties by reason of his involvement in Nerd Group's contraventions outlined above, and seeks orders that any penalties imposed on Mr Garber be paid to the Commonwealth Consolidated Revenue Fund within 28 days of any order being made.

⁹ See affidavit of Scott Graydon Clarke, sworn 23 July 2012, at para.3.

¹⁰ *Corporations Act 2001 (Cth)*, s.471B.

6. Mr Garber filed no submissions in relation to penalty, which, in accordance with earlier consent orders between the parties, is to be decided on the papers.

Penalty – general principles and considerations

General principles concerning penalty

7. The federal courts have regard to general principles which have been developed in relation to the imposition of penalties in workplace relations matters, including the following:
- a) fundamentally, the penalty must be proportionate to the gravity of the contravening conduct;¹¹
 - b) penalties are imposed for the following purposes:
 - i) punishment, proportionate to the offence and according to prevailing standards;
 - ii) personal or specific deterrence, assessing the risk of reoffending, and general deterrence, as a deterrent to others who might be likely to offend; and
 - iii) rehabilitation;¹²
 - c) the sentencing task is one of instinctive synthesis in which the court takes account of all relevant factors and arrives at a single result taking due account of all of those relevant factors;¹³
 - d) proportionality and consistency are a final check on the penalty assessed;¹⁴
 - e) courts may identify a range of factors appropriate to the assessment of penalty, but ought to be wary of the use of check lists which “*give rise to the risk of transforming the process of*

¹¹ *Attorney-General v Tichy* (1982) 30 SASR 84 at 92 per Wells J; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at para.25 per Gilmour J (“*ABCC*”).

¹² *Ponzio v B & P Caelli Constructions Pty Ltd and Ors* (2007) 158 FCR 543 at 559-560 per Lander J; [2007] FCAFC 65 at para.93 per Lander J (“*Caelli Constructions*”); *ABCC* at para.26 per Gilmour J.

¹³ *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at 567-568 per Gray J and 572 per Graham J; [2008] FCAFC 8 at para.27 per Gray J and para.55 per Graham J (“*Australian Ophthalmic Supplies*”); *ABCC* at para.27 per Gilmour J.

¹⁴ *Australian Ophthalmic Supplies* FCR at 572 per Graham J; FCAFC at para.54 per Graham J; *ABCC* at para.28 per Gilmour J.

*instinctive synthesis into the application of a rigid catalogue of matters for attention”;*¹⁵ and

- f) courts ought also be wary of comparing penalties from other cases when assessing the amount of penalty to be fixed.¹⁶

General considerations relevant to assessment of penalty

8. Considerations which may be taken into account in assessment of penalty are well established and have been consistently applied by this Court,¹⁷ but are not fixed or immutable.¹⁸ Broadly, the relevant factors can be listed as follows:

- a) the nature and extent of the conduct which led to the contraventions;
- b) the circumstances of the conduct (including deliberate defiance or disregard of Commonwealth workplace relations legislation);
- c) the consequences of the contravening conduct;
- d) the objects of Commonwealth workplace relations legislation;
- e) whether the contraventions are distinct or arise from a single course of conduct;
- f) deterrence, both general and specific;
- g) relevant record of civil penalty contraventions;
- h) the size and financial resources of the contravener;
- i) co-operation with regulatory authorities;
- j) the contravener’s contrition;

¹⁵ *Australian Ophthalmic Supplies* FCR at 579-580 per Buchanan J; FCAFC at paras.89-91 per Buchanan J; *ABCC* at para.30 per Gilmour J.

¹⁶ *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 295 per Burchett and Kiefel JJ; *ABCC* at para.31 per Gilmour J.

¹⁷ Examples include: *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Olsen v Sterling Crown Pty Ltd* (2008) 177 IR 337; [2008] FMCA 1392 (“*Sterling Crown*”); *Construction, Forestry, Mining and Energy Union v Austral Bricks (Qld) Pty Ltd* (2009) 178 IR 470; [2009] FMCA 143; *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211; [2009] FMCA 664 (“*Golden Maple*”); *Fair Work Ombudsman v Industrial Roadpavers (WA) Pty Ltd* (2010) 194 IR 436; [2010] FMCA 204 (“*Industrial Roadpavers*”).

¹⁸ *Australian Ophthalmic Supplies* FCR at 580 per Buchanan J; FCAFC at para.91 per Buchanan J; *Golden Maple* IR at 224 per Lucev FM; FMCA at para.11 per Lucev FM.

- k) the size of the prescribed penalty, and any recent increases to that prescription; and
 - l) the totality principle.
9. A number of the factors are relevant to the present matter and are therefore considered below.

Nature and extent of the conduct and circumstances in which the conduct took place

FW Ombudsman's submissions

10. The FW Ombudsman submits that:
- a) on 2 November 2009 Fair Work Inspector Scott Sutherland¹⁹ personally served an NTP²⁰ on Nerd Group at the registered office of Nerd Group.²¹ The First NTP required the production of records pertaining to the employment of Ms Tinka Lin;²²
 - b) on 18 November 2009, Inspector Sutherland wrote to Mr Garber, in Mr Garber's capacity as a director of Nerd Group, noting the failure to comply with the First NTP, and sought a reasonable excuse by 26 November 2009;²³
 - c) on 30 March 2010, Inspector Sutherland personally served an NTP²⁴ on Nerd Group at the registered office of Nerd Group.²⁵ The Second NTP required the production of records pertaining to the employment of Mr Craig Blackie;²⁶
 - d) Nerd Group and Mr Garber have not produced the documents requested in either the First NTP or Second NTP;²⁷

¹⁹ "Inspector Sutherland".

²⁰ "First NTP".

²¹ Citing *Nerd Group (No. 2)* FLR at 332 per Lucev FM; FMCA at para.67 per Lucev FM.

²² Affidavit of Scott Stuart Sutherland, affirmed 24 September 2010 at para.25 and Annexure "K" ("Inspector Sutherland's Affidavit").

²³ Inspector Sutherland's Affidavit at para.30 and Annexure "L" ("the Letter").

²⁴ "Second NTP".

²⁵ Citing *Nerd Group (No. 2)* FLR at 332 per Lucev FM; FMCA at para.68 per Lucev FM.

²⁶ Inspector Sutherland's Affidavit at para.35 and Annexure "N".

²⁷ Citing *Nerd Group (No. 2)* FLR at 332 per Lucev FM; FMCA at para.69 per Lucev FM.

- e) Nerd Group's contravening conduct was a failure to produce records requested by the FW Ombudsman under the First NTP and Second NTP. While the nature of the contraventions themselves is not significant in scope, the conduct of Nerd Group and Mr Garber must be seen in the context of their interaction with Inspector Sutherland prior to the issuing of the First NTP;
- f) Mr Garber, on behalf of Nerd Group, has shown a consistent unwillingness to co-operate with the FW Ombudsman. Prior to issuing the First NTP, Inspector Sutherland had made four formal requests for Ms Lin's employment records.²⁸ Accordingly, there were a number of times during the investigation when Nerd Group and Mr Garber had the opportunity to provide the FW Ombudsman with the records that were requested in the First NTP;
- g) at all relevant times Mr Garber was the sole director and secretary of Nerd Group. Mr Garber was aware of the day to day activities of the business and was the effective controller of Nerd Group.²⁹ The FW Ombudsman submits that these facts allow an inference to be drawn that Mr Garber made the deliberate decision not to provide records and is responsible for failing to provide the records as required by the *FW Act*;
- h) the FW Ombudsman submits that the failure of Nerd Group and Mr Garber to produce the records requested under the First NTP and Second NTP should be considered as serious.³⁰ It involved a deliberate course of conduct and displayed disregard to the *FW Act* and the role of the FW Ombudsman as regulator;
- i) while the consequences of the contravention do not immediately impact upon any person in terms of loss or damage, the FW Ombudsman submits that the loss or damage should be considered in the context of the relevant statutory objective. That

²⁸ Inspector Sutherland's Affidavit at para.11.

²⁹ Citing *Nerd Group (No. 2)* FLR at 357 per Lucev FM; FMCA at para.163 per Lucev FM.

³⁰ Citing *Sterling Crown* IR at 348 per Lucev FM; FMCA at para.35 per Lucev FM.

is, “conduct ... [which] undermines the utility and effectiveness of a fundamental object”,³¹ of the *FW Act*;

- j) one of the principal objects of the *FW Act* is to ensure a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions for all employees.³² In order to enforce minimum terms and conditions, Fair Work Inspectors must be able to exercise their compliance powers effectively. The purpose of the powers conferred on Fair Work Inspectors (such as the power to issue an NTP under s.712 of the *FW Act*) is to provide the FW Ombudsman with effective means for investigating and enforcing compliance with minimum standards and industrial instruments;³³
- k) Nerd Group and Mr Garber’s conduct stifled the FW Ombudsman’s ability to conduct a proper investigation of a complaint made by two employees against Nerd Group. Such conduct undermines the objects and purposes of the *FW Act*; and
- l) the FW Ombudsman submits that, in this context, the effect of the contravention should be considered by the Court as being of similar importance as would be the case if loss or damage were suffered.³⁴

Consideration

11. The nature of the conduct in this case involved a deliberate refusal by Nerd Group and Mr Garber to comply with the First NTP and the Second NTP. Not only was the nature of the conduct deliberate, it was also ongoing, and, at least during the period Mr Garber was in control until Nerd Group was wound up on 29 November 2011, there had still not been compliance with the First NTP or the Second NTP. The extent of the conduct and loss and damage might be said to be limited to the

³¹ Citing *Secretary, Department of Health & Ageing v Pagasa Australia Pty Ltd* [2008] FCA 1545 at para.56 per Flick J (“*Pagasa*”); *Sterling Crown IR* at 350-351 per Lucev FM; FMCA at para.51 per Lucev FM.

³² *FW Act*, s.3(b).

³³ *Fair Work Ombudsman v Finetune Holdings Pty Ltd & Anor (No. 2)* [2012] FMCA 349 at paras.31-42 per Lucev FM.

³⁴ Citing *Sterling Crown IR* at 351 per Lucev FM; FMCA at para.52 per Lucev FM; *Industrial Roadpavers IR* at 446 per Lucev FM; FMCA at para.28 per Lucev FM.

failure to produce the relevant documents. It goes further than that, however, because it involves not merely a failure to comply with the requests in the First NTP and Second NTP, but also has the following consequence:

- a) the powers conferred on Fair Work Inspectors, which are designed to provide the FW Ombudsman with means to investigate and enforce compliance with minimum legislated standards, and industrial instruments, are impaired by a failure to comply with an NTP; and
 - b) employees may be denied their lawful entitlements, or part thereof, because the failure to comply with the NTP means that documents essential to a determination of which entitlements have been complied with are not produced, and entitlements, or partly met entitlements, might not be able to be calculated, properly or at all.
12. The investigative, compliance and enforcement powers of the FW Ombudsman, and the payment to employees of entitlements, are therefore adversely affected by a failure to comply with an NTP. Thus there is damage and loss in the sense of a failure to comply with a statutory objective,³⁵ and “*this effect must be considered as being of similar importance as would be the case if loss and damage were suffered.*”³⁶ By failing to provide the records as requested, Nerd Group and Mr Garber engaged in conduct undermining the utility and effectiveness of the relevant legislative provisions.³⁷
13. In this case, the failure to provide the records involved a course of conduct which was serious, deliberate, and not limited in time because the records have not been produced.

³⁵ *Pagasa* at para.56 per Flick J; *Sterling Crown* IR at 350-351 per Lucev FM; FMCA at para.51 per Lucev FM.

³⁶ *Industrial Roadpavers* IR at 446 per Lucev FM; FMCA at para.28 per Lucev FM.

³⁷ *Industrial Roadpavers* IR at 447 per Lucev FM; FMCA at para.33 per Lucev FM.

Similar previous conduct

14. The Court accepts the FW Ombudsman's submission that Mr Garber is a first time contravener of workplace relations legislation and is thereby entitled to some discount on penalty.

Whether the contraventions arose out of one course of conduct

FW Ombudsman's submission

15. The FW Ombudsman submits that:
- a) Mr Garber has committed two contraventions of s.712(3) of the *FW Act*; that is, a failure to comply with each of the First NTP and Second NTP;
 - b) section 557 of the *FW Act* provides for multiple contraventions of certain civil remedy provisions to be dealt with as a single contravention if those contraventions arose out of a course of conduct exhibited by the same person, but it does not operate in relation to contraventions of s.712(3) of the *FW Act*;³⁸
 - c) the maximum penalty in relation to each of Mr Garber's contraventions is \$6,600, that is a maximum penalty of \$13,200 for the two contraventions;
 - d) it is open to the Court to group separate contraventions together where contraventions may be said to overlap with each other or involve potential punishment for the same or substantially similar conduct;³⁹ and
 - e) the FW Ombudsman accepts that the contraventions have common elements, and that this may be taken into account in considering an appropriate penalty to ensure that Nerd Group and

³⁸ *FW Act*, s.557(2).

³⁹ Citing *Pearce v R* (1998) 194 CLR 610 at para.40 per 623 per McHugh, Hayne and Callinan JJ; *Johnson v R* (2004) 205 ALR 346 at 356-357 per Gummow, Callinan and Heydon JJ; [2004] HCA 15 at paras.27-34 per Gummow, Callinan and Heydon JJ; and *Australian Ophthalmic Supplies*. The Full Court of the Federal Court in *Australian Ophthalmic Supplies* accepted that this approach is open in determining appropriate penalties: FCR at 571 and 576 per Graham J; FCAFC at paras.46 and 72 per Graham J.

Mr Garber are not punished more than once for the same or substantially similar conduct.

Consideration

16. Multiple contraventions of s.712(3) of the *FW Act* are not taken to be a single contravention, as s.712(3) of the *FW Act* is not mentioned in s.557(2) of the *FW Act*, nor is it prescribed, for the purposes of s.557(3) of the *FW Act*, by the *Fair Work Regulations 2009* (Cth). There are, therefore, two separate contraventions. The conduct in relation to the First NTP and the Second NTP did not arise out of one course of conduct. The First NTP and the Second NTP were separated by a period of almost six months, related to different employees, and were the subject of two separate NTPs, with the contravention of the First NTP complete well before the Second NTP issued. In those circumstances, the Court would not, in any event, have been prepared to find that there was one course of conduct in relation to the contraventions.
17. The conduct in relation to the First NTP and the Second NTP was however similar in that it related to a refusal to produce documents in response to an NTP. In the circumstances of this case, the similarity of conduct, especially when separated by such a significant period of time, and having regard to the deliberateness of the conduct,⁴⁰ is such that it does not avail Mr Garber much by way of mitigation of penalty.

Deliberateness of the contravention

FW Ombudsman's submissions

18. The FW Ombudsman submits that:
 - a) Nerd Group and Mr Garber were provided with ample opportunity to provide the records requested in the NTPs, each of which related to only one employee; and

⁴⁰ See para.13 above and paras.19 and 21 below.

- b) the failure by Nerd Group to produce to the FW Ombudsman the documents or records requested in the NTPs was, on each occasion, a wilful contravention.

Consideration

19. The conduct of Mr Garber was deliberate. This is evident from a letter sent under his signature as Managing Director of Nerd Group to Inspector Sutherland on 22 September 2009, the full terms of which are as follows:

Dear Mr Sutherland

In reference to your notice dated 8th September 2009 we reply as follows:

Your notice purports to be issued pursuant to section 700 of the Fair Work Act 2009 (thy Act). There under subsection 712(4) provides a person served is not required to comply with a notice if the person has a reasonable excuse. We hereby assert a reasonable excuse as reason not to comply with your notice.

To that end, we have reviewed the Act and fail to see any provision that reconcile the fact records sought within your notice fall within privacy provision of the Tax Administration Act 1953, the Privacy Act, Income Tax Assessment Act and others, to wit:

All time and wage records, including timesheets and pay slips, and any documents relating to employment classification, commencement date and termination details for Tingka Lin ...

Accordingly, until such time as a reconciliation of the various privacy issues can be satisfactorily provided to the undersigned, we will not be complying with your notice.

Further, we wish to advise you to be very certain and cautious in how you choose to proceed in this matter. We are informed and believe, and thereupon allege your complaining witness has perjured herself in an employment declaration. Therefore, any statements made by this individual should be viewed as not credible and her prior misrepresentations maybe used to impeach any and all statements made in this matter. A word to the wise, be certain this is the case you elect to die on your sword. We will

challenge the validity of your enabling Act to the full extent of the law.

Please advise us of your intentions as soon as piratical. If you decide to continue this matter we will seek further protection, on an interlocutory basis, from either the Federal Courts or the Administrative Appeals Tribunal whichever is applicable under the situation.

*Jack C Garber
Managing Director
Nerd Group Australia Pty Ltd⁴¹*

20. In *Nerd Group (No. 2)* the Court found that the issues raised with respect to privacy provisions in Commonwealth tax administration, privacy and income tax legislation were not reasonable excuses.⁴²

21. Having regard to:

- a) the 22 September 2009 Letter; and
- b) the consideration of the nature and extent of Mr Garber's conduct set out above,⁴³

there can be no doubt that Mr Garber's conduct was deliberate. Deliberate conduct warrants a more significant penalty than conduct which is not deliberate.

Involvement of senior management

FW Ombudsman's submissions

22. The FW Ombudsman submits that:

- a) Mr Garber was the sole director and company secretary of Nerd Group;
- b) during the relevant period, Mr Garber was aware of the day to day activities and was the effective controller of Nerd Group.⁴⁴

⁴¹ Transcribed from the original copy without amendment ("22 September 2009 Letter").

⁴² *Nerd Group (No. 2)* FLR at 347-356 per Lucev FM; FMCA at paras.119-161 per Lucev FM.

⁴³ See paras.11-13 above.

⁴⁴ Citing *Nerd Group (No. 2)* FLR at 357 per Lucev FM; FMCA at para.163 per Lucev FM.

Accordingly, Nerd Group's contraventions are attributable to the actions or omissions of Mr Garber in his capacity as sole director and secretary of Nerd Group;

- c) Nerd Group and Mr Garber have not provided any evidence that the contraventions were attributable to any other person or agent of theirs; and
- d) the high level of involvement by senior management is a factor which aggravates the seriousness of the contraventions in these proceedings.

Consideration

- 23. The fact that the conduct in question is that by the sole director, and the company secretary, who signed correspondence to the FW Ombudsman as the Managing Director of Nerd Group,⁴⁵ is an aggravating factor as to the seriousness of the contraventions by Mr Garber.
- 24. Effectively, Mr Garber controlled Nerd Group. All of the available evidence indicates that he alone was responsible for dealing with workplace relations and employee issues. Whatever was done by Nerd Group was done by Mr Garber, or done at his behest. Senior management of Nerd Group was therefore inextricably intertwined with the acts and omissions of Nerd Group, and had direct knowledge of, and was involved in, the contraventions. The nature of Mr Garber's involvement in the contraventions makes them more serious, particularly in circumstances where there has been, for reasons set out above, a deliberate course of conduct,⁴⁶ and for reasons set out below, a lack of contrition and corrective action, and virtually no co-operation with the FW Ombudsman.⁴⁷

⁴⁵ See para.19 above.

⁴⁶ See paras.13, 19 and 21 above.

⁴⁷ See paras.26-32 below.

Contrition, corrective action, cooperation with enforcement authorities

FW Ombudsman's submissions

25. The FW Ombudsman submits that:
- a) Mr Garber has not :
 - i) accepted responsibility for his conduct; or
 - ii) expressed any contrition in respect of the contraventions;
 - b) Nerd Group and Mr Garber were virtually non co-operative in respect of their obligations to comply with the NTPs; and
 - c) Nerd Group and Mr Garber's conduct demonstrates recalcitrance in providing the records requested under the NTPs.

Consideration

26. There is no evidence of contrition by Mr Garber. Indeed, Nerd Group, through Mr Garber, adopted a course of conduct inconsistent with contrition. Unwisely, in the circumstances, that course of conduct, involved:
- a) belligerently expressed threats of legal action directed to the FW Ombudsman; and
 - b) allegations about a former employee's conduct and credibility, which were irrelevant to compliance with the First NTP,
- with those matters conveyed under the signature of Mr Garber as Managing Director of Nerd Group.⁴⁸
27. The fact that Mr Garber has not taken the time or trouble to file affidavits or submissions in relation to penalty, is further evidence of a lack of contrition.

⁴⁸ See the 22 September 2009 Letter at para.19 above.

28. In the circumstances, there can be no discount on penalty on account of contrition, because there is none.
29. Evident from the reasoning above and in particular the 22 September 2009 Letter set out above, there has been a lack of co-operation with the FW Ombudsman, save for the admission of certain formal matters in *Nerd Group (No. 2)*.⁴⁹ None of those matters, however, would in any event, have been the subject of significant controversy, and most were almost self-evident in the circumstances of this matter.
30. In the circumstances, there has been an almost complete lack of co-operation by Nerd Group, at the behest of Mr Garber, with the FW Ombudsman, and no case is made out for any significant discount on penalty by reason of co-operation with the FW Ombudsman.
31. There is no evidence of corrective action being taken by Nerd Group at Mr Garber's behest prior to Nerd Group being wound up. There is no case for a discount on penalty by reason of appropriate corrective action.
32. Overall, Mr Garber did not evidence, at any stage, credible regret or a real willingness to facilitate the course of justice in these proceedings.⁵⁰

Ensuring compliance with minimum standards

FW Ombudsman's submissions

33. The FW Ombudsman submits that:
 - a) ensuring compliance with minimum standards is an important consideration in the present case. One of the principal objects of the *FW Act* has been the maintenance of an effective safety net of employer obligations, and effective enforcement mechanisms; and
 - b) the substantial penalties prescribed by Parliament for contraventions of provisions such as s.712(3) of the *FW Act*

⁴⁹ *Nerd Group (No. 2)* FLR at 319-320 per Lucev FM; FMCA at para.7 per Lucev FM.

⁵⁰ *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at 405 per Stone and Buchanan JJ; [2008] FCAFC 70 at para.76 per Stone and Buchanan JJ ("*Mornington Inn*"); *Sterling Crown IR* at 357 per Lucev FM; FMCA at para.78 per Lucev FM.

reinforce the importance placed on compliance with minimum standards.

Consideration

34. In assessing the seriousness of the conduct by Mr Garber, and what the level of penalty might be, the Court must have regard to the statutory purposes of the *FW Act*.⁵¹ Relevantly, the objects in s.3 of the *FW Act* include:

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

...

(e) ... providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms

35. In the context of the objects and purposes of the *FW Act* requiring compliance with minimum standards and facilitating enforcement of the *FW Act*:

- a) deliberate contravention, as to production of records, extending over a period of time; and
- b) continued unremedied non-compliance with the NTPs,

involves an undermining of the statutory objects and purposes of the *FW Act*, as set out above,⁵² because ensuring compliance with minimum standards may not be able to be enforced if relevant documents are not produced.

⁵¹ *Golden Maple IR* at 235 per Lucev FM; FMCA at para.63 per Lucev FM.

⁵² See paras.11-12 and 34 above.

Deterrence

FW Ombudsman's submissions

36. The FW Ombudsman submits that:
- a) the Court has recognised that general deterrence is an important and relevant consideration in assessing penalty for contraventions of Commonwealth workplace relations legislation, in order to mark disapproval of the conduct in question.⁵³ The penalty should be of a kind that would have the effect of deterring similar conduct by like-minded persons or organisations.⁵⁴ This consideration is equally as important to small businesses as it is to large employers;⁵⁵
 - b) the contravention in this case concerns the powers of the FW Ombudsman and its ability to ensure effective compliance with minimum entitlements. The FW Ombudsman submits that the penalty in this case should be imposed at a meaningful level so as to deter other employers from committing similar contraventions, and to emphasise the importance of assisting and co-operating with the FW Ombudsman's Fair Work Inspectors in their investigations;
 - c) as for specific deterrence, Mr Garber should be left in no doubt that failing to comply with minimum obligations will not be tolerated;
 - d) specific deterrence is particularly relevant in this case given that:
 - i) Nerd Group and Mr Garber did not co-operate with the FW Ombudsman in its investigation and the attempts to ensure compliance with workplace laws;
 - ii) the deliberateness of the contraventions; and

⁵³ Citing *Klousia v TKM Investments Pty Ltd & Anor* [2009] FMCA 208 at para.55 per O'Sullivan FM; ("*Klousia*"); *Alcantara & Anor v Buildpower Pty Ltd* (No.2) [2010] FMCA 763 at para.32 per Lucev FM.

⁵⁴ See *Caelli Constructions* FCR at 562 per Lander J; FCAFC at para.113 per Lander J.

⁵⁵ Citing *Kelly v Fitzpatrick* (2007) 166 IR 14 at 21 per Tracey J; [2007] FCA 1080 at para.28 per Tracey J ("*Kelly*").

- iii) the lack of contrition.

Consideration

37. A primary objective of penalties is deterrence.⁵⁶ In imposing civil penalties, deterrence is therefore a significant consideration.⁵⁷ It is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend.⁵⁸ The penalty must be of a kind that demonstrates an appropriate assessment of the seriousness of the offending conduct.⁵⁹ In circumstances where Nerd Group has been wound up, and it is not apparent that it is engaging in any further commercial or business activity, but where there has been no relevant measure of contrition, co-operation or corrective action, the Court is satisfied that this is still an appropriate case for specific deterrence in relation to the conduct of Mr Garber, because it is his conduct that caused Nerd Group to act in the way that it did, and which is therefore responsible for the lack of contrition, co-operation or corrective action.
38. General deterrence is an important and relevant consideration in assessing penalty, in order to mark disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct.⁶⁰
39. This is an appropriate case for a meaningful measure of general deterrence insofar as employers ought not to be impressed with the idea that they can:
- a) avoid the requirement to produce documents upon request by the FW Ombudsman; or
 - b) fail to co-operate with FW Inspectors lawfully exercising powers under the *FW Act*.

⁵⁶ *Kelly IR* at 21 per Tracey J; *FCA* at para.28 per Tracey J; *Sterling Crown IR* at 351 per Lucev FM; *FMCA* at para.53 per Lucev FM.

⁵⁷ *Caelli Constructions FCR* at 577 per Jessup J; *FCAFC* at para.164 per Jessup J.

⁵⁸ *Caelli Constructions FCR* at 559 per Lander J; *FCAFC* at para.93 per Lander J; *Kelly IR* at 21 per Tracey J; *FCA* at para.28 per Tracey J.

⁵⁹ *Caelli Constructions FCR* at 559 per Lander J; *FCAFC* at para.93 per Lander J.

⁶⁰ *Klousia* at para.55 per O'Sullivan FM; *Industrial Roadpavers IR* at 447 per Lucev FM; *FMCA* at para.37 per Lucev FM.

Conclusions as to penalty

FW Ombudsman's submissions

40. The FW Ombudsman submits that:
- a) the FW Ombudsman acknowledges that in determining an appropriate penalty to be awarded against Mr Garber, the Court is obliged to apply the “totality principle” to ensure that the total penalty is just and appropriate in all of the circumstances;
 - b) the conduct of Mr Garber has shown a distinct disregard for the objects of the *FW Act* and the obligations of Nerd Group as an employer. This has been compounded throughout the FW Ombudsman’s investigation of Nerd Group by the consistent lack of co-operation with the FW Ombudsman by Mr Garber;
 - c) although the imposition of any penalty is a matter within the sentencing discretion of the Court, the penalty imposed against Mr Garber should be in the mid to upper end of the mid range of penalty; and
 - d) any penalties imposed by the Court be paid within 28 days to the Commonwealth Consolidated Revenue Fund.

Consideration

41. Penalty is not to be assessed by a comparison with existing decided cases, that is, precedent does not determine penalty for particular cases. Previous cases might set a broad band within which a particular penalty might be considered to be reasonable, but that aside, each case must be looked at in relation to its particular circumstances.
42. The maximum penalty payable by Mr Garber is \$13,200. In determining penalty, the Court has weighed all of the factors set out above. None of those factors operate in the circumstances of this case so as to justify any significant reduction in the appropriate level of penalty payable by Mr Garber, other than the fact that he is a first time contravener.

43. A failure to produce documents in response to a NTP is not the gravest contravention under the *FW Act*. It involves conduct at the lower end through to around the middle of the penalty spectrum, that is, up to about 50 per cent of the maximum penalty. In this case, the Court is satisfied that having regard to all of Mr Garber's conduct, this is a case in which, for reasons set out above, there should be no, or little, deduction from the maximum applicable penalty, save for a discount as a first time contravener, and recognition:
- a) that it involved only two employees, and two similar NTPs; and
 - b) of some very minor co-operation as to formal matters conceded at hearing.
44. In the circumstances, the Court has determined that each of the contraventions warrants a penalty of 40 per cent of the maximum, that is, \$2,640 for each contravention. That will result in a total penalty of \$5,280. That penalty is to be paid by Mr Garber to Commonwealth Consolidated Revenue by 26 October 2012.

Totality principle

45. The Court is required to consider the application of the totality principle in this case which concerns more than one alleged contravention by Mr Garber. Essentially, the totality principle requires the Court, once it has made a judicial evaluation of what it considers to be an appropriate aggregate penalty, to examine one final time, the aggregate penalty in order to determine whether it appears wrong.⁶¹ Having regard to all of the circumstances of this case, a penalty of \$5,280 appears to be in order.

Declarations and orders

46. For the reasons set out above the Court will make an order that a penalty of \$5,280 be paid by Mr Garber to the Commonwealth Consolidated Revenue Fund by 26 October 2012.

⁶¹ Citing *Mornington Inn* FCR at 397 and 408 per Stone and Buchanan JJ; FCAFC at paras.42-43 and 91 per Stone and Buchanan JJ; *Australian Ophthalmic Supplies* FCR at 567-568 per Gray J and 577 per Graham J; FCAFC at paras.27-28 per Gray J and 78 per Graham J.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Lucev FM

Associate: *sa gough*

Date: 26 September 2012