FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TERRENCE CYRIL THOMAS (TRADING AS OVER THE TOP HAPPY CLEANING SERVICES PTY LTD) *[2013] FCCA 536*

Catchwords:
INDUSTRIAL LAW – penalties – respondent employing foreign nationals on student visas to undertake contract cleaning work – respondent not paying the employees any wages at all – gross exploitation – need for deterrence.

Legislation:
Fair Work Act 2009 ss. 546(1), 546(3)(a), 559(1)

Cases cited:
Australian Opthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560; (2008) 246 ALR 35; [2008] FCAFC 8
Community and Public Sector Union v Telstra Corporation Limited (2001) 108 IR 228; [2001] FCA 1364
Fair Work Ombudsman v Go Yo Trading Pty Ltd & Anor [2012] FMCA 865
Fair Work Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38
Kelly v Fitzpatrick (2007) 166 IR 14; [2007] FCA 1080
Lynch v Buckley Saw Mills Pty Ltd 3 FCR 503; (1984) 9 IR 469
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357; (2008) 177 IR 243; [2008] FCAFC 170
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	TERRENCE CYRIL THOMAS (TRADING AS OVER THE TOP HAPPY CLEANING SERVICES PTY LTD)
File number:	MLG 706 of 2012
Judgment of:	Judge Riley
Hearing date:	27 May 2013

Date of last submission:	27 May 2013
Delivered at:	Melbourne
Delivered on:	21 June 2013

REPRESENTATION

Counsel for the Applicant:	Ms Phoebe Nicholas
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondent:	The respondent appeared in person
Solicitors for the Respondent:	The respondent was not represented

ORDERS

(1) Pursuant to section 546(1) of the *Fair Work Act 2009* (Cth) the respondent pay an aggregate penalty of $52,800 in respect of the contraventions referred to in the declarations and orders made on 6 February 2013.

(2) Pursuant to section 546(3)(a) of the *Fair Work Act 2009* the penalties imposed on the respondent be paid to the Commonwealth.

(3) The payment of penalties referred to in order 1 be made within 60 days of this order.

(4) In the event the respondent within 30 days is unable to locate any of the employees referred to in orders 4 and 5 made on 6 February 2013 decision, the respondent within a further 14 days pay the amounts as set out in those orders to the Consolidated Revenue Fund of the Commonwealth pursuant to section 559(1) of the *Fair Work Act 2009*.

(5) The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

FEDERAL CIRCUIT COURT OF AUSTRALIA AT MELBOURNE

MLG 706 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

TERRENCE CYRIL THOMAS (TRADING AS OVER THE TOP HAPPY CLEANING SERVICES PTY LTD)
Respondent

REASONS FOR JUDGMENT

Introduction

1. This matter concerns the penalties to be imposed on the respondent for certain contraventions of industrial laws. Essentially, it is alleged that:

   a) the respondent, a sole trader, conducted a contract cleaning business;

   b) relevantly, the respondent employed three people as cleaners, Mr Raphel, Mr Shah and Mr Khalid;

   c) the three cleaners were all in Australia on temporary student visas;

   d) the three cleaners all worked a number of hours for the respondent; and

   e) the respondent did not pay any of the three cleaners any money at all.

2. The matter came before the court for hearing on 6 February 2013. On that date, the respondent did not appear, although the court was satisfied that he had been properly served. On 6 February 2013, the court made orders and declarations as follows:

> ***... UPON ADMISSIONS*** *that are taken to have been made consequent upon non-compliance with orders of the court:*
>
> ***THE COURT DECLARES THAT:***
>
> *1. The respondent contravened:*
>
> *a. clause 15.2.3(a) of the* Building Services (Victoria) Award 2003 *(AT822844) (Transitional Award) and item 2(1) of* Schedule 16 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 *(Transitional Act) by failing to pay Reju Raphel (Raphel) the minimum rate of pay for all hours worked;*
>
> *b. clause 12.3.2(b) of the Transitional Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay Raphel the part time allowance of 15% of the hourly rate for all hours worked;*
>
> *c. clause 23.2 of the Transitional Award and item 2(1) of Schedule 16 of the Transitional Act by failing to pay Raphel the shift work penalty of 15% of the ordinary hourly rate of pay for shifts worked finishing after 5:00pm and at or before midnight;*
>
> *d. section 235(2) of the* Workplace Relations Act *(Cth) (WR Act) and item 6 of Schedule 16 of the Transitional Act by failing to pay Raphel upon termination for annual leave accrued but not taken by him during his employment;*
>
> *e. section 45 of the* Fair Work Act 2009 *(Cth) (FW Act) by virtue of a contravention of Clause 16.1 of the* Cleaning Services Award 2010 *[MA000022] (Modern Award) by failing to pay Umesh Kumar Shah (Shah) and Hamza Khalid (Khalid) the minimum wage for all hours worked;*
>
> *f. section 45 of the FW Act by virtue of a contravention of Clause 12.4(b)(iii) of the Modern Award by failing*

to pay Shah the part time allowance of 15% of the ordinary hourly rate for all hours worked;

g. *section 45 of the FW Act by virtue of a contravention of Clause 12.5 of the Modern Award by failing to pay Khalid the casual loading of 25% of the ordinary hourly rate for all hours worked;*

h. *section 45 of the FW Act by virtue of a contravention of Clause 27.1(a) of the Modern Award by failing to pay Shah the shift work penalty rate of 15% of the ordinary hourly rate of pay for shifts worked on Monday to Friday and starting before 6:00am or finishing after 6:00pm; and*

i. *section 44(1) of the FW Act by failing to pay Shah for his accrued untaken annual leave upon termination of his employment in accordance with Section 90(2) of the FW Act, which is a provision of the National Employment Standards.*

AND THE COURT ORDERS THAT:

2. *The matter be adjourned to 3 May 2013 at 10am for penalty hearing.*

3. *Judgment against the respondent be entered for the applicant pursuant to Rule 13.03B(2)(c) of the* Federal Magistrates Court Rules 2001.

4. *Pursuant to section 545(2) of the FW Act the respondent pay:*

   a. *$1,204.82 to Reju Raphel;*

   b. *$4,445.54 to Umesh Kumar Shah; and*

   c. *$1,169.68 to Hamza Khalid.*

5. *Pursuant to section 547(2) of the FW Act, the respondent pay interest pursuant to legislation on the underpayment amounts specified in order 3 in the sums of:*

   a. *$59.00 to Reju Raphel;*

   b. *$218.00 to Umesh Kumar Shah; and*

   c. *$51.00 to Hamza Khalid.*

> 6. *The respondent pay the underpayment and interest amounts specified in orders 4 and 5 within 30 days.*
>
> 7. *The applicant file and serve any affidavit and written submissions on or before 19 April 2013.*
>
> 8. *The applicant serve a copy of this order on the respondent.*
>
> 9. *The parties have liberty to apply.*
>
> ***AND THE COURT NOTES THAT:***
>
> *Pursuant to rule 16.05(2)(a) of the* Federal Magistrates Court Rules 2001, *the court may vary or set aside a judgment or order made in the absence of a party.*

3. Pending the penalty hearing scheduled for 3 May 2013, the applicant served on the respondent an outline of penalty submissions in which the applicant indicated that it would seek orders against the respondent for aggregate penalties of about $50,000, being penalties of between 70% and 90% of the maximum.

4. On 3 May 2013, the respondent appeared by a solicitor. The solicitor told the court that, because the applicant was seeking large penalties, he sought an adjournment to permit full instructions to be obtained and proper submissions to be put on penalty. The matter was adjourned until 27 May 2013. On that date, the solicitor sought and was granted leave to withdraw. Thereafter, the respondent appeared in person.

5. Until 3 May 2013, the respondent had not participated in the proceedings at all. On 27 May 2013, after his solicitor had withdrawn, the respondent asked for the matter to be stood down to see the duty lawyer. There was some discussion about whether the duty lawyer would assist in industrial matters. However, ultimately, the matter was stood down for one hour.

6. The respondent returned to court later and said that the duty lawyer was unable to assist him. The respondent then asked for an adjournment on medical grounds. He provided to the court:

   a) a referral for a blood test;

   b) a referral for a hearing test;

c) a referral for a heart test; and

d) a report of a heart test stating that no abnormality was detected.

7. None of that amounted to medical evidence that the respondent had any health issues. An adjournment on the grounds of health issues was refused. The respondent then sought an adjournment to enable him to adduce evidence that he had mental health issues. That application was also refused, as the respondent had had ample time to gather any evidence to support such an application.

8. The respondent was asked whether he wished to cross examine any witnesses. He said he had no idea. After some discussion, the matter proceeded without any cross examination.

9. The applicant's proposed orders are as follows:

> *1. Pursuant to section 546(1) of the Fair Work Act 2009 (Cth) **(FW Act)** the respondent pay an aggregate penalty of $..... in respect of the contraventions referred to in the declarations and orders made by this Court on 6 February 2013 (**6 February 2013 decision**).*
>
> *2. Pursuant to section 546(3)(a) of the FW Act the penalties imposed on the respondent be paid to the Commonwealth.*
>
> *3. The payment of penalties referred to in order (1) above be made within 60 days of this order;*
>
> *4. In the event the respondent within 30 days in unable to locate any of the employees referred to in orders 4 and 5 of the 6 February 2013 decision, the respondent within a further 14 days pay the amounts as set out in those orders to the Consolidated Revenue Fund of the Commonwealth pursuant to section 559(1) of the Fair Work Act.*
>
> *5. The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.*
>
> *6. The parties have leave to apply.*
>
> *7. Such further or other orders as the court considers appropriate.*

10. The respondent was invited to make submissions after the applicant made its submissions, which are discussed in detail below. The respondent said that he could not say whether the applicant's submissions were true or false. He said he was a good employer to the three men but they had done "a lot of dodgy stuff". He said that he did not want to discriminate against them or himself. He said he wanted them to have a good life and move on. Otherwise, he said that he did not know what to say.

Approach to determining penalty

11. The proper approach to determining penalty in cases such as this is as follows.

12. The first step for the court is to identify each separate contravention involved. Multiple breaches which occurred in a single course of conduct may be treated as a single breach.

13. The second step is for the court to consider an appropriate penalty to impose in respect of each breach. The penalty imposed by the court should be an appropriate response to the contravenor's conduct.[1]

14. The third step is for the court to apply the totality principle.[2] This requires the court to consider the aggregate penalty overall, and determine whether it is an appropriate response to the conduct which led to the breaches.[3] The court in this step makes an "instinctive synthesis".[4]

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

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

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

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

[4] *Ophthalmic*, supra at [27] (Gray J) and [55] and [78] (Graham J).

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

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

> *Check lists of this kind can be useful providing they do not become transformed into a rigid catalogue of matters for attention. At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations. There is no suggestion in the present case that the*

learned magistrate made any relevant error in her identification of the matters which she should consider in fixing penalties.

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

Step 1: identifying the breaches

18. As stated above, the respondent breached various industrial laws as declared on 6 February 2013. In summary, the respondent's breaches were as follows:

    a) the respondent failed to pay Mr Raphel:

        i) minimum wages totalling $1,128.06;

        ii) part-time allowance totalling $130.16;

        iii) shift work penalty totalling $130.16; and

        iv) annual leave on termination totalling $76.76;

    b) the respondent failed to pay Mr Shah:

        i) minimum wages totalling $3,175.38;

        ii) part-time allowance totalling $476.31;

        iii) shift work penalty totalling $476.31; and

        iv) annual leave on termination totalling $317.54; and

    c) the respondent failed to pay Mr Khalid:

        i) minimum wages totalling $935.74; and

        ii) casual loading totalling $233.94.

19. The applicant submitted that there should be no grouping of the contraventions beyond the grouping reflected in the summary above. I agree with that submission. The contraventions involved three different employees, occurred at somewhat different times and arose from separate decisions by the respondent to not pay each employee his

proper entitlements. As such, the contraventions did not involve a single course of conduct, except as has already been accommodated, for example, by treating the repeated failure to pay Mr Shah the minimum wage as a single contravention.

20. That means that there were 10 contraventions. Each one carries a maximum penalty of $6,600.

Step 2: the appropriate penalty for the breaches

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

21. The respondent offered to pay Mr Raphel, Mr Shah and Mr Khalid somewhat more than the minimum payable for their work. However, ultimately, the respondent paid them nothing at all, despite their requests and despite their continuing for some time to work for him without pay.

22. Mr Raphel worked for the respondent for a total of 63 hours between 19 October 2009 and 22 November 2009. Mr Shah worked for the respondent for a total of 207 hours between 16 February 2010 and 16 May 2010. Mr Khalid worked for the respondent for a total of 61 hours between 3 March 2010 and 28 March 2010.

23. The respondent should have paid Mr Raphel but did not a total of $1,465.14. The respondent should have paid Mr Shah but did not a total of $4,445.54. The respondent should have paid Mr Khalid but did not a total of $1,169.68. Those three figures add up to $7,080.36.

24. The contraventions concerned failures to pay:

a) minimum wages;

b) part-time allowance;

c) shift work penalty;

d) annual leave on termination; and

e) casual loading.

The circumstances in which that conduct took place

25. The respondent was an undischarged bankrupt at the time of the contraventions. His bankruptcy was extended because he was two years late in filing his statement of affairs. The fact that the respondent may have been in financial difficulty in no way excuses him from his obligations to pay his employees their lawful entitlements.

26. For example, in *Lynch v Buckley Saw Mills Pty Ltd* (1984) 3 FCR 503; (1984) 9 IR 469 at 508, Keely J, in the Federal Court, said:

> *... it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of compying with an award and it follows that any decision taken by them which is regarded as affecting their obligations to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*

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

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

28. It is particularly clear in the present case that the respondent's financial difficulty should not be a mitigating factor because his contraventions continued over an extended period of about six months.

29. Having said that, the respondent has not disclosed to the court his financial circumstances. Consequently, his financial circumstances cannot be taken into account in any event.

30. Mr Raphel, Mr Shah and Mr Khalid were all in Australia on student visas at the time of their employment by the respondent. English was not their first language. They were not familiar with Australian

workplace standards. These factors made the employees in this case particularly vulnerable.

31. In *Fair Work Ombudsman v Go Yo Trading Pty Ltd & Anor* [2012] FMCA 865, Jarrett FM (as his Honour then was) said at [15]:

> *Foreign nationals working in Australia on visas, be they 417 visas or 457 visas or some other form of visa, in my view, represent a particular class of employee who are potentially vulnerable to improper practices by their employer. The cases demonstrate that those characteristics mean that a particular employee concerned is of a vulnerable class: see, for example,* Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd *(2012) FMCA 258,* Fair Work Ombudsman v Orwill Pty Ltd *(2011) FMCA 730;* Fair Work Ombudsman v Sanada Investments Pty Ltd *[2010] FMCA 401 at [60].*

32. In *Fair Work Ombudsman v Saya Cleaning Pty Ltd* [2009] FMCA 38 at [20], Simpson FM (as his Honour then was) explained the consequences for a respondent of the exploitation of vulnerable workers as follows:

> *Ms Iglesias was 18 years of age at the time of the contraventions concerning her. Mr Elbehidi was a person who had newly arrived in Australia from Iraq. It is reasonable to conclude that he had limited experience both of working in Australia and of his legal entitlements. Both employees were vulnerable employees. The vulnerability of these employees and the way they were exploited by the respondents is a significant factor when assessing the quantum of penalty:* Cotis v Pow Juice Pty Ltd *[2007] FMCA 140 at [57-58];* Jones v Hanssen Pty Ltd *[2008] FMC 291 at [8].*

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

33. The amounts lost to the employees in this case are set out above. Their evidence explains that, as they were not paid for their work, they were forced to rely on savings and the financial support of family and friends. Although the underpayments were not large in absolute terms, the underpayments were very large in the sense that the employees were not paid at all for their work.

Whether there had been similar previous conduct by the respondent

34. The applicant claimed that there have been numerous complaints of a similar nature against the respondent. However, those complaints have apparently not resulted in findings made by a court. Consequently, I do not consider that it would be appropriate to take the complaints into account, just as a criminal court would not take into account unproven charges.

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

35. As discussed above, the contraventions were distinct.

The size of the business enterprise involved

36. The respondent's business was quite small. However, as Tracey J said in *Kelly v Fitzpatrick* (2007) 166 IR 14; [2007] FCA 1080 at [28]:

> *No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction "must be imposed at a meaningful level": see* Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd *[2001] ATPR 41-815 at [13].*

Whether or not the breaches were deliberate

37. The breaches in this case can only be regarded as deliberate. This is not a case of underpayment resulting from some alleged confusion about the proper rates of pay. It was a total failure by the respondent to pay the employees anything at all over a prolonged period of time.

Whether senior management was involved in the breach

38. The respondent was a sole trader and was entirely responsible for the business and all the decisions made in relation to it.

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

39. The respondent did not cooperate with the authorities in their investigation into his conduct. He did not participate in these proceedings until the final stages. The applicant was obliged to make application for substituted service and default judgment. The respondent only appeared in court when he learnt of the quantum of the penalties that the applicant would be seeking. Even then, he only appeared to seek adjournments. The first adjournment request was granted, as the respondent had only recently obtained legal assistance. The subsequent adjournment requests were totally spurious.

40. The respondent was ordered on 6 February 2013 to pay the employees the amounts of the underpayments with interest. He has not done so.

41. The respondent has shown no remorse. When his contraventions were made clear to him, he did not apologise or offer any excuse for his actions. Instead, he blamed the employees and accused them of shoddy work. The respondent has taken no corrective action despite being ordered to do so. He has not cooperated with the authorities.

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

42. There is a clear need to ensure compliance with minimum standards, particularly in the contract cleaning industry where many vulnerable workers are employed.

The need for specific and general deterrence

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

> *Specific deterrence focuses on the party on whom the penalty is to be imposed and the likelihood of that party being involved in a similar breach in the future. Much will depend on the attitude*

expressed by that party as to things like remorse and steps taken to ensure that no future breach will occur.

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

> *In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend:* Yardley v Betts *(1979) 22 SASR 108. The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like minded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty:* R v Thompson *(1975) 11 SASR 217.*

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

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

46. There is a considerable need for specific deterrence in this case. The respondent has shown no remorse or contrition. There is no evidence before the court to suggest that he does not presently have employees or would not have employees in the future. The experience of the three employees in this case indicates that the respondent had a *modus operandi* that involved gross exploitation of vulnerable workers. It is imperative that the respondent understands that it will not be financially advantageous to him to behave in the same way in the future.

47. There is also a considerable need in this case for general deterrence. There must be a clear message to employers that not paying vulnerable employees will not be tolerated.

48. It is difficult to detect, investigate and bring to court contraventions such as the present, where the employees are unfamiliar with Australian workplace standards and systems. Consequently, the objective of deterrence calls for a more substantial penalty than might otherwise be the case.

Other issues

49. There are no other relevant matters.

The amount of the penalties for the breaches

50. The legislation provides for a maximum penalty of $6,600 for each of the contraventions, or $66,000 for all ten contraventions.

51. The applicant seeks:

    a) for each of the three minimum wage contraventions, and for the casual loading contravention, penalties of 80% to 90% of the maximum, or penalties in the range of $5,280 to $5,940; and

    b) for each of the other six contraventions, penalties of 70% to 80% of the maximum, or penalties in the range of $4,620 to $5,280.

52. The applicant did not explain why it sought a higher penalty for some of the contraventions than for others.

53. I consider that a penalty of 90% of the maximum is warranted for each contravention in this case. The respondent has given no pay whatsoever to three vulnerable employees. That amounts to gross exploitation. The fact that the respondent treated three employees in the same way over a period of about six months shows that his conduct was deliberate and part of a *modus operandi* to advantage himself financially at considerable cost to others.

54. The respondent has shown no remorse, has failed to take corrective action even after being ordered to do so by the court and has failed to cooperate in the investigation or in these court proceedings. This case calls for considerable specific deterrence as well as a measure of general deterrence.

55. The fact that only relatively small amounts of money were underpaid in this case does not reduce the respondent's culpability. Rather, it merely reflects how little the employees could have expected to earn if properly paid and how little the respondent would have needed to pay them to comply fully with his obligations.

56. A penalty of 90% of the maximum for each contravention produces an aggregate penalty of $59,400.

Step 3: the totality principle

57. I note that the proper approach in determining penalty is to impose a penalty for each contravention, and then, as a check, to consider whether the aggregate penalty is appropriate for all of the contraventions as a whole. In *Ponzio v B & P Caelli Constructions Pty Ltd and Ors* (2007) 158 FCR 543; (2007) 162 IR 444; [2007] FCAFC 65, Jessup J, with whom Lander J agreed, said at [145] to [146]:

> *145. For the above reasons, his Honour's disposition of the appellant's case under s 187AA cannot stand. That does not mean, however, that the appeal must necessarily succeed. As I have said, the trial Judge recognised that this was a case in which the totality principle should apply. His Honour said that the principle required "that in imposing penalties for numerous offences, the penalties in aggregate are just and appropriate ... ." For that proposition, his Honour relied upon* CPSU v Telstra Corporation Limited *[2001] FCA 1364; (2001) 108 IR 228, 230 [7]. In* CPSU, *Finkelstein J said that, in a case of multiple breaches punishable by pecuniary penalty, it would be –*
>
> > *... necessary to resolve upon the appropriate total penalty, dividing that penalty by the number of individual contraventions and record that amount as the penalty for each contravention, whether or not the sum produced might be regarded as an inappropriate individual penalty.*
>
> *With respect to his Honour, I do not believe this is the correct approach. The position was, in my view, correctly stated by Goldberg J in* ACCC v Australian Safeway Stores Pty Ltd *(1997) 145 ALR 36, 53:*

The totality principle is designed to ensure that overall an appropriate sentence or penalty is appropriate and that the sum of the penalties imposed for several contraventions does not result in the total of the penalties exceeding what is proper having regard to the totality of the contravening conduct involved: McDonald v R *[1994] FCA 956; (1994) 48 FCR 555; 120 ALR 629. But that does not mean that a court should commence by determining an overall penalty and then dividing it among the various contraventions. Rather the totality principle involves a final overall consideration of the sum of the penalties determined. In* Mill v R *[1988] HCA 70; (1988) 166 CLR 59; 83 ALR 1 the High Court accepted the following statement as correctly describing the totality principle:*

> *The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".*

As Spender J pointed out in McDonald v R *at FCR 556; ALR 631:*

> *Implicit in that statement is that the sentence for each offence should be "properly calculated in relation to the offence for which it is imposed".*

It is explicit in this statement that a sentencer or penalty fixer must, as an initial step, impose a penalty appropriate for each contravention and then as a

check, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct involved: McDonald v R *at FCR 563, per Burchett and Higgins JJ.*

The position as stated in Mill, *on which Goldberg J relied, was described by Gummow, Callinan and Heydon JJ as the "orthodox, but not necessarily immutable, practice" in* Johnson v The Queen *[2004] HCA 15; [2004] 205 ALR 346, [26].*

146. *In a setting which did not involve an agreement on penalty, it would, therefore, be necessary to commence with an assessment of an appropriate penalty for each contravention, paying due regard to such mitigating factors as there were. In the judgments to which the trial Judge referred, it seems to have been accepted that, absent strong mitigating circumstances such as sheer inadvertence, a penalty of about $200 for each contravention of s 187AA on the facts existing on 5 and 6 August 2003 could not be regarded as excessive. On the facts of the present case, and having regard to what I have described as the conventional mitigating circumstances referred to by his Honour, I do not think that a penalty of $200 for a single contravention would have been excessive. It may not have been the penalty that I would have imposed, but on no view might it have been regarded as outside the permissible range. If that penalty had been imposed for each of the contraventions which came before his Honour, a total of $20,200 would be the aggregate result. Manifestly the application of the totality principle was then required.*

58. I consider that the totality principle requires some reduction of the amount that would otherwise be the aggregate penalty in this case. I consider that, in view of the totality of the respondent's conduct, a 10% reduction is warranted. Consequently, the respondent will be ordered to pay a total penalty of 80% of the maximum possible penalty, being a penalty of $52,800.

I certify that the preceding fifty-eight (58) paragraphs are a true copy of the reasons for judgment of Judge Riley.

Associate: Rose Hopkins

Date: 21 June 2013