FEDERAL MAGISTRATES COURT OF *AUSTRALIA*

FAIR WORK OMBUDSMAN v BUTLER & BLACKBERRY MELBOURNE PTY LTD & ANOR *[2012] FMCA 846*

INDUSTRIAL LAW – Penalty hearing – underpayment of wages – late payment of wages – failure to provide pay slips – statement of agreed facts – penalty hearing proceeded in default of respondent's compliance with orders and/or attendance at hearing.

Workplace Relations Act 1996 (Cth) s.185, 189, 719, 722, 728, 841
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)
Fair Work Act 2009 (Cth) s.45, 323, 536, 545, 546, 547, 557
Federal Magistrates Court Rules 2001 (Cth) r.13.03A, 13.03B, 13.03C
Evidence Act 1995 (Cth) 191

Kelly v Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor [2010] FMCA 599
Ponzio v B & P Caelli Construction Pty Ltd (2007) 158 FCR 543
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Cotis v Macpherson (2007) 169 IR 310
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2) (1999) 94 IR 231
Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38
McIver v Healey [2008] FCA 425
Gibbs v Mayor Councillors and Citizens of City of Altona (1992) 37 FCR 216
Lynch v Buckley Sawmills Pty Ltd (1985) 3 FCR 503
Printing and Kindred Industries Union & Ors v Vista Paper Products Pty Ltd (1994) 127 ALR 673
Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557
Fair Work Ombudsman v Hungry Jack's Pty Ltd [2011] FMCA 233
Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	BUTLER & BLACKBERRY MELBOURNE PTY LTD

Second Respondent:	LENNY SCALIA
File Number:	(P)MLG168 of 2012
Judgment of:	O'Sullivan FM
Hearing date:	5 October 2012
Date of Last Submission:	5 October 2012
Delivered at:	Melbourne
Delivered on:	19 October 2012

REPRESENTATION

Counsel for the Applicant:	Ms Nicholas
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	No appearance
Solicitors for the Respondents:	No appearance

ORDERS

UPON THE STATEMENT OF AGREED FACTS FILED 20 JUNE 2012 THE COURT DECLARES THAT:

(1) The First Respondent, and also the Second Respondent by reason of his involvement in the contraventions pursuant to section 728(1) of the *Workplace Relations Act 1996* (Cth) (**WR Act**) and section 550(1) of the *Fair Work Act 2009* (Cth) (**FW Act**), each contravened:

(a) Section 185(2) of the WR Act, by failing to pay Mr Kumar (the **Employee**) the guaranteed casual loading on his basic periodic rate of pay contained in the preserved Australian Pay and Conditions Scale (**APCS**) derived from the *Catering Victoria Award 1998* [AP772681] (the **Award**);

(b) Section 185(2) of the WR Act and item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**Transitional Act**) by failing to pay the Employee the guaranteed casual loading on his basic periodic rate of pay contained in the preserved APCS derived from the Award;

(c) Section 45 of the FW Act, by virtue of a contravention of clause 13.1 of the *Hospitality General Industry Award 2010* (the **Modern Award**), by failing to pay the Employee a casual loading of 25%;

(d) Section 189 of the WR Act by failing to pay the Employee's wages at the termination of each engagement or at least fortnightly;

(e) Section 323(1)(c) of the FW Act by failing to pay the Employee the amounts payable to him in relation to the performance of work at least monthly;

(f) Section 45 of the FW Act, by virtue of a contravention of clause 13.3 of the *Hospitality General Industry Award 2010* (the **Modern Award**), by failing to pay the Employee's wages at the end of each engagement or at least fortnightly;

(g) Section 323(1)(a) of the FW Act, by failing to pay the Employee the amounts payable to him in relation to the performance of work in full; and

(h) Section 536(1) of the FW Act, by failing to provide a payslip to the Employee within one working day of paying an amount to him in relation to the performance of work.

THE COURT ORDERS THAT:

(1) The First Respondent pay an aggregate penalty pursuant to:

(a) section 719(1) of the WR Act; and

(b) section 546(1) of the FW Act,

for the contraventions of the WR Act, the Transitional Act; and the FW Act referred to in the above declarations in the amount of $40,000.00.

(2) The Second Respondent pay an aggregate penalty pursuant to:

(a) section 719(1) of the WR Act; and

(b) section 546(1) of the FW Act,

for the contraventions of the WR Act; the Transitional Act; and the FW Act referred to in the above declarations in the amount of $8,000.00.

(3) Pursuant to section 841(a) of the WR Act and section 546(3)(a) of the FW Act that each of the Respondents pay the penalties referred to in orders 1 and 2 above into the Consolidated Revenue Fund of the Commonwealth;

(4) The payment of penalties referred to above be made within 60 days from the date of this Order.

(5) Pursuant to section 719(6) of the WR Act and section 545(2)(b) of the FW Act that the First Respondent pay to Mr Amit Kumar the total outstanding underpayment amount of $7,990.81.

(6) Pursuant to section 722 of the WR Act and section 547(2) of the FW Act that the First Respondent pay interest pursuant to legislation on the

underpayment amount referred to in the preceding Order, in the amount of $426.00.

(7) The payment of the underpayment and interest amounts referred to in orders 5 and 6 above be made within 60 days of the date of this Order.

(8) The applicant serve the respondents with a copy of these Orders within 14 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

(P)MLG168 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

BUTLER & BLACKBERRY MELBOURNE PTY LTD
First Respondent

And

LENNY SCALIA
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. These proceedings were commenced by the Fair Work Ombudsman ("the applicant") for declarations and other orders against Butler & Blackberry Melbourne Pty Ltd ("the first respondent") and Lenny Scalia, ("the second respondent") for contraventions of the *Workplace Relations Act 1996* (Cth) ("the WR Act") and the *Fair Work Act 2009* (Cth) ("the FW Act").

2. Subsequently the respondents made certain admissions in relation to the allegations made against them. As a result the proceedings now concern the question of the imposition of penalties and orders for the

payment of outstanding amounts in respect of admitted contraventions by the respondents of the WR Act and the FW Act.

3. The proceedings were commenced in February 2012. There were orders for substituted service made on 6 March 2012 and the matter was adjourned to 5 June 2012.

4. However on 31 May 2012, the Court made the following orders by consent:

> *"1. The directions hearing on 5 June 2012 be vacated.*
>
> *2. The matter be listed for a penalty hearing on 5 October 2012 at 10am.*
>
> *3. The parties file an Agreed Statement of Facts by 20 June 2012.*
>
> *4. The applicant file and serve its penalty submissions and any evidence on which it seeks to rely by 4:00pm on 3 August 2012.*
>
> *5. The respondents file and serve their penalty submissions and any evidence on which they seek to rely by 4:00pm on 31 August 2012.*
>
> *6. The applicant file and serve submissions in reply to the respondent's submissions by 4:00pm on 21 September 2012.*
>
> *7. The parties have liberty to apply."*

5. After the respondents filed a notice of address for service on 20 June 2012 the parties filed a statement of agreed facts ("S.O.A.F").

6. The applicant filed penalty submissions on 3 August 2012, amended penalty submissions on 1 October 2012 and an affidavit of Sarah Crowe on 3 October 2012. The respondent failed to file material in accordance with the above mentioned order or at all.

The hearing

7. At the penalty hearing on 5 October 2012 the applicant, was represented by Ms Nicholas of Counsel. There was no appearance by and or on behalf of either respondent.

8. The applicant sought leave to proceed with the penalty hearing in the absence of the respondents in reliance on to Rule 13.03A,13.03B and 13.03C of the *Federal Magistrates Court Rules* 2001 ("the Rules").

9. There was no appearance by either of the respondents at the penalty hearing. In the circumstances the Court was satisfied that both respondents were aware of the hearing.

10. Rule 13.03B(2) of the *Federal Magistrate Rules 2001* ("the Rules") provides:

> *"(2) If a respondent is in default, the Court may:*
>
> *(c) if the proceeding was commenced by an application supported by a statement of claim or the Court has ordered that the proceeding continue on pleadings - give judgment against the respondent for the relief that:*
>
> *(i) the applicant appears entitled to on the statement of claim; and*
>
> *(ii) the Court is satisfied it has power to grant; or*
>
> *(d) give judgment or make any other order against the respondent."*

11. Pursuant to rule 13.03(A)(2), the Rules define when a respondent is in default. Circumstances giving rise to such a default which are presently relevant include failure to:

> *"comply with an order of the Court in the proceeding; or*
>
> *file and serve a document required under the Rules; or*
>
> *defend the proceeding with due diligence."*

12. Rule 13.03C also provides for the Court to make orders on default as follows:

> *"13.03C Default of appearance of a party*
>
> *(1) If a party to a proceeding is absent from a hearing (including a first court date), the Court may do 1 or more of the following:*

(a) adjourn the hearing to a specific date or generally;

(b) order that there is not to be any hearing, unless:

(i) the proceeding is again set down for hearing; or

(ii) any other steps that the Court directs are taken;

(c) if the absent party is an applicant — dismiss the application;

(d) if the absent party is a party who has made an interlocutory application or a cross-claim — dismiss the interlocutory application or cross-claim;

(e) proceed with the hearing generally or in relation to any claim for relief in the proceeding.

(2) If a party to a proceeding is absent from a hearing, the Court may also make an order of the kind mentioned in subrule 13.03B (1), (2) or (4), or any other order, or may give any directions, and specify any consequences for non-compliance with the order, that the Court thinks just."

13. The respondents had not sought any adjournment of the penalty hearing or provided any explanation for their absence.

14. The conduct of the respondents in their failure to comply with the orders and rules of the Court and their failure to defend the proceedings with due diligence led to the applicant making an application for the penalty hearing to proceed undefended. There were grounds to proceed with an undefended hearing pursuant to rule 13.03B(2)(c),(d) for any default by the respondents as set out in rule 13.03A(2) and on the basis of rule 13.03C(1) of the Rules.

15. In the circumstances set out above the Court decided it is appropriate that the penalty hearing proceed as undefended.

16. At the penalty hearing the applicant relied on:

a) the S.O.A.F which was marked as Exhibit A1;

b) amended penalty submissions filed 1 October 2012 marked as Exhibit A2;

c) minute of proposed orders marked Exhibit A3; and

d) the affidavit of Sarah Crowe filed 3 October 2012 marked as Exhibit A4.

Background

17. The following background is drawn from the S.O.A.F. filed by the parties on 20 June 2012 and the affidavit of Ms Crowe.[1]

18. The proceedings were commenced following an investigation by the applicant into a complaint made by Mr Amit Kumar a former employee of the first respondent ("the employee") about underpayment of wages. The first respondent supplied labour on a on-hire basis in the catering and hospitality industry and to Transfield Services (Australia) Pty Ltd who ran the junior mess hall at the HMAS Cerebus site in Victoria. The second respondent was the sole director of the first respondent.

19. The employee was an Indian national who held a student visa from April 2007 to September 2011. The employee then held a section 485 bridging visa from September 2009 to September 2011. The employee was employed by the first respondent from 23 June 2008 to approximately 16 May 2010. The employee's duties involved operating a dish washing machine and hand washing commercial kitchen utensils and equipment and coordinating rosters for other employees of the first respondent undertaking similar duties at the HMAS Cerberus site.

20. During the employee's employment with the first respondent the applicable industrial and/or fair work instruments were the Australian Fair Pay and Conditions Standard, the Australian Pay and Classification Scale derived from the Catering Victoria Award and the Hospitality Industry Award 2010 (the Modern Award). The WR Act and the FW Act also governed the employee's employment with the first respondent.

21. The first respondent was required to pay the employee a total of $56,427.80 for all of the hours worked by him during his employment. However the first respondent only paid the employee a total of

[1] see s.191 of the *Evidence Act* 1995 (Cth)

$47,437. It is agreed that the first respondent underpaid the employee a total of $8,990.81.

22. It is agreed the first respondent at times did not pay the employee the amounts due to him, underpaid him, was late in paying wages and failed to provide pay slips. It is also agreed the second respondent under s.728(1) of the WR Act and s.550(1) of the FW Act was involved in each of those contraventions and taken to have contravened same.

23. The first respondent remains registered and there is no current action on foot to wind up, place in receivership or liquidate it.[2]

24. Following the applicant's investigation into the complaint made by the employee and after the commencement of these proceedings and the admissions made by the respondents, the second respondent entered into a payment plan for the amounts it was agreed were owing to the employee. As at the date of the penalty hearing $7,990.81 remains owing to the employee as a result of the respondents' admitted contraventions.[3]

The legal framework

25. These proceedings concern contraventions of the WR Act and the FW Act.

26. On 1 July 2009 the WR Act was repealed by the provisions of the FW Act. In respect of breaches occurring prior to 1 July 2009, s.11 of Schedule 2 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* ("Transitional Act") provides that the WR Act continues to apply on or after 1 July 2009 in relation to conduct that occurred before that date.

27. The applicant (the Fair Work Ombudsman) is a "Fair Work Inspector" pursuant to s.701 of the FW Act who can bring proceedings under s.589(2) of the FW Act for conduct after 1 July 2009.

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[2] see affidavit of Sarah Crow paragraphs 5-9
[3] see affidavit of Sarah Crow paragraphs 13-21

28. A Fair Work Inspector may bring proceedings relating to conduct that occurred before the repeal of the WR Act pursuant to sub item 13(1) of Part 3 to Schedule 18 of the Transitional Act.

29. Section 719(1) of the WR Act and s.546 of the FW Act enables a Court to impose a penalty upon a person who has contravened a civil remedy provision.

30. Section 719(4) of the WR Act and s.546(2) of the FW Act provide that the maximum penalty that may be imposed by the Court for each contravention committed by a body corporate is 300 penalty units and by a natural person is 60 penalty units. A penalty unit is currently $110. For the purposes of contraventions of s.535 and 536 of the FW Act the maximum penalty is 30 penalty units for an individual and 150 for a body corporate.

31. Subsection 719(2) of the WR Act and s.557(1) of the FW Act provides that where two or more breaches are committed by the same person, the Court should consider whether the breaches arose out of a course of conduct by the person, such as to be taken to constitute a single breach of the term.

32. Section 728 of the WR Act and section 550 of the FW Act provide that a person who is involved in a contravention of a civil remedy provision is treated as having contravened the civil remedy provision.

Approach to penalty proceedings

33. The considerations which may be taken into account is the assessment of penalty are well established. The factors relevant to the imposition of a penalty were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, [26]-[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."*

34. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14. In *Australian Ophthalmic Supplies Pty Ltd v Mc Alary-Smith* [2008] FCAFC 8 Buchanan J after referring to the decision in *Kelly v Fitzpatrick* (supra) said at [9]:

> *"9. Checklists 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..."*

35. In *Fair Work Ombudsman v Roselands Fruit Market Pty Ltd & Anor* [2010] FMCA 599 Driver FM summarised the approach the Court should follow in these sorts of proceedings at paragraphs 22 to 26 as follows:

> *"22. The first step for the Court is to identify the separate contraventions involved. Each breach of each separate*

obligation found in the AFPCS, the NAPSA is a separate contravention of a term of an applicable provision for the purposes of s.719.[4]

23. *However, s.719(2) provides for treating multiple breaches, involved in a course of conduct, as a single breach.*

24. *Secondly, to the extent that two or more contraventions have common elements, this should be taken into account in considering what is an appropriate penalty in all the circumstances for each contravention. The respondents should not be penalised more than once for the same conduct. The penalties imposed by the Court should be an appropriate response to what the respondent did.*[5] *This task is distinct from and in addition to the final application of the "totality principle".*[6]

25. *Thirdly, the Court will then consider an appropriate penalty to impose in respect of each course of conduct, having regard to all of the circumstances of the case.*

26. *Fourthly and finally, having fixed an appropriate penalty for each group of contraventions or course 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 breaches.*[7] *The Court should apply an "instinctive synthesis" in making this assessment.*[8] *This is what is known as an application of the 'totality principle'."*

Admitted contraventions

36. The S.O.A.F set out a summary of the admitted contraventions, It was agreed for the purposes of assessing penalty there were eight identified and admitted contraventions by the respondents. These were:

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4 *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223; *McIver v Healey* [2008] FCA 425 at [16] (unreported, Federal Court of Australia, 7 April 2008, Marshall J).

5 *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) (*Merringtons*).

6 *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) (*Mornington Inn*).

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

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

a) section 185(2) of the WR Act,

b) section 189(1) of the WR Act,

c) item 5 of Schedule 16 of the Transitional Act, by virtue of a contravention of section 185(2) of the WR Act,

d) section 45 of the FW Act, by virtue of a contravention of clause 13.1 of the Modern Award,

e) section 45 of the FW Act, by virtue of a contravention of clause 13.3 of the Modern Award,

f) section 323(1)(c) of the FW Act,

g) section 323(1)(a) of the FW Act; and

h) section 536(1) of the FW Act.

37. The applicant in submissions relied on at the penalty hearing took the position, which I accept, that the admitted contraventions should be grouped as follows:

(a) section 185(2) of the WR Act, by failing to pay the employee the full casual loading contained in the APCS for work done between 6 October 2008 and 30 June 2009; item 5 of Schedule 16 of the Transitional Act, by virtue of a contravention of section 185(2) of the WR Act, by failing to pay the employee the full casual loading contained in the APCS for work done between 1 July 2009 and 31 December 2009; and section 45 of the FW Act, by virtue of a contravention of clause 13.1 of the Modern Award, by failing to pay the employee the full casual loading contained in clause 13.1 of the Modern Award for work done between 1 January 2010 and 16 May 2010.;

(b) Section 189(1) of the WR Act, by failing to pay the employee at the end of each engagement or at least fortnightly between 23 June 2008 and 30 June 2009; section 323(1)(c), by failing to pay the employee at least monthly between 1 July 2009 and 31 December 2009; and section 45 of the FW Act, by virtue of a contravention of clause 13.3 of the Modern Award, by failing to pay the employee at the end of each engagement or at least fortnightly between 1 January 2010 and 16 May 2010.

(c) Section 323(1)(a) of the FW Act, by failing to pay the employee in full the amounts payable to him in relation to the performance of work from 1 January 2010 to 16 May 2010; and

(d) Section 536(1) of the FW Act, by failing to provide the employee with pay slips within one working day of paying amounts to him in relation to the performance of work on 26 February 2010, 17 March 2010 and 14 April 2010.[9]

38. In light of the applicant's position on this issue and the S.O.A.F the maximum penalty would be:

- $115,500 for the first respondent; and
- $23,100 for the second respondent.[10]

39. The first respondent admits that the contraventions of the WR Act, the Transitional Act, the Modern Award and the FW Act resulted in underpayments in wages and entitlements to the employee totalling $8.990.81.[11]

40. The second respondent admits to his involvement, within the meaning of section 728(1) of the WR Act and section 550(1) of the FW Act, in each of the contraventions.[12]

Considerations

41. In submissions upon which it relied the applicant contended the relevant considerations when fixing penalties in this case include:

a) the nature and extent of the offending conduct;

b) the circumstances in which the conduct took place;

c) the nature and extent of any loss or damage;

d) any similar previous conduct;

[9] see para 8.2 of submissions filed 1 October 2012
[10] *Ibid* at para 8.3
[11] see S.O.A.F
[12] *Ibid*

e) whether the breaches were properly distinct or arose out of one course of conduct;

f) the size of the respondent's business;

g) the deliberateness of the breach;

h) the involvement of senior management;

i) the respondents contrition, corrective action and cooperation with the enforcement authorities;

j) ensuring compliance with minimum standards; and

k) deterrence.

The nature and extent of the offending conduct

42. The first respondent provided an on hire staff to Transfield Services who operated the mess hall at HMAS Cerberus. The second respondent was responsible for the first respondent's operations and required the employee to co-ordinate rosters for other employees at that site.

43. The employee was paid a flat hourly rate for all hours worked by the first respondent. The employee did not receive the correct casual loading throughout his employment and was not paid at least fortnightly during this time.

44. The admitted contraventions set out above occurred throughout the whole of the employee's employment. Along with the payslips contraventions the nature and extent of the offending conduct represents a failure to provide basic and important conditions and entitlements under Australia's workplace relations legislation.

The circumstances in which the conduct took place

45. The applicant submitted:[13]

> *"9.3. At all relevant times, the First Respondent was carrying on a labour hire business that provided on-hire staffing*

[13] see submissions filed on behalf of the Applicant 1 October 2012

services to Transfield Services (Australia) Pty Ltd which operated a mess hall at HMAS Cerberus, in Crib Point, Victoria.[14]

9.4. The Complainant was first employed by the First Respondent in June 2008 until on or about 16 May 2010.

9.5. The Complainant performed work at the junior mess hall at HMAS Cerberus. The Complainant operated a dish-washing machine and hand washed commercial kitchen utensils and equipment and was responsible for co-ordinating rosters for other employees of the First Respondent undertaking similar duties at the HMAS Cerberus site.

9.6. The contravening conduct identified by the Applicant's investigation relates to the entire period of employment by the First Respondent of the Complainant.

9.7. The Respondents' admit the Complainant was paid a flat rate of $18.00 per hour for all hours worked, with the exception of public holidays.[15] *The contravening conduct relevant to this proceeding extended over a significant period of time (just under 2 years), involving a number of contraventions. The Respondents' admit that, as a result, the Complainant was underpaid $8,990.81 (gross) (Gross Underpayment) in the course of his employment.*

9.8. The contraventions represent a failure to provide basic and important conditions and entitlements under workplace relations legislation. The purpose of the legislation is to provide a safety net which ensures adequate minimum entitlements to employees, particularly those whom are vulnerable or in low income roles. The legislation is also designed to provide an even playing field for all employers with regard to employment costs. Contravention of these fundamental entitlements undermines the workplace relations regime as a whole and illustrates a general disregard for compliance with Australia's workplace laws by the Respondents.

9.9. The Second Respondent's conduct was intrinsically linked to the First Respondent's contraventions. The Second Respondent admits that, he was aware of, and responsible for setting and adjusting pay rates, wages and conditions

[14] S.O.A.F, paragraph 8
[15] S.O.A.F, paragraph 22

for the Complainant on behalf of the First Respondent; and was responsible for making payments of wages to the employees of the First Respondent.[16]

9.10. It is submitted that, in the circumstances, the Respondents exhibited a general disregard of the First Respondent's obligations to pay the Complainant his minimum entitlements in accordance with the law. The contraventions continued until the end of the complainant's employment on 16 May 2010.

9.11. The Respondents' conduct also concerned an employee who was particularly vulnerable. The Complainant was an Indian national who held a student visa until September 2009, and then held a section 485 bridging visa from September 2009 to September 2011. The Complainant spoke English as a second language and it is reasonable to infer had limited knowledge, if any, of how to exercise his rights under relevant industrial instruments and standards. The Applicant submits it is open to the Court to find that the Complainant was a vulnerable employee in these circumstances.

9.12. There is no evidence that the Respondents took any steps to ensure the Complainant was aware of the full scope of his employment entitlements under Australian law. Nor is there any evidence that the Respondents took any steps to try to ensure that they achieved compliance with their statutory employment obligations."

46. On the evidence before the Court and in light of the S.O.A.F I am satisfied the contravening conduct extended over a significant period of time and exhibited behaviour by the respondents, (in relation to an employee who was particularly vulnerable) that demonstrates a general disregard for compliance with Australia's workplace laws.

The nature and extent of any loss or damage

47. The applicant submitted:[17]

"9.13. The amount of the Gross Underpayment (being $8,990.81) is significant, particularly taking into consideration that the Complainant was reliant on the

[16] S.O.A.F, paragraph 10
[17] see submissions filed 1 October 2012

minimum terms and conditions of employment offered by the respective industrial instruments.

9.14. The Gross Underpayment represented approximately 16% of the amount the Complainant should have been paid. Compounding this is the fact that the Gross Underpayment has yet to be rectified.

9.15. When calculated by reference to the Complainants date of termination (being 16 May 2010), the First Respondent has received the benefit of the underpayment by deferring the payment of the Complainants correct entitlements for approximately two years and two months, and will continue to receive the benefit until the underpayment is rectified.

9.16. It follows that the Complainant was disadvantaged by the First Respondents' failure to pay the correct wages and entitlements when they became due and payable, and for a significant time thereafter. The Complainant has and continues to be deprived of the financial benefits which the timely payment of the correct wages would have provided.[18]

9.17. Importantly, the amount of the underpayment represents the First Respondent's obligation to make good the Complainant's minimum entitlements under the provisions of the relevant industrial instruments. The proceedings do not only relate to a failure to pay the correct entitlements, but also a failure to pay wages at all or on a regular basis.

9.18. The underpayment of any employee is a serious matter, particularly if the employee is a vulnerable employee. The Applicant submits the underpayment is undoubtedly a significant sum of money for an employee who is reliant on the minimum wage."

48. On the material before the Court I accept the applicant's submission that any underpayment is a serious matter and the underpayment in this case for a vulnerable employee who was *"reliant"* on the minimum wage and who by virtue of the ongoing failure by the respondents to rectify the underpayment continues to be deprived of his minimum entitlements.

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[18] see *Fair Work Ombudsman v Hungry Jack's Pty Ltd* [2011] FMCA 233 at [47].

Any similar previous conduct

49. The Applicant submitted:[19]

> *"9.19. The applicant is not aware of any previous findings of contraventions of Commonwealth workplace laws by the Respondents."*

50. On the evidence before the Court there is no similar previous conduct by either of the respondents.

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

51. The Applicant submitted:[20]

> *"9.20. The complainant was paid a flat rate of pay for all hours worked. The payment of the flat rate of pay for the hours worked resulted in contraventions of a number of provisions. As was noted by Gray J in* Gibbs v Mayor, Councillors and Citizens of City of Altona:[21]
>
> > *If such a party has pursued a course of conduct which gives rise to breaches of several different obligations, there is no reason why it should be treated as immune in respect of its breach of one obligation, merely because it has acted in breach of another.*[22]
>
> *9.21. The Applicant submits that the contraventions have been appropriately grouped as outlined in paragraph 8.2 above, and that the Respondents have already had the benefit of the course of conduct provisions as outlined in paragraph 7.2 above. Accordingly no further discount is available to the Respondents in relation to the courses of conduct engaged in by them.*

52. On the material before the Court I accept the applicant's submission the respondents have received the benefit of the course of conduct

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[19] see submissions filed on behalf of the Applicant 1 October 2012
[20] ibid
[21] (1992) 37 FCR 216.
[22] (1992) 37 FCR 216 at 223. See also *FWO v Garfield Berry Farm Pty Ltd* [2012] FMCA 103 at [28]-[29]

provisions referred to earlier and am satisfied the common elements have been appropriately taken into account.[23]

The size of the respondent's business

53. The Applicant submitted:

> ***"Size of the business***
>
> *9.22 The Applicant has not, as at the date of filing these submissions, received any evidence on which it can rely on as to:*
>
> *a. the size of the business;*
>
> *b. the number of employees the First Respondent employed or continues to employ; or*
>
> *c. the Respondents' financial position - either in respect of the contravening period or up to the current point in time.*
>
> *9.23 The Applicant is therefore not in a position to properly determine the size or turnover of the First Respondent at the relevant times.*
>
> *9.24 While the evidence with respect to the size of the business is limited, the Applicant acknowledges that the business of the First Respondent was not large.*
>
> *9.25 Regardless of the size of the business it does not absolve the First Respondent from its legal obligations to comply with the law in relation to the employment of its employees. In Workplace Ombudsman v Saya Cleaning Pty Ltd [2009] FMCA 38 at paragraphs [26]-[30] Simpson FM provided a summary of the case law in this respect:*
>
> The first respondent is a small company and, I infer, has very few assets. However, as Justice Tracey said in Kelly v Fitzpatrick:
>
> "No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an

[23] see S.O.A.F and para 36 and 37 above

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.

9.26 Further, in Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412 at paragraphs [27] – [29] the Court observed:

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 a Court's consideration of penalty."

Capacity to Pay

9.27 The Applicant has not been provided with evidence relating to the First Respondent's financial position, but understands the First Respondent is no longer trading.

9.28 The decision of Printing and Kindred Industries Union v Vista Paper Producers Pty Ltd[24] *concerned an application for penalties for contraventions by an employer of an award requiring the reinstatement of certain employees. The Industrial Relations Court of Australia found those contraventions made out. Wilcox CJ rejected*[25] *a submission that evidence about the employer's financial position was irrelevant (at least to the question of quantum of penalty to be imposed) and stated:*[26]

In determining what monetary penalty to impose on an offender it is usual for a court to take into account the offender's capacity to pay. A monetary sum that would constitute a reasonable penalty to a person of average income might be unduly oppressive if imposed on an impecunious person.

9.29 Wilcox CJ had regard to the evidence that the employer and its controller were in a "parlous financial position"[27] *but concluded:*[28]

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[24] (1994) 127 ALR 673.
[25] At 686.3.
[26] At 686.3.
[27] At 688.2.

While this evidence suggests that both Vista and Mr McNamee may have difficulty in paying penalties, I do not think I should allow it to deflect me from imposing whatever penalties are otherwise appropriate. ....

9.30 In Jordan v Mornington Inn Pty Ltd,[29] Heerey J was required to determine the appropriate penalties to be imposed on an employer for admitted contraventions ss 400(5) and 792 of the the WR Act. His Honour stated:[30]

As to the respondent's own financial position, however, in considering the size of a penalty, capacity to pay is of less relevance than the objective of general deterrence: *Leahy (No 2)* at [9]. In any event, to the extent that financial hardship might mitigate what would otherwise be an appropriate penalty, such an argument would need to be based on evidence. Apart from the income figures mentioned above, which were advanced from the Bar table, no such evidence was forthcoming.

9.31 On appeal,[31] Stone and Buchanan JJ described the statement of principle highlighted in the above extract from the judgment of Heerey J as being "unimpeachable".[32]

9.32 More recently in FWO v Promoting U Pty Ltd,[33] Burchardt FM observed:

"... Respondents cannot hope to have their conduct in effect exonerated by the Court merely because they are impecunious. Parliament has set significant penalties for the sort of contraventions that the Respondents engaged in and I do not think it is appropriate for the totality principle to operate simply to ensure that penalties are imposed in suitably insignificant amounts to meet the Respondents' capacity to pay".[34]

9.33 It is submitted that the Court should impose penalties which take into account the principles set out above."

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[28] At 688.4
[29] (2007) 166 IR 33
[30] At [99] (emphasis added)
[31] (2008) 168 FCR 383
[32] At [69]
[33] [2012] FMCA 58
[34] [2012] FMCA 58 at [57]

54. The applicant led evidence that as a result of its inquiries it understood that whilst the first respondent was no longer trading, no action had yet been taken to de-register the first respondent nor was it in administration or liquidation.[35] There is otherwise no evidence as to the size of the first respondent's business.

55. The applicant correctly submitted that regardless of its size the first respondent was not absolved of its legal obligations to comply with its legislative obligations in relation to its employees.

The deliberateness of the breach

56. The Applicant submitted:[36]

> *"9.34 It is submitted that the Respondents displayed a general disregard for compliance with Australia's workplace laws and deliberately ignored the statutory obligations they owed to the Complainant.*
>
> *9.35 Not only did the First Respondent pay the complainant below the required rate, he failed to pay the Complainant at all for 433 hours of work he performed. This failure to pay must be seen as a deliberate breach of the laws.*
>
> *9.36 The complainant made several requests for his wages, however they were not forthcoming. At this stage the underpayments have still not been rectified.*
>
> *9.37 In any event an employee should not be required to complain to his or her employer to make certain they are paid their lawful entitlements. Employees rightfully have an expectation that their employer will obey the law."*

57. On the material before the Court I accept the applicant's submission that the admitted contraventions evidence that the respondents displayed a general disregard for their obligations. I accept and endorse the submissions made by the applicant that employees should not be required to complain to their employer to make certain they are paid their entitlements and all employees rightfully have an expectation that their employer will abide by the law. Where that isn't the case the Court is required to sanction such conduct.

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[35] see affidavit of Sarah Crowe filed 3 October 2012
[36] see submissions filed 1 October 2012

The involvement of senior management

58. The Applicant submitted:[37]

> *"Involvement of senior management*
>
> *9.38 The Second Respondent has admitted he was the person who had ultimate responsibility, direction and control of the First Respondent and its operations, including in respect of the Complainant and his wages of conditions of employment.*[38]
>
> *9.39 The Applicant submits that the Second Respondent's actions were, in essence, the actions of the First Respondent."*

59. On the material before the Court I accept, in light of the S.O.A.F that the second respondent who had ultimate responsibility for the first respondent was involved with the contravening conduct.

The respondent's contrition, corrective action and cooperation with the enforcement authorities

60. The Applicant submitted:

> *"9.40 This factor involves three related, yet separate elements. Each of them has resonance in this case.*
>
> ***Contrition***
>
> *9.41 The Applicant is not in receipt of any evidence that demonstrates the Respondents are genuinely remorseful in respect of their unlawful conduct towards the Complainant.*
>
> *9.42 The Applicant is not aware of the Respondents making any expressions of regret or remorse or apologising to the Complainant for its unlawful conduct.*
>
> ***Corrective Action***
>
> *9.43 The Applicant notes that there has not yet been any rectification by the Respondents in respect of the underpayments owed to the Complainant. However, the*

[37] see submissions filed 1 October 2012
[38] S.O.A.F, paragraph 10

Respondents have undertaken to make good the outstanding underpayment by entering into a repayment plan which is due to begin on 1 September 2012 with a $500 payment. Provided the Respondents maintain the payments in accordance with the repayment plan, the employee will receive his total entitlements in February 2014. As such, the Complainant will continue to experience a lengthy delay before receiving his total entitlements.

Co-operation

9.44 *It is submitted that there has been minimal, if any, cooperation by the Respondents with the Applicant in respect of the investigation of this matter. The Respondents were provided with ample opportunity to participate in the investigation and/or rectify the underpayment prior to litigation and chose to ignore the repeated attempts at contact by the Applicant.*

9.45 *The Respondents did not produce documents as required by a notice to produce and did not respond to any correspondence sent. The Second Respondent provided a phone number that the Applicant was unable to contact him on and denied having received documents sent to his residential address.*

9.46 *It is acknowledged, however, that shortly after being served with the Application and Statement of Claim, the Respondents made full admissions to all contraventions alleged by the Applicant.*

9.47 *The Respondents worked with the Applicant to file both Consent Orders*[39] *and the SOAF. These actions have reduced the resources and costs that would otherwise have been required in relation to a contested hearing as to the Respondents' liability.*

9.48 *The Applicant acknowledges that the Respondents have considerably shortened and assisted the litigation process, and reduced costs to the public purse, by admitting liability and entering into the SOAF. This has removed the necessity for the Applicant to file evidence in relation to liability and has allowed this matter to progress to a hearing on penalty only.*

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[39] Made on 19 June 2012

9.49 However, it should also be borne in mind that it is unlikely that any rectification of the underpayments would have been made by the Respondents if the Applicant had not brought these proceedings."

61. I accept the submission by the applicant that the admissions made by the respondents along with their co-operation (albeit late in the piece) should be taken into account. However balanced against that should be the failure of the respondents to fully rectify the underpayment, (i.e. the lack of corrective action) and failure to properly participate in the proceedings which renders hollow any claim of contrition.

Ensuring compliance with minimum standards

62. The Applicant submitted:[40]

"Ensuring compliance with minimum standards

9.50 One of the principal objects of the WR Act and the FW Act is the maintenance of an effective safety net of minimum terms and conditions of employment and effective enforcement mechanisms of the obligations imposed by the law.

9.51 To this end, the law makes provision for the investigation of alleged contraventions of obligations imposed by industrial instruments and the imposition of penalties where it is established that contraventions have occurred.

9.52 The importance of this 'safety net' is reflected not only in the magnitude of the maximum penalties imposed in respect of any breach of an applicable provision, but also in the legislature's increase of those maximum penalties in August 2004 whereby the maximum penalty for individuals increased from $2,000 to $6,600 and the maximum penalty for bodies corporate increased from $10,000 to $33,000.

9.53 The substantial penalties set by the legislature for contraventions of such minimum entitlements reinforce the importance placed on compliance with minimum standards."

[40] see submissions filed 1 October 2012.

63. The applicant's submissions set out above accurately recorded the reasons for the importance placed by the Courts in ensuring compliance with minimum standards when considering a suitable penalty.

Deterrence

64. The Applicant submitted:

> *"9.54 The Applicant submits that there is no need for specific deterrence in the present case given that the First Respondent is no longer trading.*
>
> ***General deterrence***
>
> *9.55 The Applicant submits there is a strong need for general deterrence in the present case. On the need for and approach to general deterrence, the Applicant notes the following statement by Lander J in* Ponzio v B & P Caelli Constructions Pty Ltd:[41]
>
> '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.'
>
> *9.56 Similarly in* CPSU v Telstra Corporation Limited[42] *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

[41] (2007) 158 FCR 543, [93]
[42] (2001) 108 IR 228, 231

mark the law's disapproval of the conduct in question, and act as a warning to others not o engage in similar conduct.'

9.57 *General deterrence is an important factor, as it should be made clear that employers have a positive obligation to ensure compliance with their lawful obligations to their employees and cannot close their mind to the issue until they are notified by the Office of the Applcant that a contarvention has occurred. Recently, Marshall J observed:*[43]

"It is important to ensure that the protections provided by the Act to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected."

9.58 *It is important to emphasise that business operators should take steps to ensure their business is compliant with the applicable minimum standards, and that they cannot rely on ignorance of the law as a defence.*

9.59 *The Courts should demonstrate in clear terms, that the actual human agents/decision makers who choose (for the employer) to engage in underpaying employees, cannot avoid liability by failing to make proper enquiries about the specific entitlements which apply to the employer. This is especially so when they are on notice of the existence of such obligations, as was the case here.*

9.60 *Given the vulnerability of visa holders in the Australian community, general deterrence is particularly important. Failure by employers to comply with Commonwealth workplace laws in relation to migrant workers can result not only in exploitation of vulnerable workers, but can also give the non-compliant employer an unfair comparative advantage against competing Australian businesses and workers operating lawfully. By imposing a penalty in an appropriate range, the Court can attempt to counteract, or at least reduce, those dangers.*[44]

9.61 *The seriousness associated with contraventions of the Act is reflected in the significant increases that the Commonwealth Parliament has in recent years*

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[43] *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557 at [29]
[44] *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 at [38]

determined to apply to the maximum penalties which may be imposed for contraventions of the Act. In Finance Sector Union v Commonwealth Bank of Australia, Merkel J observed:[45]

'Finally, I note that the penalties imposed in the present case... greatly exceed penalties imposed under the Act or its predecessors in previous cases. It may be that breaches by unions and employers of industrial legislation from time to time have been accepted as part of the give and take of industrial disputation. However, in recent years industrial legislation has increasingly codified and prescribed what is acceptable, and what is unacceptable, industrial conduct. The legislature has, over time, also moved to increase the penalties that may be imposed in respect of unlawful industrial conduct. **In my view, any light handed approach that might have been taken in the past to serious, wilful and ongoing breaches of the industrial laws should no longer be applicable.'**[46] (emphasis added)

65. Given the applicant's position on deterrence I accept the applicant's submission that there is a need for general deterrence and to ensure employers understand they must take steps to ensure correct employee entitlements are paid and statutory requirements are observed. As Tracey J stated in *Kelly v Fitzpatrick* [2007] FCA 1080 (at paragraph [28]):

> *"[28] ...Specific deterrence does not, therefore, loom large as a consideration in determining penalty. It does not follow that the need for general deterrence may be disregarded. As Finkelstein J said in* CPSU v Telstra Corporation Limited (2001) *108 IR 228 at 231: "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..." 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*

[45] (2005) 224 ALR 467
[46] (2005) 224 ALR 467 at [72]. His Honour's observations were not criticised on appeal.

> ***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] (emphasis added)"*

Conclusion

66. In setting appropriate penalties I have borne in mind that the admitted contraventions represented a significant underpayment to a vulnerable employee. The admitted contraventions are serious. The respondents underpaid a vulnerable employee as compared to his entitlements under the WR Act and the FW Act. Given the matters set out above there is a need for general deterrence. In all the circumstances, bearing in mind the maximum penalties applicable, I am of the view that, overall, penalties at the mid range are appropriate.

67. However, the amount of the penalty should be mitigated by the cooperation and partial rectification by the respondents and the absence of evidence of any similar previous conduct. Taking into account, amongst other things, the co-operation of the respondents and the resolution of the matter by way of penalty hearing and in all the circumstances of the case there could be a further discount of 25% for this and the application of the totality principle.

68. Given this and in light of the S.O.A.F and submissions of the applicant I consider that the individual penalties for the contraventions referred to at paragraph 36 above as grouped at paragraph 37 above should be:

    a) for the first respondent and in relation to the first three of the contraventions $11,175.00 each and $6,475.00 for the fourth; and

    b) for the second respondent and in relation to the first three of the contraventions $2,250.00 each and $1,250.00 for the fourth.

69. This results in a total penalty of $40,000.00 or 35% of the maximum for the admitted contraventions by the first respondent and in relation to the second respondent $8,000.00 also being 35% of the maximum for the admitted contraventions. Those penalties are in the aggregate not crushing and an appropriate response to the offending conduct.

70. This is not a case in which it is sought that penalties be paid to the affected employee in lieu of payment by the respondents of the amounts underpaid. The applicant seeks orders for both payment to the affected employee of the outstanding wages and the imposition of penalties.

71. The penalties should be paid to the Commonwealth. An order should also be made that the first respondent pay the total amounts underpaid that are outstanding to the employee, with interest thereon calculated at $426.00 in accordance with s.722 of the WR Act and s.547 of the FW Act.

72. Therefore, as the Court:

- is directed by the relevant authorities to consider what is appropriate in all the circumstances of this case;[47] and
- in its discretion in relation to penalty is not fettered by a checklist of mandatory criteria;[48] and
- notes the parties have filed the S.O.A.F; and
- is satisfied the individual and aggregate penalty for the whole of the contravening conduct is appropriate;

there will be orders as set out at the beginning of these reasons for decision.

I certify that the preceding seventy-two (72) paragraphs are a true copy of the reasons for judgment of O'Sullivan FM

Date: 19 October 2012

[47] see *Construction Forestry Mining & Energy Union v Coal & Allied Operations Pty Ltd (No.2)* (1999) 94 IR 231
[48] see *Australian Ophthalmic Supplies Pty Limited v McAlary-Smith* [2008] FCAFC 8