FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SECOM AUSTRALIA (ACT) PTY LIMITED *[2013] FCCA 649*

Catchwords:
FAIR WORK – agreed statement of facts – admission of liability – considerations regarding penalty – role of management – failure to obtain advice regarding pay and entitlements

Legislation:
Fair Work Act 2009

Cases cited:
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2012] FCA 189
Australian Ophthalmic Supplies Limited v McAlary-Smith (2008) 165 FCR 560
Finance Sector Union v Commonwealth Bank of Australia (2006) 224 ALR 467
Kelly v Fitzpatrick (2007) 166 IR 14
Markarian v the Queen (2005) 228 CLR 357
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Ponzio v B & P Caelli Constructions Pty Limited (2007) 158 FCR 543

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	SECOM AUSTRALIA (ACT) PTY LIMITED
File Number:	CAG 46 of 2012
Judgment of:	Judge Neville
Hearing date:	12 April 2013
Date of Last Submission:	12 April 2013
Delivered at:	Canberra
Delivered on:	28 June 2013

REPRESENTATION

Solicitor/Advocate for the Applicant:	Ms J Dennis
Solicitors for the Applicant:	Fair Work Ombudsman, Sydney
Solicitor/Advocate for the Respondent:	Mr D Robens
Solicitors for the Respondent:	Dibbs Barker Lawyers, Canberra

ORDERS

THE COURT DECLARES THAT:

1. Secom Australia (ACT) Pty Ltd (ACN 137 123 374) contravened section 45 of the *Fair Work Act 2009* by way of contravening the following provisions of the *Security Services Industry Award 2010* during the period from 27 February 2011 to 5 June 2011:

    (a) clause 10.5(b) of the *Security Services Industry Award 2010* (as amended by items A.5.2 and A.5.4 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay Mr Phillips the applicable casual loading;

    (b) clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay Mr Phillips the applicable permanent night work penalty rate;

    (c) clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay Mr Phillips the applicable Saturday span penalty rate;

    (d) clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay the following 16 employees the applicable Sunday span penalty rates:

        (i) Christopher Channells;

        (ii) Stephen Diablasio;

        (iii) Ryan Hourigan;

        (iv) Jeremy Ireland;

        (v) Glenn Manacap;

        (vi) Oliver Marsh;

        (vii) Gary Marshallsea;

        (viii) Colin McGovern;

(ix) Madison Montgomery;

(x) Arshdeep Walia;

(xi) Oudum Ok;

(xii) Suhununu Adam;

(xiii) Khurram Awan;

(xiv) Thomas Kelleher;

(xv) Robert May; and

(xvi) Peter Phillips.

(e) clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay Mr Phillips the applicable public holiday Span penalty rate;

(f) clause 23.3 of the *Security Services Industry Award 2010*, in failing to pay the following 16 employees the applicable overtime loading for 50% overtime hours worked:

(i) Christopher Channells;

(ii) Stephen Diablasio;

(iii) Richard Edmands;

(iv) Ryan Hourigan;

(v) Jeremy Ireland;

(vi) Gareth Jamaine;

(vii) Paul Kerr;

(viii) Glenn Manacap;

(ix) Oliver Marsh;

(x) Gary Marshallsea;

(xi) Colin McGovern;

(xii) Madison Montgomery;

(xiii) Arshdeep Walia;

(xiv) Oudum Ok;

(xv) Khurram Awan; and

(xvi) Robert May.

(g) clause 23.3 of the *Security Services Industry Award 2010*, in failing to pay the following 16 employees the applicable overtime loading for 100% overtime hours the employees worked:

(i) Christopher Channells;

(ii) Stephen Diablasio;

(iii) Richard Edmands;

(iv) Ryan Hourigan;

(v) Jeremy Ireland;

(vi) Gareth Jamaine;

(vii) Paul Kerr;

(viii) Glenn Manacap;

(ix) Oliver Marsh;

(x) Gary Marshallsea;

(xi) Colin McGovern;

(xii) Madison Montgomery;

(xiii) Arshdeep Walia;

(xiv) Oudum Ok;

(xv) Khurram Awan; and

(xvi) Robert May.

(h) clause 23.3 of the *Security Services Industry Award 2010*, in failing to pay the following 11 employees the applicable overtime loading for public holiday overtime hours the employees worked:

(i) Christopher Channells;

(ii) Ryan Hourigan;

(iii) Jeremy Ireland;

(iv) Gareth Jamaine;

(v) Paul Kerr;

(vi) Oliver Marsh;

(vii) Gary Marshallsea;

(viii) Colin McGovern;

(ix) Madison Montgomery;

(x) Arshdeep Walia; and

(xi) Khurram Awan.

THE COURT ORDERS THAT:

2. The First Respondent pay penalties pursuant to subsection 546(1) of the *Fair Work Act 2009* for the alleged contraventions as follows:

   (a) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $7,920.00 be imposed on the first respondent in respect of its contravention of clause 10.5(b) of the *Security Services Industry Award 2010* (as amended by items A.5.2 and A.5.4 of Schedule A of the *Security Services Industry Award 2010*), failing to pay the applicable casual loading;

   (b) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $7,920.00 be imposed on the first respondent in respect of its contravention of clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay the applicable permanent night work penalty rate;

   (c) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $7,920.00 be imposed on the first respondent in respect of its contravention of clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of

Schedule A of the *Security Services Industry Award 2010*), in failing to pay the applicable Saturday span penalty rate;

(d) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $13,200.00 be imposed on the first respondent in respect of its contravention of clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay the applicable Sunday span penalty rates;

(e) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $7,920.00 be imposed on the first respondent in respect of its contravention of clause 22.3 of the *Security Services Industry Award 2010* (as amended by the Transitional Provisions at item A.7.3 of Schedule A of the *Security Services Industry Award 2010*), in failing to pay the applicable Public Holiday span penalty rate; and

(f) pursuant to subsection 546(1) of the *Fair Work Act 2009*, a penalty of $21,120.00 be imposed on the first respondent in respect of its contravention of clause 23.3 of the *Security Services Industry Award 2010*, in failing to pay the applicable overtime loading.

3. Pursuant to subsection 546(3)(a) of the *Fair Work Act* the Respondent shall pay the penalty amount to the Consolidated Revenue Fund of the Commonwealth.

4. The Respondent shall pay the penalties to the Commonwealth (as set out in Order 2) **within 28 days** of the date of this order.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT CANBERRA

CAG 46 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

SECOM AUSTRALIA (ACT) PTY LIMITED
Respondent

REASONS FOR JUDGMENT

Introduction

1. This is an application to determine an appropriate penalty in relation to admitted breaches/contraventions of the *Fair Work Act* 2009 ("the Act") and the *Security Services Industry Award* 2010 ("the award").

2. The parties have tendered a Statement of Agreed Facts ("the Statement"). That Statement is appendix A to these reasons. A schedule of the contraventions admitted is annexure B.

3. The parties are not agreed in relation to penalty. As already observed, that is the only issue for the Court to determine.

4. In addition to certain declarations (in relation to which there is no dispute), the Applicant contends that the maximum penalty applicable to the six categories of contraventions is $198,000. The Applicant submits, however, that an appropriate penalty, in all the circumstances, is $66,000.

5. The Respondent says that in relation to particular and agreed categories of contraventions the penalties sought by the Applicant are disproportionate to the conduct involved and, in all the circumstances, it is suggested that the penalties overall border on the oppressive.[1] Otherwise, the Respondent does not offer any specific figure in relation to penalty.

6. These reasons proceed as follows: (a) factual background; (b) submissions of the parties; (c) legal principle and conclusion.

Factual Background

7. The factual summary that follows obviously draws from the Statement and also from the helpful submissions from both parties.

8. The proceedings relate to the underpayment of wages and entitlements to nineteen employees of the Respondent company. The employees worked as security guards at various sites in the Australian Capital Territory and New South Wales.

9. The Respondent ("Secom") operated and continues to operate a business in the ACT, supplying security guard services.

10. In July 2009, Secom acquired the business from Centurion Corporate Protective Services Pty Ltd ("Centurion"). Centurion operated and paid its employees under an employee collective agreement entitled the *Centurion Corporate Protection [ACT] Employee Collective Agreement 2008* ("Centurion Agreement").

11. The Centurion Agreement covered the employment of existing employees of Centurion that transferred to Secom. However the agreement did not cover employees who commenced employment with Secom after the transfer of the business had occurred. Employees who commenced employment with Secom after July 2009 were new (non-transferring) employees and were not covered by the Centurion Agreement. These new employees were covered by the Modern Award.

[1] See in particular, pars.63 – 67 of the Respondent's Written Submissions, filed 15th March 2013.

12. The underpayments occurred when the Respondent paid flat rates of pay, pursuant to the Centurion Agreement, to nineteen new employees. The flat rates of pay were insufficient to meet all of these employees' entitlements to casual loading, penalty rates and overtime.

13. The ACT and NSW relevant pay scales did not contain penalty rates. As such the phasing-in of penalty rates under the Modern Award commenced on 1 July 2010 from zero.

14. The audit period took place during the first stage of the phasing-in period. Accordingly, the penalty rates for working night shift, Saturday, Sunday and public holiday shifts was phased in at 20% of the full penalty rate. This meant that Secom only had to pay 20% of the relevant penalty rate under the Modern Award during the audit period. Accordingly, and as noted by the Applicant, because the rate payable to the employees for penalty rates during this period was low, the total underpayment amounts appear somewhat low.

15. As it happened, overtime rates were not phased in, and as such the full overtime rate was payable during the audit period. Accordingly, the overtime underpayments were significant and higher than underpayments associated with the other contraventions.

16. In May 2011, the Applicant commenced an audit and investigation of Secom. The investigation reviewed Secom's pay records for the period from 27 February to 5 June 2011.

17. That audit and investigation disclosed that nineteen new employees were underpaid an amount of $21,548.21 for the audit period.

18. Following the audit, and at the direction of the Applicant, Secom carried out a self-audit for the period 17 May 2010 to 6 March 2011 and discovered a further underpayment of $29,225.42.

19. The Applicant submits, and there was little contention about it, that as a result of the investigations and the further complaints, the Respondent has underpaid its employees a total of $101,934.37.

20. By way of summary, in the light of the facts set out above and in the annexed Statement, the Applicant seeks penalties in the sum of

$66,000.00, and submits that such a figure is appropriate because of the following factors:

a) The significant amount of underpayment over a short period of time;

b) The need for general deterrence in the security industry;

c) The Respondent's failure to obtain (or its disregard of) legal advice regarding the operation of the Modern Award;

d) The significant amount of underpayment associated with failure to pay overtime rates; and

e) The underpayment of night, Saturday, Sunday and public holiday penalty rates, whilst not significant in dollar amount, because the occurred in the first stage of phasing-in, are still significant.

Submissions

21. The following provides a very brief summary of the submissions of the parties.

Applicant's Submissions

22. The Applicant contends that the nature and the extent of the loss suffered by the employees was significant and warrants the imposition of a significant penalty because:

a) it involves contravention of minimum standards of "the most fundamental kind", namely the payment of wages and entitlements;

b) it affected a large number of employees (nineteen);

c) the amount of underpayment is significant;

d) the Respondent was able [potentially] to profit from the underpayments during the relevant period;

e) Had it not been for the intervention and audit, it is [perhaps] likely that the contravening conduct would have continued undetected and unattended.

23. There is no dispute that the underpayment has been rectified. Nor is there any dispute that the Respondent has cooperated with the Applicant in relation to the investigation. Further, there is no evidence that the Respondent has previously engaged in similar conduct.

24. At some length in its written submissions, the Applicant set out the size and financial circumstances of the Respondent's business, and relies heavily upon it being a subsidiary of larger corporate entities (nationally and internationally) which thereby would otherwise enable it to access relevant resources that should have enabled it to know of and act upon its responsibilities. The Applicant submits: "The Respondent, as part of a large company and employer, has the benefit of significant financial resources and, it is submitted, through its parent company has the ability to readily access professional and legal advice…".

25. The Applicant further submits that any sanction imposed should be at a meaningful level. Further, the Applicant submitted that the Respondent's conduct should be characterised not necessarily as deliberate, but at best "grossly careless." In the course of the penalty hearing, the Applicant agreed with a question/inquiry from the Bench that "careless disregard" might also be an appropriate description of the Respondent's conduct.

26. The Applicant contends also that the Respondent has provided no evidence that the Respondent is contrite for the admitted breaches.

27. The three final matters addressed by the Applicant in submissions related to the need for specific and general deterrence, with particular reference to the comments of Lander J from the Full Court judgment in *Ponzio v B & P Caelli Constructions Pty Ltd*.[2] At [93], his Honour said (because of its helpful detail and comments of wider application, I set out the paragraph in full rather than the selection relied upon by the Applicant):

[2] *Pozio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543.

> *[93] There are three purposes at least for imposing a penalty: punishment; deterrence; and rehabilitation. The punishment must be proportionate to the offence and in accordance with the prevailing standards of punishment: R v Hunter (1984) 36 SASR 101 at 103. Therefore the circumstances of the offence or contravention are especially important. The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. 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. In some cases, although hardly in this type of contravention, rehabilitation is an important factor.*

28. The Applicant also submitted that because of the Respondent's ongoing employment of security guards, it was important for the Court particularly to consider "specific deterrence" as a factor in relation to ensuring compliance with minimum standards by the Respondent and others in the security industry.

29. Finally, having determined an appropriate penalty for each course of conduct, having regard to the totality principle, the Applicant submitted that the Court must determine whether the penalty is an appropriate response to the conduct which led to the breaches.[3]

30. At paragraph 89 and following of its written submissions, the Applicant contends (internal citations omitted): "the determination of the correct penalty to be imposed on the Respondent is ultimately a matter for the Court. However, after applying a 20% discount for the Respondent's cooperation, the Applicant recommends a total penalty of $66,000 to be imposed on the Respondent…"

[3] See *McAlary-Smith* at [23] (Gray J), [71] (Graham J), [102] (Buchanan J).

Respondent's Submissions

31. The Respondent again acknowledged the admissions previously made.

32. The Respondent submitted that the parties (and the Court) are entitled, pursuant to s.557 of the Act, to find that two or more contraventions of s.45 can be considered to constitute a single contravention if it is committed by the same person and arose out of a course of conduct by that person. I accept this submission.

33. The primary submission of the Respondent was that the penalty sought by the Applicant was excessive. Although the Court attempted to elicit from the advocate for the Respondent what he considered to be an appropriate penalty (or even an appropriate range for fixing a penalty) no figure (or figures) was offered.

34. Quite some stress was placed (and understandably so) on the fact that the general manager of Secom Australia at the time of the contraventions had died in November 2012. Therefore, a number of factual matters were unable to be checked, which may have assisted in explaining why certain things were, or were not, done by the Respondent and which ultimately gave rise to the contraventions.

35. The Respondent also submitted that, in relation to the Centurion Agreement, "it is entirely possible that the relevant employees of the Respondent and Secom Australia misunderstood which legislative provisions applied to the transfer of the Centurion Agreement."

36. I pause here to observe that I do not regard this submission as satisfactory. An employer, of whatever size, has a responsibility to make appropriate enquiry and obtain proper advice to ensure that there is compliance with all statutory and award provisions that relate to pay and conditions for its employees. There is no reason given why proper advice was not taken by the Respondent to ensure that there was compliance in this case to protect the Respondent's employees. "Genuine misunderstanding of the application of the Centurion Agreement", as submitted by the Respondent, is a "plea in mitigation" that can only go so far. Put more bluntly: ignorance is no excuse.

37. At paragraph 46 of its written submissions, the Respondent stated: "there is no evidence that the Respondent obtained legal advice about

the application of the Centurion Agreement to new employees of the business as part of the due diligence exercise or otherwise, and, it is unlikely that any legal advice obtained in connection with a due diligence exercise connected with the acquisition would have covered the applicability of the Centurion Agreement to new employees."

38. Again I observe that this submission obfuscates or minimises the responsibilities of management to the employees of the Respondent company. Further, it must necessarily be speculative to suggest that legal advice in relation to a "due diligence exercise" would not have assisted in ensuring that employees were properly paid. Absent plain negligence, legal advice will be provided to a client on the basis of the parameters of the retainer. Put another way, had the management of the Respondent asked specifically for legal advice in relation to compliance with relevant awards and pay and conditions for employees, presumably that advice would have been given. Not to have sought it bespeaks a failure on the part of management to ensure compliance with awards and payment to employees. Should it need to be stated, the Respondent is in the business of providing a service that relies pre-eminently upon the labour of its employees.

39. Contrary to the Applicant's submissions, the Respondent confirmed that it had expressed contrition at all times, which was demonstrated, among other things, by two written apologies provided to all affected employees.[4]

40. As of 18 February 2013, the Respondent has employed a dedicated human resources manager to manage human resources and industrial issues, and to ensure that Secom Australia and the Respondent comply with their obligations under the Act. Further, Secom Australia is currently negotiating a new enterprise agreement with United Voice and its employees to cover all of its security employees in Australia. What is being put in place, the Respondent contends, is to simplify and to provide greater certainty around employee terms and conditions, and to ensure that Secom Australia and the Respondent comply with relevant awards and terms and conditions in the future.

[4] See the affidavit of Mr Campagna, affirmed 15 March 2013, at [4a – d].

41. In relation to matters of deterrence and the totality principle, the Respondent submitted that the penalty sought by the Applicant is disproportionate in all of the circumstances.

Legal Principle & Consideration

42. For current purposes, it is sufficient to highlight and have regard to relevant principle drawn primarily from three cases: *Kelly v Fitzpatrick*, *Australian Ophthalmic Supplies Limited v McAlary-Smith* ("McAlary-Smith"), and the relatively recent decision of Bromberg J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* ("ABCC").[5]

43. In *Kelly v Fitzpatrick*, at [14], Tracey J outlined a range of "non-exhaustive" considerations in relation to penalty. They were:

- *The nature and extent of the conduct which led to the breaches.*
- *The circumstances in which that conduct took place.*
- *The nature and extent of any loss or damage sustained as a result of the breaches.*
- *Whether there had been similar previous conduct by the respondent.*
- *Whether the breaches were properly distinct or arose out of the one course of conduct.*
- *The size of the business enterprise involved.*
- *Whether or not the breaches were deliberate.*
- *Whether senior management was involved in the breaches.*
- *Whether the party committing the breach had exhibited contrition.*
- *Whether the party committing the breach had taken corrective action.*

[5] *Kelly v Fitzpatrick* (2007) 166 IR 14; *Australian Ophthalmic Supplies Limited v McAlary-Smith* (2008) 165 FCR 560; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2012] FCA 189.

- *Whether the party committing the breach had cooperated with the enforcement authorities.*

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

- *The need for specific and general deterrence.*

44. In *McAlary-Smith*, among many matters addressed in the instructive judgments of each member of the Full Court, Buchanan J cautioned, at [21], against using any single list of considerations in a prescriptive or restrictive manner

45. In ABCC, Bromberg J said, admittedly in a slightly different legislative context, at [19] – [23]:

> *[19] The relevant considerations required for an assessment of the appropriate penalty to be imposed for a breach of the BCII Act have been discussed at length by this Court: see Stuart-Mahoney v CFMEU [2008] FCA 1426 at [40] (Tracey J); Temple v Powell [2008] FCA 714; (2008) 169 FCR 169 at [56]- [78] (Dowsett J); Cahill v CFMEU (No 4) [2009] FCA 1040 at [9]-[10] (Kenny J).*
>
> *[20] As the parties have proposed an agreed penalty to be imposed in these proceedings, the relevant question for the Court is whether that agreed penalty is "appropriate in all the circumstances": Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72 at [51] (Branson, Sackville and Gyles JJ) where the Full Court adopted the reasoning of Burchett and Kiefel JJ (with whom Carr J agreed) in NW Frozen Foods Pty Ltd v ACCC [1996] FCA 113; (1996) 71 FCR 285 at 298-299.*
>
> *[21] In Mobil at [51], the Full Court listed the principles enunciated in NW Frozen Foods including that:*
>
> - *it is the Court's responsibility to determine the appropriate penalty;*
>
> - *determining the quantum of a penalty is not an exact science;*
>
> - *there is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy;*

- *the view of the regulator, as a specialist body, is a relevant, but not determinative consideration on the question of penalty;*

- *in determining whether the proposed penalty is appropriate, the Court examines all the circumstances of the case;*

- *where the parties have put forward an agreed statement of facts, the Court may act on that statement if it is appropriate to do so in the circumstances of the case;*

- *where the parties have jointly proposed a penalty, it will not be useful to investigate whether the Court would have arrived at that precise figure in the absence of agreement;*

- *the question is whether that figure is, in the Court's view, appropriate in the circumstances of the case;*

- *in answering that question, the Court will not reject the agreed figure simply because it would have been disposed to select some other figure; and*

- *it will be appropriate if within the 'permissible range'.*

[22] The 'permissible range' of penalties refers to that range that would be permitted by the Court, which is neither manifestly inadequate nor manifestly excessive, and only where the agreed penalty falls outside the permissible range should the court depart from the figure agreed by the parties: see Wells v Locano Management Pty Ltd [2008] FCA 1034 at [23] (Jessup J); Ponzio v B & P Caelli Constructions [2007] FCAFC 65; (2007) 158 FCR 543 at [129] (Jessup J) and Alfred v CFMEU [2011] FCA 556 at [68] (Tracey J).

[23] The CFMEU contended, and I agree, that the following principles should also inform the exercise of the Court's discretion:

> *(a) Proportionality: that any penalty imposed should not exceed that which is appropriate or proportionate to the gravity of the contravention found proven in the light of its objective circumstances: Hoare v the Queen [1989] HCA 33; (1989) 167 CLR 348 at 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ). See also the Veen v The Queen (No 1) [1979] HCA 7; (1979) 143 CLR 458 at 467-468 (Stephen J) and 482-483 (Jacobs J) and 495 (Murphy J); Veen v The Queen (No 2) [1988] HCA 14;*

(1988) 164 CLR 465 at 472 (Mason CJ, Brennan, Dawson and Toohey JJ), 485-486 (Wilson J), 490-491(Deane J) and 496 (Gaudron J). This approach has been adopted in relation to contraventions of the BCII Act: Stuart v CFMEU [2010] FCAFC 65; (2010) 185 FCR 308 at [30] (Moore J).

(b) Parsimony: the Court must ensure that it imposes the minimum term consistent with the attainment of the relevant purposes of sentences taking care that the punishment is only for the crimes before the Court: R v Valentini [1980] FCA 133; (1980) 48 FLR 416 at 420 (Bowen CJ, Muirhead and Evatt JJ).

(c) Penalty maximum: that the maximum penalty should be reserved for the worst type of contravention: Veen v The Queen (No 2) at 478 (Mason CJ, Brennan, Dawson and Toohey JJ); Stuart v CFMEU at [30] (Moore J).

Conclusion

46. In all of the circumstances, and in the light of the cases to which I have referred, the following matters, in my view, are the most relevant to, and therefore determinative of, the appropriate penalty:

a) The contravention involved minimum standards in the payment of wages and entitlements. Employees should be able reasonably to expect compliance with such a basic aspect of their contract of employment;

b) It is significant that the underpayments, which in themselves and in total may be considered as not being particularly exceptional, were not discovered until the audit conducted by the Applicant. This is also to say that the Respondent had no relevant system or procedure in place in order to ensure compliance with minimum standards and entitlements. In my view, this was a significant omission on the part of management. Moreover, the company is an enterprise of some means, but, at the very least, it took a number of things for granted, or simply did not take appropriate action;

c) As already indicated, the fact that no relevant advice was sought (and again I stress, by an organisation of some means) to guide

management in relation to the application of the Centurion Agreement as it would, or would not, impact upon the Respondent's employees was also a very significant omission.

47. Although I was initially tempted to impose a slightly higher penalty, in my view, the penalty sought by the Applicant is within the 'permissible range'. In all of the circumstances, therefore, the penalty determined by the Court is $66,000. The Court also makes the declarations, and ancillary orders, sought by the Applicant in the Minute of Orders provided to the Court.

I certify that the preceding forty-seven (47) paragraphs are a true copy of the reasons for judgment of Judge Neville

Associate: SS

Date: 28 June 2013