FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v UNGER CATERING SERVICES (AUST) PTY LTD & ANOR *[2013] FCCA 497*

INDUSTRIAL LAW – Fair work – pecuniary penalties – contraventions of the Australian Pay and Classification Scale – underpayment of employees – failure to pay superannuation entitlements – agreed statement of facts – breaches admitted – consideration of matters relevant to penalty.

Crimes Act 1914 (Cth), s. 4AA
Evidence Act 1995 (Cth), s. 191
Fair Work Act 2009 (Cth), s. 557(1)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth), sch. 16, items 1, 2(2) and 5
Superannuation Guarantee (Administration) Act 1992 (Cth)
Workplace Relations Act 1996 (Cth), ss. 4(1), 185(2), 719(2), 719(4)

Jordan v Mornington Inn Pty Ltd (2007) 166 IR 33
Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	UNGER CATERING SERVICES (AUST) PTY LTD
Second Respondent:	SHARON UNGER
File Number:	MLG 918 of 2012
Judgment of:	Judge Hartnett
Hearing date:	18 February 2013
Delivered at:	Melbourne
Delivered on:	12 June 2013

REPRESENTATION

Counsel for the Applicant:	Mr Vallence
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the First Respondent:	Mr Mahos
Solicitors for the First Respondent:	Maddocks Lawyers
Counsel for the Second Respondent:	Mr Mahos
Solicitors for the Second Respondent:	Maddocks Lawyers

THE COURT DECLARES THAT:

(1) The First Respondent contravened:

(a) Section 185(2) of the *Workplace Relations Act 1996* (Cth) by failing to pay Ms Amanda Gardner, Ms Wendy O'Meara and Ms Michelle Simmonds a guaranteed casual loading percentage of 20 per cent in addition to the basic periodic rate of pay contained in the Australian Pay and Classification Scale ('APCS') derived from the *Catering – Victoria – Award 1998*.

(b) Section 185(2) of the *Workplace Relations Act 1996* (Cth) and item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) by failing to pay Ms Gardner, Ms O'Meara and Ms Simmonds a guaranteed casual loading percentage of 20 per cent of their basic periodic rate of pay contained in the preserved APCS.

(c) Clause 11 of the *Unger Catering Services (Aust) Pty Ltd Employee Collective Agreement* ('the Agreement') and sub-item 2(2) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) by failing to pay Ms Gardner the rate of pay specified in the Agreement for the duration of her employment.

(d) Clause 13 of the Agreement and sub-item 2(2) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) by failing to pay Ms Gardner, Ms O'Meara and Ms Jane Sheehy superannuation contributions that were at least nine per cent of the wages paid to those employees to a compliant superannuation fund.

(2) The Second Respondent was involved in each of the contraventions specified in paragraph 1 above within the meaning of s.728(1) of the *Workplace Relations Act 1996* (Cth) and s.550(1) of the *Fair Work Act 2009* (Cth).

THE COURT ORDERS THAT:

(1) Pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) and s.546(1) of the *Fair Work Act 2009* (Cth) the First Respondent pay an aggregate penalty of $21,120 in respect of the contraventions referred to in declarations 1(a) to 1(d).

(2) Pursuant to s.719(1) of the *Workplace Relations Act 1996* (Cth) and s.546(1) of the *Fair Work Act 2009* (Cth) the Second Respondent pay an aggregate penalty of $3,168 in respect of her involvement in the contraventions referred to in declarations 1(a) to 1(d) above.

(3) Pursuant to s.841(1) of the *Workplace Relations Act 1996* (Cth) and s.546(3)(a) of the *Fair Work Act 2009* (Cth) the penalties imposed on the First and Second Respondents be paid to the Commonwealth.

(4) The payment of penalties referred to in orders (1) and (2) above be made within 90 days of the date of this Order.

FEDERAL CIRCUIT COURT OF AUSTRALIA AT MELBOURNE

MLG 918 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

UNGER CATERING SERVICES (AUST) PTY LTD
First Respondent

SHARON UNGER
Second Respondent

REASONS FOR JUDGMENT

1. These proceedings commenced upon the Applicant filing, on 31 July 2012, an Application in the Fair Work Division of this Court together with a Statement of Claim. That claim against the First and Second Respondents was in respect of alleged underpayments to four former employees in the total sum of $13,768.72. The parties have subsequently filed a Statement of Agreed Facts made for the purposes of s.191 of the *Evidence Act 1995* (Cth) ('the Evidence Act'), wherein the First and Second Respondents expressly admit to contravening:-

   a) Section 185(2) of the *Workplace Relations Act 1996* (Cth) ('the WR Act') and item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) ('Transitional Act');

   b) Clause 11 of the *Unger Catering Services (Aust) Pty Ltd Employee Collective Agreement 2006* ('the Agreement') and sub-item 2(2) of Schedule 16 of the Transitional Act; and

c) Clause 13 of the Agreement and sub-item 2(2) of Schedule 16 of the Transitional Act.

2. Further, the parties have agreed upon the declarations to be made by the Court in the proceedings (which shall be made) and the form of orders to be made. The parties do not agree upon the aggregate penalty to be imposed upon each of the First and Second Respondents in respect of the admitted contraventions of the First Respondent and the admitted involvement (in those contraventions) of the Second Respondent. The Second Respondent, having admitted her involvement in each of the contraventions, is treated as having contravened the provisions herself. The total underpayment of the employees of $13,768.72 was rectified by the First Respondent during the period 13 April 2012 to 13 September 2012. There is no further sum outstanding.

3. In the Applicant's submissions on penalty, the Applicant sought a total maximum penalty (after the grouping of contraventions and a 20 per cent discount for admissions and cooperation) of $52,800 in respect of the First Respondent and $10,560 in respect of the Second Respondent, and submitted that in the circumstances of this matter, a penalty that is greater than nominal was warranted, and recommended a penalty in the range of between 40 and 60 per cent of the total maximum penalty as determined after discount in the sums proposed above. In the Respondents submissions on penalty, the Respondents sought (after the same grouping of contraventions but with a 30 per cent discount for admissions and cooperation making a maximum penalty of $23,100 for each contravention for the First Respondent) for minimum wage contraventions, 20 per cent of the maximum penalty as determined after the 30 per cent discount and being a total sum of $4,620, and for the superannuation contraventions, 30 per cent of the maximum penalty (being a total sum of $6,930) with a combined total of $11,550 for the First Respondent. In respect of the Second Respondent, it was submitted that for the minimum wage contraventions, 10 per cent of the maximum penalty (being $462) should be imposed and for the superannuation contraventions, 20 per cent of the maximum (being $924) should be imposed making a total amount for the Second Respondent of $1,386.

4. The following facts in evidence are agreed between the parties:-

a) the First Respondent is and was at all material times;

i) a company incorporated under the *Corporations Act 2001* (Cth):

ii) the trustee of the Unger Catering Trust;

iii) an entity carrying on a food catering business from 2 Percy Place Prahran in the State of Victoria that specialises in Kosher cuisine catering for private and corporate events, airline carriers, meals on wheels and schools; and

iv) relevantly contracted to run a school canteen at Mount Scopus College, 245 Burwood Highway Burwood in the State of Victoria ('the Canteen'); and

b) the Second Respondent is and was at all material times:

i) a director of the First Respondent;

ii) the holder of one third of the shares in the First Respondent;

iii) responsible for the overall direction, management and supervision of the First Respondent's business and its employees;

iv) aware of, and responsible for, setting and adjusting the wage rates of the employees;

v) aware of the *Unger Catering Services (Aust) Pty Ltd Employee Collective Agreement 2006* ('the Agreement') and that it applied to the employees; and

vi) the person who lodged the Agreement with the Office of the Employment Advocate in 27 November 2006.

5. During the period from 23 April 2007 to 17 May 2011, or part thereof, the First Respondent employed the following employees ('the Employees'):

   a) Ms Amanda Gardner who was employed from 23 April 2007 to 17 May 2011;

   b) Ms Wendy O'Meara who was employed from 5 June 2007 to 17 May 2011;

   c) Ms Michelle Simmonds who was employed from 11 February 2008 to 17 May 2011; and

   d) Ms Jane Sheehy who was employed from 12 July 2010 to 17 May 2011.

6. The Employees were employed by the First Respondent to perform catering services at the Canteen for the First Respondent.

7. At all material times during their employment with the First Respondent, each of the Employees were employed on a casual basis.

Failure to pay casual loading during the period up to and including 30 June 2009 (section 185(2) of the WR Act)

8. During the period up to and including 30 June 2009, pursuant to subsection 185(2) of the WR Act, the First Respondent was required to pay Ms Gardner, Ms O'Meara and Ms Simmonds a guaranteed casual loading percentage of 20 per cent in addition to the basic periodic rate of pay contained in the Australian Pay and Classification Scale ('the APCS').

9. The applicable rates of pay, including the guaranteed casual loading, contained in the APCS that were to be paid to Ms O'Meara and Ms Simmonds at all material times were as follows:-

Casual rates of pay for a food and beverage attendant grade 2 under the APCS				
Time period	Basic periodic rate of pay	Casual loading per cent	Casual loading amount	Casually loaded basic periodic rate of pay
1 December 2006 to 30 September 2007	$14.57	20 per cent	$2.91	$17.48
1 October 2007 to 30 September 2008	$14.84	20 per cent	$2.96	$17.80
1 October 2008 to 30 June 2009	$15.41	20 per cent	$3.08	$18.49

10. The First Respondent paid Ms O'Meara the following hourly rates of pay for all hours worked by her:-

    a) from around 25 June 2007: $15.82;

    b) from around October 2007: $17.05; and

    c) from around 21 October 2008: $17.70.

11. The First Respondent paid Ms Simmonds the following hourly rates of pay for all hours worked by her:-

    a) from around February 2008: $17.05; and

    b) from around October 2008: $17.70.

12. Given the applicable rates of pay contained in the APCS, the payments to Ms O'Meara and Ms Simmonds of the hourly rates of pay as outlined in paragraphs 10 and 11 herein constituted a breach by the First Respondent of s.185(2) of the WR Act.

13. The applicable rates of pay, including the guaranteed casual loading, contained in the APCS that were to be paid to Ms Gardner at all material times were as follows:-

Casual rates of pay for a cook grade 5 (tradesperson) under the APCS				
Time period	Basic periodic rate of pay	Casual loading per cent	Casual loading amount	Casually loaded basic periodic rate of pay
1 December 2006 to 30 September 2007	$17.53	20 per cent	$3.50	$21.03
1 October 2007 to 30 September 2008	$17.80	20 per cent	$3.56	$21.36
1 October 2008 to 30 June 2009	$18.37	20 per cent	$3.67	$22.04

14. The First Respondent paid Ms Gardner the following hourly rates of pay for all hours worked by her:-

a) from around May 2007: $20.00;

b) from around October 2007: $21.00; and

c) from around October 2008: $21.45.

15. Given the applicable rates of pay contained in the APCS, the payment to Ms Gardner of the hourly rates of pay as outlined in paragraph 14 herein constituted a breach by the First Respondent of s.185(2) of the WR Act.

Failure to pay casual loading during the bridging period (section 185(2) of the WR Act and item 5 of Schedule 16 Transitional Act)

16. Pursuant to s.185(2) of the WR Act and item 5 of Schedule 16 of the Transitional Act, during the bridging period the First Respondent was required to pay Ms Gardner, Ms O'Meara and Ms Simmonds the guaranteed casual loading of 20 per cent of their basic periodic rate of pay contained in the APCS.

17. The applicable rates of pay during the bridging period, including the guaranteed casual loading, contained in the transitional APCS, that were to be paid to Ms O'Meara and Ms Simmonds at all material times were as follows:-

Casual rates of pay for a food and beverage attendant grade 2 under the APCS				
Time period	Basic periodic rate of pay	Casual loading per cent	Casual loading amount	Casually loaded basic periodic rate of pay
1 July 2009 to 31 December 2009	$15.41	20 per cent	$3.08	$18.49

18. The First Respondent paid Ms O'Meara and Ms Simmonds $17.70 per hour for all hours worked.

19. Given the applicable rates of pay contained in the transitional APCS, the payment to Ms O'Meara and Ms Simmonds of the hourly rates of pay as outlined in paragraphs 18 herein was a contravention by the First Respondent of s.185(2) of the WR Act and item 5 of Schedule 16 of the Transitional Act.

20. The applicable rates of pay during the bridging period, including the guaranteed casual loading, contained in the transitional APCS that were to be paid to Ms Gardner at all material times were as follows:-

Casual rates of pay for a cook grade 5 (tradesperson) under the APCS				
Time period	Basic periodic rate of pay	Casual loading per cent	Casual loading amount	Casually loaded basic periodic rate of pay
1 July 2009 to 31 December 2009	$18.37	20 per cent	$3.67	$22.04

21. The First Respondent paid Ms Gardner $21.45 per hour for all hours worked.

22. Given the applicable rates of pay contained in the transitional APCS, the payment to Ms Gardner of the hourly rates of pay as outlined in paragraph 21 herein, was a contravention by the First Respondent of s.185(2) of the WR Act and item 5 of Schedule 16 of the Transitional Act.

Failure to pay hourly rate of pay (clause 11 of the Agreement (Casual Rates) and item 2(2) of Schedule 16 of the Transitional Act)

23. At all material times clause 11 of the Agreement prescribed the rates of pay to be paid to a level 2 and level 6 casual employee employed by the First Respondent.

24. Clause 11 of the Agreement provided that a level 2 casual employee was to be paid $17.65 per hour.

25. Ms O'Meara and Ms Simmonds were properly classified as level 2 casual employees under the Agreement. As set out above, from the commencement of Ms O'Meara and Ms Simmonds employment until 1 October 2008, the First Respondent paid Ms O'Meara and Ms Simmonds hourly rates of pay that were below the rate of pay specified in the Agreement. This was a contravention by the First Respondent of clause 11 of the Agreement and sub-item 2(2) of Schedule 16 of the Transitional Act in relation to Ms O'Meara and Ms Simmonds.

26. Clause 11 of the Agreement provided that a level 6 casual employee was to be paid $21.80 per hour.

27. Ms Gardner was properly classified as a level 6 casual employee under the Agreement. As set out above, Ms Gardner was paid below the rate of pay specified in the Agreement for the duration of her employment. Thus the First Respondent contravened clause 11, in conjunction with clause 6, of the Agreement and sub-item 2(2) of Schedule 16 of the Transitional Act in relation to Ms Gardner.

Contravention of clause 13 of the Agreement (failure to make superannuation guarantee contributions)

28. Pursuant to clause 13 of the Agreement the First Respondent was required to pay superannuation contributions as required by the *Superannuation Guarantee (Administration) Act 1992* (Cth) ('the Superannuation Guarantee Act') to a complying fund.

29. The Superannuation Guarantee Act provides that an employer will avoid the imposition of the superannuation guarantee charge if they contribute at least nine per cent of the wages paid to an employee to a complying fund.

30. During Ms Gardner's, Ms O'Meara's and Ms Sheehy's employment, the First Respondent failed to pay superannuation contributions, in respect of each of Ms Gardner, Ms O'Meara and Ms Sheehy, that were at least nine per cent of the wages paid to the employees to a complying fund. Thus, the First Respondent contravened clause 13 of the Agreement and sub-item 2(2) of Schedule 16 of the Transitional Act.

Consideration

31. The Applicant relies upon the Affidavit of Ms Anica Grace Winterburn affirmed on 1 February 2013, Submissions filed 23 November 2012 and Submissions in Reply filed 12 February 2013. The Respondents rely upon the Affidavits of the Second Respondent affirmed 10 January 2013 and 14 February 2013, and Submissions filed 10 January 2013. There is also in evidence exhibit "R1", being a letter dated 15 February

2013 from the Respondents' solicitors to solicitors not involved in these proceedings, in respect of monies allegedly removed, without authority, from the trading accounts of the First Respondent by a previous employee, not being an employee in respect of whom underpayments were made.

32. Section 719(4) of the WR Act prescribes the maximum penalty that may be imposed by this Court to be, in the case of an individual, 60 penalty units and in the case of a body corporate, 300 penalty units.

33. Section 4(1) of the WR Act provides that "penalty unit" has the same meaning as in the *Crimes Act 1914* (Cth). Section 4AA of the *Crimes Act 1914* (Cth) defines a "penalty unit" to be $110 dollars (at the relevant time).

34. The maximum penalty that may be imposed by the Court on the First Respondent (as a body corporate) for each contravention is $33,000. The maximum penalty that may be imposed by the Court on the Second Respondent (as an individual) for each contravention is $6,600.

35. Subsection 719(2) of the WR Act and s.557(1) of the *Fair Work Act 2009* (Cth)('the FW Act') provide that multiple contraventions of a provision, arising out of a course of conduct, are taken to be a single contravention. The parties agree that the contraventions ought to be considered, for the purposes of penalty, as forming two distinct groups:-

a) the failure to pay the Employees the applicable minimum hourly rate of pay as determined by the WR Act, the Transitional Act and the Agreement; and

b) the failure to make the required superannuation guarantee contributions as required by the Agreement.

On the basis of these groupings the maximum total penalty would be $66,000 in respect of the First Respondent and $13;200 in respect of the Second Respondent.

36. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act was summarised by Mowbray FM in

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7 at paragraphs 26 to 59 as follows:-

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.

37. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at paragraph 14. Whilst the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion (*Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at paragraph 11). I have taken the relevant and significant matters as applicable to these facts from those set out in the summary into account as detailed hereafter.

38. The Respondents admitted liability at an early stage in the proceedings and have rectified the underpayments made. They agreed to a statement of facts, which is in evidence, thereby facilitating the efficient conduct of these proceedings. The Applicant proposes a 20 per cent discount in respect of the maximum penalty in relation to this conduct of the Respondents. The Respondents seek a 30 per cent discount in respect of the maximum penalty in respect of this conduct. Certainly the 20 per cent discount is warranted, but any further discount or effective double-dipping, is not. The Respondents have rectified the underpayments but did not do so immediately. They failed to comply with agreed payment plans and sought additional time to repay the monies owing to the Employees in circumstances where the Unger Catering Trust determined to repay $40,000 to Mr Peter Unger, a shareholder of the First Respondent, during the 2011 financial year. This does not sit well with a claim that the First Respondent could not afford to make required superannuation payments due to the Employees before 30 June 2012. There was not, in the Respondents initial handling of these matters, a genuine expression of contrition or acknowledgment of their wrongdoing. The Court accepts that did follow as the prosecution proceeded.

39. The Second Respondent deposed that the superannuation breaches came about because the business did not have the money to pay Ms Gardner, Ms O'Meara and Ms Sheehy their superannuation entitlements as they fell due. The Second Respondent stated in her Affidavit filed 10 January 2013 that:-

> *"41. ... We did not conceal this from our employees. We apologised to these employees at the time, and told them the payment of their wages was the highest priority, and that superannuation entitlements would be paid as soon as cash flow improved. This was a highly regrettable situation but it was the best we could do at the time. I now understand that superannuation payments are an essential cost of doing business and that it was a mistake to take the approach that we did. I intend to ensure it will not occur again.*
>
> *42. The Business kept records of superannuation payments due to the three employees and has now paid all superannuation monies owed. The Business has engaged a software consultant to ensure that superannuation payments are made correctly and on time in the future.*

...

50. Unger Catering has also incurred substantial unforeseen expenses in rectifying the Contraventions. In total, the rectification costs so far are approximately $35,000. This includes the total amounts back-paid to the employees together with associated employment on-costs, IT, accounting, legal and other professional services expenses. Further, as I have stated previously, Unger Catering has committed resources, including engaging a software consultant, to ensure future compliance with all employment obligations. I will also undertake training from Maddocks Lawyers on workplace legislation and compliance with workplace instruments to ensure future compliance and improve my knowledge of workplace law."

40. The First and Second Respondents have not previously been prosecuted by the Applicant and there are no relevant prior convictions or adverse judgments. Earlier complaints have been made and investigated however, and being some thirteen other employees between 1998 and 2009, and earlier underpayments voluntarily rectified. This would have, or should have, impressed upon the Respondents the need to ensure the employees were properly paid. It did not have that effect. The Respondents continued to engage in contravening conduct, although I accept the number of complaints were very small when considering, over the decades, the employment of thousands of casual workers and currently hundreds of casual workers. Nevertheless, the Respondents had not taken the necessary steps to prevent further contraventions as highlighted by these proceedings.

41. The contraventions do represent a failure to comply with basic and important conditions of employment being wages and superannuation contributions for employees engaged on a casual basis in a low-income employment field. The hourly rates of pay paid to the Employees was below the guaranteed minimum hourly rate of pay that formed part of the safety net entitlements for the Employees under the Australian Fair Pay and Conditions Standard ('the AFPCS') and were below the rates provided in the First Respondent's own Agreement lodged with the Office of the Employment Advocate in November 2006. The explanation for the underpayments proffered by the Respondents, underpayments which spanned many years, was that the

underpayments arose due to an error on the part of the Respondents regarding the classification level of the Employees, and further that the Respondents accidentally overlooking notices relating to wage increases. It is difficult to see on the evidence that the Respondents held any genuine belief that they were strictly compliant with their obligations under workplace laws. However, the Court does not find there was a general and reckless disregard for compliance with the employment obligations that applied to the First Respondent as they were managed and controlled by the Second Respondent in the operation of the Canteen, and nor does it find the failure to pay the correct hourly rates of pay intentional. The conduct took place against a backdrop of the Second Respondent attempting to simplify employment matters by lodging an Agreement in November 2006 to ensure compliance by the Respondents was made easier. She was then diagnosed with cancer in 2008 and underwent treatment including chemotherapy and radiotherapy. The Second Respondent and her husband separated; with as part of that outcome the financial pressures of the medium sized business impacting adversely on the Second Respondent and her husband. The Respondents appeared lacking in specialist knowledge of workplace relations and appeared in a state of operational disorganisation. The First Respondent has now attempted to rectify the failure in complying with its employment obligations by the engagement of external advice in the form of a software consultant with payroll responsibilities and legal and accounting advice to assist it with complying with its obligations.

42. The First Respondent's failure to pay superannuation payments to Ms Gardner, Ms O'Meara and Ms Sheehy resulted from, it claimed, its financial circumstances. It paid Ms Simmonds all her superannuation entitlements as and when they fell due. This was a serious error as now acknowledged by the Respondents. It is clear the Respondents suffered some financial difficulties in the operation of the First Respondent's business over this time frame. The Respondents advised the employees of their then inability to meet superannuation payments and promised to make good those payments as soon as possible. But in this they traded on the goodwill of the employees. In fact the superannuation payments required the intervention of the Applicant before they were made. This was a serious contravention with no arguable ameliorating factor.

43. The Employees were deprived of wages at various times during their employment and suffered hardship as a consequence. They did not receive their minimal entitlements. They have since been paid those monies owing to them and received an apology from the Second Respondent. The First Respondent lost the Canteen Contract with the school which went to the Employees who had set up in competition to the First Respondent. This loss of the Canteen Contract was a significant loss of annual revenue of approximately 20 to 25 per cent to the First Respondent. It was due, in part, to the contraventions.

44. Any penalty must not be manifestly excessive nor manifestly inadequate. It must be sufficiently meaningful. Counsel for the Respondents described the particular financial circumstances of the Respondents as follows:-

a) the First Respondent only made very small profits relative to turnover in the financial years ending 30 June 2010 and 30 June 2011. These were $51,983.07 and $34,537.34 respectively;

b) the First Respondent incurred a loss for the financial year ending 30 June 2009 of $66,812.79;

c) the First Respondent incurred a loss for the financial year ending 30 June 2012 of $13,351; and

d) a former bookkeeper of the Respondents is currently being investigated by the Victoria Police for allegedly embezzling around $100,000 from the First Respondent.

45. The financial position of the Second Respondent is also precarious in income terms. The Second Respondent's income for the 2011 financial year was $20,052 and for the 2012 financial year was $19,508. Her asset position is assets of approximately $450,000.

46. One of the matters to consider is that of specific and general deterrence. The Respondents in these proceedings are unlikely to re-offend. They have incurred significant costs in relation to these proceedings and the corrective action taken by them to resolve the breaches and thereby ensure future compliance. The Respondents have suffered humiliating publicity for which they are responsible, and which is a natural consequence of these proceedings. This has served

as a personal deterrent for the Second Respondent. When considering the question of general deterrence, the Court is mindful that any penalty imposed should not "crush the person upon whom the penalty is imposed" (*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at paragraphs 559 and 560 per Lander J). In that regard the financial circumstances of the Respondents as described are relevant.

47. The Court also considers the totality principle in particular in the light of the Second Respondent being one of the shareholders of the First Respondent which operated in essence a family business. The First Respondent needs to trade and carry on as a going concern. Although some evidence is put before the Court by the Respondents there is not sufficient evidence to conclude that a penalty in the range the Court proposes would have enormous impact on the First Respondent's ability to trade. In any event, capacity to pay is here of less relevance than the objective of general deterrence (*Jordan v Mornington Inn Pty Ltd* (2007) 166 IR 33 at paragraph 99). In looking to the imposition of penalty and having regard to all these matters a discount of 20 per cent of the maximum is appropriate, with a penalty of 40 per cent of that sum in respect of the First Respondent and 30 per cent of that sum in respect of the Second Respondent. The Court has not adapted a differing approach to the two groupings which both involve serious admitted contraventions. The employees were entitled to be paid those wages which they should have received and the Respondents had an obligation to ascertain and comply with minimum wage entitlements.

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

Associate:

Date: 12 June 2013