FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v SHAFI INVESTMENTS PTY LTD & ORS (NO.2) *[2013] FMCA 168*

INDUSTRIAL LAW – Appropriate penalty for multiple breaches of sections of the *Workplace Relations Act 1996* and *Workplace Relations Regulations 2006.*

Workplace Relations Act 1996 (Cth) ss.182(1), 189(1), 235(2), 607, 717, 719(1), 728(1), 841A
Workplace Relations Regulations 2006 (Cth) rr.14.4, 19.4

Community and Public Sector Union v Telstra Corporation (2001) 108 IR 228
Fair Work Ombudsman v Fortcrest Investments Pty Ltd (2010) 190 IR 422
Fair Work Ombudsman v Go Yo Trading Pty Ltd & Anor [2012] FMCA 865
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579
Fair Work Ombudsman v Orwill Pty Ltd and Anor [2011] FMCA 730
Fair Work Ombudsman v Promoting U Pty Ltd & Anor [2012] FMCA 58
Fair Work Ombudsman v Shafi Investments Pty Ltd & Others [2012] FMCA 1150
Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor [2012] FMCA 258
Finance Sector Union v Commonwealth Bank of Australia (2005) 147 IR 462
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar [2007] FMCA 7
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	SHAFI INVESTMENTS PTY LTD
Second Respondent:	YOUNUS MOHAMMED
Third Respondent:	MAHMOOD MOHAMMED
File Number:	MLG 878 of 2011
Judgment of:	Whelan FM

Hearing date:	20 February 2013
Date of Last Submission:	20 February 2013
Delivered at:	Melbourne
Delivered on:	20 February 2013

REPRESENTATION

Counsel for the Applicant:	Mr Vallence
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr Boden
Solicitors for the Respondents:	Starnet Legal

ORDERS

(1) That pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) ("the Act") and reg.14.4 of the *Workplace Relations Regulations 2006* (Cth) ("the Regulations") the First Respondent pay an aggregate penalty in the amount of $100,000.00 for the contraventions of the Act and the Regulations set out in Orders 1 to 5 of the declarations of the Court on 10 December 2012.

(2) That pursuant to s.719(1) of the Act and reg.14.4 of the Regulations the Second Respondent pay an aggregate penalty in the amount of $22,000.00 for his involvement in the contraventions of the Act and the Regulations set out in Orders 1 to 5 of the declarations of the Court on 10 December 2012.

(3) That pursuant to s.719(1) of the Act and reg.14.4 of the Regulations the Third Respondent pay an aggregate penalty in the amount of $14,000.00 for his involvement in the contraventions of the Act and the Regulations set out in Orders 1 to 5 of the declarations of the Court on 10 December 2012.

(4) That pursuant to s.841(a) of the Act, the penalty payable by the First Respondent in accordance with Order 1 herein be paid into the Consolidated Revenue Fund of the Commonwealth within 28 days of the date of these Orders.

(5) That pursuant to s.841(b) of the Act, the penalties payable by the Second and Third Respondents be payable to the Complainant, Mr Osman Mohammed ("the Complainant"), within 28 days of the date of these Orders.

(6) That should the Respondents fail to make the payments in full by the due date, the Complainant will be entitled to interest on any amounts outstanding should enforcement proceedings be necessary.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 878 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

SHAFI INVESTMENTS PTY LTD
First Respondent

YOUNUS MOHAMMED
Second Respondent

MAHMOOD MOHAMMED
Third Respondent

REASONS FOR JUDGMENT

(as revised from transcript)

Introduction

1. On 10 December 2012 this Court handed down a decision in *Fair Work Ombudsman v Shafi Investments Pty Ltd & Others*[1] in which it found that the First, Second and Third Respondents contravened the *Workplace Relations Act 1996* ("the Act") and the *Workplace Relations Regulations 2006* ("the Regulations").

2. I do not intend to restate the contraventions that were committed by each of the Respondents except to say that they dealt with s.182(1), s.189(1), s.235(2) and s.607 of the Act and r.19.4 of the Regulations.

[1] *Fair Work Ombudsman v Shafi Investments Pty Ltd & Others* [2012] FMCA 1150.

The Court found that the Second and Third Respondents were involved in the contraventions and by virtue of s.728(1) of the Act they are therefore treated as having contravened each of the provisions.

3. On 19 December 2012 the Court ordered the First Respondent pay the Complainant in the matter, the total underpayment of the sum of $50,751.12 and interest of $6,071.00. I understand from the material before the Court today that despite those Orders these payments have not been made. The Applicant now seeks orders pursuant to s.719(1) of the Act and r.14.4 of the Regulations, that pecuniary penalties be imposed on each of the First, Second and Third Respondents in respect of those contraventions.

4. In written submissions, the Applicant relies upon the following documents:

- the decision;
- Exhibit A1 in the proceedings being the affidavit of the Fair Work Inspector Sally McLeod;
- Exhibit A2 being the affidavit of Effie Giannakis;
- Exhibit A3, a further affidavit of Effie Giannakis;
- Exhibit A6, an affidavit of Roger Yates;
- Exhibit A7, the affidavit of the Complainant;
- Exhibit A8, a further affidavit of the Complainant; and
- an affidavit of Michele Carey, which was filed in these proceedings on 11 January 2013.

Legislative provisions

5. The power of the Court to impose pecuniary penalties in respect of contraventions of the Act arises from s.719(1) of the Act. That provides that a Court can impose a pecuniary penalty in respect of a contravention of an applicable provision by a person bound by that provision. The Act goes on to define in s.717 the applicable provisions, which includes a term of the Australian Fair Pay and Conditions

Standards and those are dealt with in s.182(1), s.189(1) and s.235(2) of the Act, which are all subject to contraventions in these proceedings and s.607 of the Act.

6. The Act also prescribes the maximum penalties that may be imposed. Based on the provisions that were relevant at the time, and I note that these have varied over time, the maximum penalty that may be imposed on the First Respondent for each contravention of the applicable provisions of the Act is $33,000.00 and in the case of the Second and Third Respondents the maximum penalty for each of the contraventions is $6,600.00.

7. The provisions which cover the Regulations are slightly different to those which refer to contraventions of sections of the Act. Regulation 14.4 of the Regulations provides that a Court may order a person who contravenes a civil penalty provision in the Regulations to pay a pecuniary penalty and for the purposes of these proceedings the maximum penalty that may be imposed on the First Respondent for each contravention of the Regulations is $5,500.00 and in the case of the Second and Third Respondents $1,100.00.

Relevant principles

8. The Applicant in written submissions proposed that the following principles should be taken into account in determining the question of appropriate penalty to be imposed on the Respondents.

9. The first step is to identify the separate contraventions involved. Second, the Court should consider whether the breaches arising in the first step constitute a single course of conduct. Third, to the extent that two or more contraventions have common elements this should be taken into account. The respondent should not be penalised more than once for the same conduct. The penalty should be an appropriate response to what the respondent did. Fourth, for the Court to determine an appropriate penalty to impose in respect of each contravention having regard to all the circumstances of the case.

10. Finally, having fixed an appropriate penalty, for each group of contraventions or courses of conduct, the Court should take a final look at the aggregate penalty to determine whether it is an appropriate

response to the conduct which led to the contraventions. I accept that those are the principles that have been applied by the Court in various other proceedings and are the principles which should guide the Court in how it approaches this matter today.

11. The Applicant has accepted that based on the facts in this case, the Respondents each have the benefit of s.719(2) of the Act which relates to where two or more breaches occur of the same term of the Act. In relation to s.182(1) of the Act, the failure to pay the basic periodic rate of pay, s.719(2) of the Act applies and it also applies with respect to s.189(1) of the Act, failure to pay the Complainant on a weekly or fortnightly basis and s.607 of the Act failure to provide the Complainant with an unpaid meal break of at least 30 minutes duration after five hours work.

12. The Applicant further submits that there should be no further grouping of the contraventions as each of the contraventions are separate and distinct obligations and do not share common elements that would result in the Respondents being penalised more than once for the same conduct and I accept that submission. The failure to pay the basic periodic rate of pay is a separate and distinct act to the failure to pay on a weekly or fortnightly basis which is also separate and distinct from the failure to provide the unpaid meal break.

13. The Applicant submits by reference to the decision of Mowbray FM in *Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar*[2] that the factors which the Court should take into account in determining an appropriate penalty are the following (although these are not mandatory and are not exclusive):

- the nature and extent of the conduct which led to the breaches;
- the circumstances in which the 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;

[2] *Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar* [2007] FMCA 7.

- whether the breaches were properly distinct or arose over 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 has exhibited contrition;
- whether the party committing the breach has taken corrective action;
- whether the party committing the breach has co-operated with enforcement authorities;
- the need to ensure compliance with minimum standards; and
- the need for specific and general deterrence.

Again, I accept that those matters have been taken into account by this Court and the Federal Court in a large range of cases dealing with similar types of matters. In written submission the Applicant addressed each of those matters.

14. Turning to the nature and extent of the conduct, the Applicant drew the Court's attention to the following matters:

- the fact that the contravening conduct extended over the entire duration of the Complainant's employment, which was approximately 13 months;
- the fact that the Complainant was rostered to work six or seven days a week from open to close of shop and that other than time off in August 2008 to look for alternative employment he would take only one day off a month;
- the fact that the First Respondent made no provision for paid leave and did not pay the complainant any amount on termination of his employment in respect of accrued and untaken leave;

- the fact that between 9 April 2008 and 15 July 2008 the Complainant was not paid any wages at all for the work that he performed;

- the fact that from 15 July 2008 onwards he was paid a flat rate of $14.50 for 20 hours per week notwithstanding that he usually worked over 70 hours per week and notwithstanding that that rate was below the rate prescribed by the Award;

- the fact that when he was paid, he was paid irregularly; and

- the fact that the First Respondent did not make or keep employment records in relation to the Complainant's employment.

15. The Applicant submits that the First Respondent obtained a significant benefit from the underpayment of the Complainant and the failure to provide meal breaks over the 13 months of the employment in the form of free labour by the Complainant. Further, it is almost four years since the Complainant left the employment of the First Respondent and has yet to be paid his entitlements.

16. The Applicant points to the fact that in the substantive decision in this matter the Court found that the Second Respondent showed a total disregard for employment laws in terms of his conduct and that the failure to provide basic and important conditions of employment to the Complainant in accordance with the minimum standards established by the former Act represents a serious breach.

17. Turning to the circumstances in which the conduct took place, the Applicant submits that the circumstances of this case are an aggrevating factor weighing in favour of a higher penalty. The Complainant was a vulnerable employee. He was a foreign national holding a visa which had been recognised in other proceedings before this Court, notably in *Fair Work Ombudsman v Go Yo Trading Pty Ltd & Anor*[3] as creating a particular class of vulnerable workers. In these circumstances, the Complainant was at a considerable disadvantage to the First Respondent and the Applicant submits that the Second and Third Respondents exploited the Complainant to their own benefit.

[3] *Fair Work Ombudsman v Go Yo Trading Pty Ltd & Anor* [2012] FMCA 865.

18. The Applicant refers to the fact that the Complainant was 26 years of age. He was in Australia on a dependant spouse visa at the time the conduct occurred. He spoke English as a second language. He had entered into an arranged marriage with the sister of the Second and Third Respondents who are his first cousins. He understood that he was expected to assist in the family business. He had limited resources when he arrived in Australia and he lived with the Second and Third Respondents during the period of his employment.

19. In his own Affidavit material the Complainant indicated that he felt he could do nothing to get out of the situation as his wife and her brothers were the only people he knew in Australia and he had nowhere else to go. He had no knowledge of the legal requirements associated with working and payment of wages under Australian law and he was performing unskilled work and was dependent on the safety net conditions in the Award and the Australia Fair Pay and Conditions Standards. The Complainant should, therefore, be regarded as a particularly vulnerable employee.

20. In terms of the nature and extent of the loss or damage, the Complainant is owed $50,751.12 for the 13-month period he worked. That payment has not been made. The Applicant further submits that the keeping of records in accordance with the relevant legislation plays a pivotal role in monitoring compliance with the relevant industrial instruments and the failure to do so by the Respondents created difficulty not only for the Complainant, but also for the Applicant in trying to determine what it was that the Complainant should have been paid. The importance of employee records has been raised in a number of cases before the Court and the Applicant cites the decision of Riethmuller FM in *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd*[4] and the decision of Lucev FM in *Fair Work Ombudsman v Orwill Pty Ltd and Anor*.[5]

21. The Applicant submits that this is a gross underpayment particularly having regard to the fact that the Complainant was relying on the statutory minimum and that he had a limited capacity to mitigate the impact of the contraventions. The Complainant had been, and remains,

[4] *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258.
[5] *Fair Work Ombudsman v Orwill Pty Ltd and Anor* [2011] FMCA 730.

deprived of the moneys owed to him for a significant period of time. To the benefit of the Respondents, the Applicant states that it is not aware of any previous contravention of any workplace laws by the Respondents and to that extent they are first offenders.

22. Turning to the question of the size of the business, the Applicant accepts that it could be characterised as a small business in respect of the period that it was trading as 'Ali Baba'. Apart from the fact that the First Respondent ceased to trade in April 2012 and that the Australian Securities and Investment Commission ("ASIC") have commenced de-registration action against the First Respondent there is no information before the Court in relation to the current position of the First Respondent.

23. The fact that it is a small business and that it is in the process apparently of being wound up are matters which the Court should take into account, but regardless of the size of the business or its financial position an employer cannot be absolved of its legal responsibilities to comply with law in relation to the employment of employees and the Applicant refers the Court to the decision of Tracey J in *Kelly v Fitzpatrick*[6] and further to the decision of Driver FM in *Rajagopalan v BM Sydney Building Materials Pty Ltd*[7] where this issue was addressed.

24. On that basis the Applicant submits that the Court should not be deterred from imposing an appropriate penalty only because the First Respondent has ceased to trade. In relation to the Second and Third Respondents there is little evidence before the Court as to their current financial situation. The Second Respondent deposed previously to having been in receipt of Centrelink benefits for a period of time although he also indicated that he was employed in a call centre and receiving an income of about $600.00 per week, in the affidavit material sworn by him on 17 September 2012.

25. As previously indicated, in relation to the Third Respondent, the last material before the Court, which is again found in the affidavit sworn on 17 September 2012, was that he was employed as a petrol station

[6] *Kelly v Fitzpatrick* (2007) 166 IR 14.
[7] *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412.

attendant. He is, however, the joint title holder of a property located in the state of Victoria. The Applicant submits that in the absence of any compelling evidence otherwise the Court should consider the capacity to pay a penalty on behalf of both the Second and Third Respondents.

26. In relation to the question of the deliberateness of the contraventions, the Applicant submits that the contraventions were deliberate and that the Respondents set about a deliberate course of conduct to exploit the labour of the Complainant who was dependent upon them in order to maximise the profitability of the business.

27. The Applicant refers to the evidence in relation to the circumstances under which the Complainant was working at 'Ali Baba' and what he was told by the Second and Third Respondents in relation to those matters. The Applicant also refers to the fact that he was being paid for 20 hours per week, which reflects the maximum permitted under the Complainant's visa which the Second Respondent had applied for and about which the Second Respondent was clearly aware.

28. The Applicant also refers to the fact that the Second and Third Respondents had undertaken a month's training arranged by the franchisor and that both had been working in Australia prior to entering into this business. It should, therefore, be inferred that they had some degree of knowledge of their obligations under workplace law and there was also evidence before the Court that Ms Giannakis had advised them in relation to matters such as penalty rates and the correct payment of their other employees once they had commenced to operate that business.

29. I accept that the Second and Third Respondents clearly knew they had legal obligations in relation to the work performed by the employees, but did not the treat the Complainant in that way. The Second Respondent is the controlling mind of the First Respondent. He is the sole director and secretary of the First Respondent and on that basis the Applicant submits that clearly there was involvement of senior management in the breaches.

30. Turning to the issue of contrition, corrective action and co-operation with authorities, the Applicant submits that there should be no discount in penalty afforded in relation to those matters. There has been no

expression of contrition made by the Respondents. There has been no rectification of the underpayment outstanding. Further, the Second Respondent in the submission of the Applicant, set out to deliberately mislead the Fair Work Inspector in relation to the period of the Complainant's employment and the hours worked by him in order to bring the matter to a close and avoid enforcement action.

31. The proceedings have been fully contested. The evidence before the Court was such that the Second and Third Respondents were not found to be credible and their evidence was implausible in a number of respects.

32. Further, the Second Respondent, by providing rosters which the Court subsequently found to have been produced after the event, intended to mislead the Fair Work Inspector involved in the investigation in respect of the true extent of the Complainant's employment. This conduct should go against the Respondents in terms of a penalty.

33. Turning to the questions of ensuring compliance with minimum standards, the Applicant referred to a number of decisions, the *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3),*[8] the matter of *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd*[9] previously referred to, and *Finance Sector Union v Commonwealth Bank of Australia.*[10] These matters deal with the importance of maintaining effective minimum terms and conditions of employment and the enforcement of industrial instruments.

34. The Complainant's basic entitlements were ignored in this case and in the circumstances there were numerous aggravating factors in the submission put to the Court by the Applicant.

35. On the question of specific and general deterrence, the Applicant accepts that the First Respondent is no longer operating the business in which the Complainant worked and is subject to de-registration action by ASIC. However, there is a need for a penalty to provide some measure of specific deterrence where there has been no acceptance of fault, remorse or rectification.

[8] *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579.
[9] *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258.
[10] *Finance Sector Union v Commonwealth Bank of Australia* (2005) 147 IR 462.

36. In relation to the question of general deterrence, the Applicant again refers to decisions such as that of Landers J in *Ponzio v B & P Caelli Constructions Pty Ltd*[11] and Finkelstein J in *Community and Public Sector Union v Telstra Corporation*[12] on the question of general deterrence.

37. The Applicant submits that there is a need for general deterrence in the present case because the law should mark its disapproval of the Respondents' conduct and set a penalty which serves as a warning to others.

38. The Applicant refers to that extent again to the particular difficulties faced by the Complainant in these circumstances and also refers to the decision of Terry FM in *Fair Work Ombudsman v Fortcrest Investments Pty Ltd*[13] where he dealt with the situation of immigrants to Australia who set up a small business and the importance of them understanding that by failing to make inquiries about their obligations as employers they put themselves at risk of such prosecutions.

39. In this case on the Applicant's submission the penalty should send the message that blatant contravention of the kind in this case will not be tolerated by the Court and vulnerable workers will not be made available to be exploited.

40. Turning to the totality principle, the Applicant submits that to the extent that the Respondents would seek to argue that a penalty would be oppressive or crushing, and I note that the Respondents did not specifically refer to that in submissions apart to say that the business was no longer trading, the Second and Third Respondents provided little information to suggest that they had extensive financial resources. The Applicant refers, however, to the judgment of Burchardt J in *Fair Work Ombudsman v Promoting U Pty Ltd & Anor*[14] where he says Respondents cannot hope to have their conduct, in effect, exonerated by the Court merely because they are impecunious.

41. In relation to the penalty, the Applicant has submitted that penalties within the range of 70 to 90 per cent are appropriate in the context of

[11] *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543.
[12] *Community and Public Sector Union v Telstra Corporation* (2001) 108 IR 228.
[13] *Fair Work Ombudsman v Fortcrest Investments Pty Ltd* (2010) 190 IR 422.
[14] *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58.

this case given the nature and extent of the contraventions and the circumstances in which they occurred.

42. The Applicant submits that a penalty in that range is suitable not only with respect to the First Respondent, but also with respect to the Second and Third Respondents. With respect to the Second Respondent, he was clearly the controlling mind of the First Respondent. The Applicant submits:

- he was running the business while being paid to work somewhere else until he started working there full-time;
- that he had been shown to have total disregard for employment laws;
- that he had fabricated rosters admitted as evidence;
- that he had been found to have been directly and knowingly involved in the contraventions; and
- had not demonstrated any contrition or remorse.

43. Similarly, the Applicant submits that the Third Respondent was equally as culpable as the First Respondent notwithstanding that he did not have a direct legal interest in the First Respondent and on that basis the Applicant submits that a penalty in the range of 70 to 90 per cent of the statutory maximum should be imposed on each of the Respondents.

44. The Applicant made further submissions which went to the issue of the payment of the pecuniary penalty. By reference to the provisions of s.841B of the Act the Court has a discretion to order that a pecuniary penalty or part of the penalty may be paid to a particular person. In this case, the Applicant submits that the pecuniary penalties imposed on the Second and Third Respondents should be paid directly to the Complainant. They do so for the following reasons:

- the First Respondent has failed to comply with the Orders of the Court made on 19 December 2012 requiring it to pay the Complainant the sum of $56,822.12;
- the First Respondent has ceased trading and did so in about April 2010;

- ASIC have commenced action to de-register the First Respondent;
- the First Respondent has made no attempt to make any arrangements for payment of the amounts; and
- it is unlikely that the Complainant will be able to recover anything from the First Respondent.

45. The Applicant submits that an Order that a penalty imposed on the Second and Third Respondents be paid to the Complainant is the only way that he is likely to recover any amounts owed to him with respect to the contravening conduct and will not amount to a windfall gain by him.

46. Mr Boden on behalf of the Respondents put forward the following:

- the Court should give weight to the fact that the Respondents have no prior record of any contraventions of the Act;
- the First Respondent's business has now closed down and the company is no longer trading; and
- while there were a number of separate offences they should be regarded as one single course of conduct.

Therefore these would impact on the penalty imposed by the Court. There were no specific submissions made in relation to what that penalty should be.

Conclusions

47. On 10 December 2012, the Court handed down its decision with respect to alleged contraventions of the Act and the Regulations by the First Respondent and found that the Second and Third Respondents were involved in those contraventions.

48. Those contraventions were serious, continued over an extended period of time and were found by the Court to be deliberate. The total underpayment involved was in excess of $50,000.00.

49. On the material before the Court the First Respondent has failed to comply with those Orders to pay the Complainant that underpaid amount.

50. In submissions to the Court, the Applicant has set out the approach to determine appropriate penalty, the steps in the process and the considerations which the Court should take into account. I accept that the Applicant has correctly identified all of those matters.

51. The Court must firstly identify the separate contraventions involved and then consider whether the breaches identified constitute a single course of conduct.

52. The Court found that the First Respondent had contravened four separate sections of the Act and the provisions of r.19.4 of the Regulations. There were multiple contraventions of s.182(1) of the Act, s.189(1) of the Act and s.607 of the Act.

53. The failure of the Respondents to keep records relating to the Complainant's employment also involved multiple breaches. I accept that each of these multiple breaches can be regarded as a single course of conduct. I do not accept that all of them collectively amount to a single course of conduct. For the purpose of further consideration of appropriate penalties in this matter I therefore find that there were five contraventions, four of which consisted of multiple breaches of the same provision which should be regarded as occurring in a single course of conduct.

54. In considering an appropriate penalty for each of these contraventions I now turn to the factors addressed by the Applicant and outlined by Mowbray FM in *Mason v Harrington Corporation Pty Ltd*.[15]

55. Considerable weight in my view, should be given to the fact that the contraventions, save for the breach of s.235(2) of the Act, failure to pay accrued annual leave on termination of employment, occurred over a long period of time. The Complainant worked long hours, was paid no wages for part of the time and was significantly underpaid for the rest. He was not paid on a regular basis. The Complainant was further confronted with the difficulty that the Respondents did not keep the

[15] *Mason v Harrington Corporation Pty Ltd trading as Pangaea Restaurant & Bar* [2007] FMCA 7.

employment records required of them and showed a total disregard for the laws which applied to all employees covered by the provisions of the Act. Further while the Complainant's employment ceased in June 2009 he is yet to be paid his entitlements.

56. I am also of the view that the circumstances under which the contraventions occurred should also be given weight. The Complainant was a vulnerable employee. He was in Australia as the spouse of a holder of a student visa. His wife was the sister of the Second and Third Respondents. He relied upon them for accommodation, for employment, for transport to and from work and for assistance in dealing with Australian law. It was the Second Respondent, for example, who organised his working visa for him.

57. The Complainant did not know the legal requirements for employing somebody in Australia and only found out anything about it due to the assistance he received from a fellow employee.

58. The Complainant's dependence on the Second and Third Respondents was a significant factor. Apart from his wife they were the only people he knew in Australia.

59. The Complainant was entirely dependent on the safety net conditions of the award and the Australian Fair Pay Conditions Standards. The failure of the Respondents to comply with those conditions had a substantial impact. I have previously referred to the amount of the underpayment involved. Given that the First Respondent ceased trading in April 2010 it appears unlikely that he will ever receive that money and his loss is therefore ongoing.

60. The business was clearly a small business as that term is commonly understood. Regardless of the size of the business however, an employer is not absolved from the obligation to comply with Australian laws, be they laws concerning taxation, health and safety or conditions of employment. Nor does the fact that a business may be facing financial difficulty absolve the employers from compliance with their legal requirements.

61. While the First Respondent has ceased trading there is no evidence to suggest that the Second and Third Respondents are impecunious. Both

appear to have obtained employment and the Third Respondent is the joint title holder of a property. They have sufficient means to travel between Australia and India and to currently be absent from their employment here while on an extended stay in India.

62. The Court accepts that the actions of the Respondents were deliberate. The Second Respondent was clearly aware of the applicable laws governing employment and at least from April 2008 after Ms Giannakis drew his attention to various provisions he could hardly have failed to have not been aware of them.

63. He was also aware of the limitation on the hours of work which the Complainant could perform as a condition of his visa. The decision to flaunt those laws was a deliberate one. No defence at all was raised for the failure to keep records. Both the Second and Third Respondents were involved in those actions.

64. The Respondents have shown no contrition for their actions and have taken no action to make good the underpayment. The apparent co-operation with the Fair Work Inspector in the early stages of the investigation served merely to cover up the extent of the Complainant's employment by provision of rosters which were not the original documents and which were not accepted by the Court to be a genuine reflection of the hours he actually worked.

65. Contraventions in this case are significant. While the First Respondent is no longer operating and neither the Second or Third Respondents are involved in any venture where they are employing others, the failure to rectify the Complainant's loss in my view justifies a penalty which takes into account specific deterrence.

66. I do accept that they have no prior record of convictions and that this also should be taken into account. The need for general deterrence in this case springs from two considerations. First, employees in the fast food industry often work irregular hours and may be regarded as low paid. They are frequently dependent on the safety net provision of the Award and they may be employed in franchised businesses where the employer does not have sophisticated human resources support. Employers in such businesses need to be reminded of their obligations to be acquainted with their legal responsibilities and to act accordingly.

67. Second, the Complainant was particularly vulnerable because of the limitations of his visa and his lack of knowledge of his entitlements due to his recent arrival in Australia. Employers of people in those circumstances need to be aware that exploitation of such persons will not be tolerated by this Court.

68. The Applicant has argued for a penalty in the range of 70 to 90 per cent of the statutory maximum, with respect to each of the Respondents and with respect to each of the contraventions. I accept that a penalty at the higher end of the range is appropriate for the First and Second Respondents and with respect to those contraventions which involved multiple breaches of the same provisions.

69. With respect to the Third Respondent and the contravention in relation to the failure to paid accrued leave on termination of employment, I consider that a slightly lower penalty might be appropriate. While he was complicit in the contraventions, the Third Respondent does not have quite the same liability as the Second Respondent because he was not the legal operator of the business.

70. On that basis the range of appropriate penalties in my view would be 70 to 90 per cent for each of the contraventions with the exception of that involving s.235(2) of the Act for the First and Second Respondent and 50 to 70 per cent with respect to the contravention of s.235(2) of the Act and all contraventions by the Third Respondent. This would result in total penalties as follows:

- for the First Respondent in the range of $89,650.00 to $117,150.00;
- for the Second Respondent in the range of $14,510.00 to $23,070.00; and
- for the Third Respondent in the range of $13,750.00 to $14,510.00.

71. I am satisfied that the imposition of penalties within that range would not be oppressive. In all the circumstances, I therefore order that the following amounts should be imposed as penalties for the contraventions in this matter:

- with respect to the First Respondent the sum of $100,000.00;
- with respect to the Second Respondent the sum of $22,000.00; and
- with respect to the Third Respondent the sum of $14,000.00.

72. I have taken into account the fact that the First Respondent has failed to pay the Complainant the total underpayment due to him under Orders made on 19 December 2012. I have also taken into account that it is unlikely to pay the penalty imposed by the Court today. I therefore consider it appropriate that the penalty payable by the Second and Third Respondents be payable to the Complainant directly.

73. Failure to make those payments in full by the due date will entitle the Complainant to interest on any amounts outstanding should enforcement proceedings be necessary.

I certify that the preceding seventy-three (73) paragraphs are a true copy of the reasons for judgment of Whelan FM

Associate:

Date: 8 March 2013