FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v FED UP DELI & CATERING PTY LTD (IN LIQUIDATION) (ACN 118 143 972) & ANOR [2012] FMCA 738

INDUSTRIAL LAW – Civil penalty provisions – default judgment – underpayments –considerations relevant to penalty.

Workplace Relations Act 1996
Workplace Relations Regulations 2006
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009
Fair Work Act 2009
Federal Magistrates Court Rules 2001, 13.03A(2)(b)(iii), 13.03B(2)(c)

Arthur v Vaupotic Investments Pty Ltd [2005] FCA 433
Australian Building and Constructions Commissioner v Abbot (No.3) [2011] FCA 340
Australian Competition and Consumer Commission v Yellow Page Marketing BV (No.2) [2011] FCA 352
Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd (2006) 236 ALR 665
Mason v Harrington Corporation Ply Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Colis v MacPherson (2007) 169 IR 30
Kelly v Fitzpatrick [2007] FCA 1080
Rajagopalan v BM Sydney Building Materials Ply Ltd [2007] FMCA 1412
Mornington Inn Pty Ltd v Jordan (2008) FCAFC 70
Fair Work Ombudsman v Contracting PIllS Ply Ltd v Anoi-[2011] FMCA 191
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
CPSU v Telstra Corporation Limited (2001) 108 IR 228
Fair Work Ombudsman v Promoting U Ply Ltd & Anor [2012] FMCA 58
Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union 171 FCR 357

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	FED UP DELI & CATERING PTY LTD (IN LIQUIDATION) (ACN 118 143 972)
Second Respondent:	CHRISTOPHER MEADE JONES

File Number:	BRG518 of 2011
Judgment of:	Jarrett FM
Hearing date:	13 August 2012
Date of Last Submission:	13 August 2012
Delivered at:	Brisbane
Delivered on:	21 August 2012

REPRESENTATION

Solicitor for the Applicant:	Ms Olsen
Solicitors for the Applicant:	Office of the Fair Work Ombudsman

No Appearance for the First or Second Respondents

ORDERS

1. The first respondent has, by failing to pay and credit minimum wages, annual leave, annual leave loading and failing to keep records for employees Damien Neil Charles and Michael Lee Loss, to which they were entitled, contravened:

    (a) section 182(1) of the *Workplace Relations Act* 1996 (Cth) (WR Act);

    (b) section 234(2) of the WR Act;

    (c) section 235(1) of the WR Act;

    (d) sub-regulation 19.4(1) of the *Workplace Relations Regulations 2006* (Cth) (WR Regulations);

    (e) sub-regulation 19.12(1) of the WR Regulations;

    (f) item 5 of schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (Transitional Act)

    (g) item 6(1)(a) of the Transitional Act;

    (h) section 44(1) of the *Fair Work Act 2009* (Cth) (FW Act);

    (i) section 45 of the FW Act;

    (j) section 535(1) of the FW Act.

(2) The second respondent has, by reason of s.728(1) of the WR Act and section 550(1) of the Fair Work Act, in respect of the employees contravened:

    (a) section 182(1) of the *Workplace Relations Act* 1996 (Cth) (WR Act);

    (b) section 234(2) of the WR Act;

    (c) section 235(1) of the WR Act;

(d) sub-regulation 19.4(1) of the *Workplace Relations Regulations* 2006 (Cth) (WR Regulations);

(e) sub-regulation 19.12(1) of the WR Regulations;

(f) item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments)* Act 2009 (Cth) (Transitional Act);

(g) item 6(1)(a) of the Transitional Act;

(h) section 44(1) of the *Fair Work Act 2009* (Cth) (FW Act);

(i) section 45 of the FW Act; and

(j) section 535(1) of the FW Act.

THE COURT ORDERS THAT:

(3) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act, the second respondent pay an aggregate penalty of $19,965.00 in respect of the contraventions identified at paragraph 2 above; and

(4) The penalty payable by the second respondent referred to in paragraph 3 above, be paid to the following persons in accordance with s.841(b) of the WR Act and s.546(3)(c) of the FW Act in the following amounts:

(a) $14,630.40 to Michael Lee Loss; and

(b) $5,334.60 to Damien Neil Charles.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT BRISBANE

BRG518 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

FED UP DELI & CATERING PTY LTD (IN LIQUIDATION) (ACN 118 143 972)
First Respondent

CHRISTOPHER MEADE JONES
Second Respondent

REASONS FOR JUDGMENT

1. The Applicant seeks findings in relation to the liability of and imposition of penalties upon the Second Respondent in respect of certain breaches by the First Respondent of:

    a) the *Workplace Relations Act* 1996 (Cth) (WR Act);

    b) the *Workplace Relations Regulations* 2006 (Cth) (WR Regulations);

    c) the *Fair Work (Transitional Provisions and Consequential Amendments) Act* 2009 (Cth) (Transitional Act); and

    d) the *Fair Work Act* 2009 (Cth) (FW Act).

2. At all relevant times, the First Respondent carried on the business of a café/restaurant and delicatessen under the name of "Fed Up Deli". The Second Respondent was the only director and shareholder of the First

Respondent. He was the secretary of the First Respondent. On the evidence, he was the "directing mind and will" of the First Respondent.

3. In the Application and Statement of Claim filed on 24 June, 2011 the Applicant alleges that the First Respondent failed to pay two apprentice chefs their entitlements. Mr Michael Loss was underpaid wages and other entitlements by the amount of $15,007.10, and Mr Damien Charles was underpaid wages and other entitlements in the amount of $5,471.95 – a total of $20,479.05.

4. The Applicant alleges that the First Respondent contravened the following provisions in relation to the employment of Mr Loss and Mr Charles:

   a) s.182(1) of the WR Act and item 5 of Schedule 16 of the Transitional Act by failing to pay Mr Loss and Mr Charles the basic periodic rate of pay, derived from the preserved Australian Pay and Classification Scale derived from the *Apprentices and Trainees' Wages and Conditions (excluding Certain Queensland Government Entities) Order* 2003, specifically Schedule 20 (Tourism and Hospitality Industry) (Preserved APCS), for each of their guaranteed hours of work: (2 contraventions);

   b) s.234(2) of the WR Act and item 6(1)(a) of the Transitional Act by failing to credit Mr Loss and Mr Charles with their annual leave entitlement on a monthly basis or at all: (2 contraventions);

   c) s.235(1) of the WR Act by failing to pay Mr Charles his entitlements for 5 days of annual leave and item 6(1)(a) of the Transitional Act by failing to pay Mr Loss his entitlements for 5 days of annual leave: (2 contraventions);

   d) reg.19.4(1) and 19.12(1) of the WR Regulations by failing to keep records in relation to the employment of Mr Loss and Mr Charles that documented their accrued annual leave, any leave taken by them and the balance of their entitlement to annual leave. Both of these provisions are civil remedy provisions for penalty purposes: (2 contraventions);

e) s.45 of the FW Act (clause A.3.3 of the *Restaurant Industry Award* 2010 and the Preserved APCS) by failing to pay Mr Loss and Mr Charles their hourly rate of pay: (1 contravention);

f) s.45 of the FW Act (clauses 11 and 31 of the Modern Restaurant Award) by failing to provide Mr Loss and Mr Charles with 38 hours of work per week averaged over a 4 week period: (1 contravention);

g) ss.44(1) and 45 of the FW Act (National Employment Standards and clause 35.2(a) of the Modern Restaurant Award) by failing to pay Mr Loss and Mr Charles their annual leave entitlements on termination of their employment: (2 contraventions);

h) s.45 of the FW Act (clause 35.2(b) of the Modern Restaurant Award) by failing to pay Mr Loss and Mr Charles leave loading on the unpaid annual leave entitlement upon termination of their employment: (1 contravention);

i) s.535(1) of the FW Act by failing to make and keep records in relation to the employment of Mr Loss and Mr Charles in relation to the leave that Mr Loss and Mr Charles took and the balance of their leave entitlements, as required by regulation 3.36(1) of the FW Regulations: (1 contravention).

5. It is alleged that the Second Respondent was involved in the breaches of the First Respondent within the meaning of s.728(2)(c) of the WR Act and s.550(2)(c) of the FW Act.

6. Some of the alleged breaches of the WR Act occurred before the commencement of the FW Act and the repeal of the WR Act by the Transitional Act on 1 July, 2009. The Transitional Act provides that the WR Act continues to apply, on and after the repeal of the WR Act, in relation to conduct that occurred before 1 July, 2009.

7. By his Statement of Claim filed on 24 June, 2011 the Applicant seeks relief against the First Respondent. However, on 13 April, 2012 by an order made in the Federal Court of Australia that day, the First Respondent was ordered to be wound up in insolvency and a liquidator was appointed. Pursuant to s.471B of the *Corporations Act* 2001 (Cth), these proceedings are stayed as against the First Respondent.

8. The proceedings can, however, continue against the Second Respondent. The Applicant seeks to pursue them to judgment against the Second Respondent.

9. By the Statement of Claim the Applicant seeks the following relief against the Second Respondent:

   a) a declaration that the Second Respondent was involved in the contraventions particularised against the First Respondent in the Statement of Claim within the meaning of s. 728(2)(c) of the WR Act and s. 550(2)(c) of the FW Act;

   b) an order that the Second Respondent pay penalties pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act in respect of his involvement in the contraventions particularised against the First Respondent in the Statement of Claim.

10. The Respondents filed a joint Defence and Response on 23 September, 2011. Both Respondents participated in a court ordered mediation on 17 October, 2011. The mediation was adjourned to allow the Respondents time to provide additional documents to the Applicant. On 17 April, 2012 this application was scheduled for further mediation. The Second Respondent did not appear and the mediation was ultimately terminated by the mediator.

11. On 10 May, 2012 this application was before the court for further mention. The Second Respondent did not appear. The Second Respondent did not appear at this hearing.

12. I accept that pursuant to rule 13.03A(2)(b)(iii) of the *Federal Magistrates Court Rules* 2001, the Second Respondent is in default. FMCR 13.03B(2)(c) provides that if the proceeding was commenced by an Application supported by a Statement of Claim, the Court may give judgement against the Second Respondent for the relief that:

   a) the Applicant appears entitled to on the Statement of Claim; and

   b) the Court is satisfied it has power to grant.

13. An order for default judgment under rule 13.03B(2)(c) does not require proof by evidence of the Applicant's claim; it is sufficient if there is a

basis for the relief sought on the face of the Statement of Claim: *Arthur v Vaupotic Investments Pty Ltd* [2005] FCA 433 at [3], cited in *Australian Building and Constructions Commissioner v Abbot (No.3)* [2011] FCA 340, [11] and *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No.2)* [2011] FCA 352 [14].

14. The general rule is that an application under FMCR 13.03B(2)(c) is determined on the face of the facts pleaded in the Statement of Claim alone. However, where discretionary relief is claimed, the Court can and should receive evidence relevant to the exercise of its discretion: *ACCC v Yellow Page Marketing* at [61] - [63], citing *Australian Competition and Consumer Commission v Dataline.net.au Pty Ltd* (2006) 236 ALR 665 at [48]-[51]. The Court may make binding declarations based on deemed admissions: *AGCC v Dataline.net.au Pty Ltd* [2007] FCAFC 146.

15. The factual background to the alleged contraventions of the WR Act, the WR Regulations, the Transitional Act and the FW Act is set out in paragraphs 3 to 15 of the Statement of Claim.

16. I will not repeat those matters in detail but in summary:

    a) The First Respondent employed Mr Loss and Mr Charles as apprentice chefs on a fulltime basis, pursuant to certain training contracts;

    b) The Second Respondent is the sole director, secretary and shareholder of the First Respondent and was responsible for the active, day to day management, direction and control of the First Respondent's operation, as well as Mr Loss and Mr Charles' day to day activities;

    c) The Second Respondent determined Mr Loss and Mr Charles' wage rate, days and hours of work and kept records of the days and hours of work;

    d) Mr Loss was paid $15.30 per hour worked during the period of his employment with the First Respondent;

    e) Mr Charles was paid $9.35 per hour worked during the period of his employment with the First Respondent;

f) It was a term of the training contracts signed by Mr Loss and Mr Charles that they would be provided with 38 hours work per week;

g) The Second Respondent was knowingly concerned in or a party to each of the First Respondent's contraventions of the WR Act, WR Regulations, Transitional Act and FW Act, so that by operation of s.728 of the WR Act and s.550 of the FW Act he is taken to have been involved in each of the contraventions and to have contravened each of the relevant provisions.

17. The facts alleged in the Statement of Claim establish that the First and Second Respondents contravened the provisions of the WR Act, WR Regulations, Transitional Act and FW Act in the respects to which I have earlier referred.

18. I am satisfied that the Applicant is entitled to the relief sought in the Statement of Claim. To the extent that the relief sought includes declarations, it is appropriate to make those declarations.

Penalty

19. Section 719(4) of the WR Act and s.546(2) of the FW Act prescribe the maximum penalty that may be imposed by this Court for each breach of the WR Act and relevant breaches of the FW Act (except for s.535(1)) to be, in the case of an individual, 60 penalty units. Section 546(2) of the FW Act prescribes the maximum penalty that may be imposed by this Court for each breach of section 535(1) of the FW Act to be, in the case of an individual, 30 penalty units.

20. Regulation 14.4 of the WR Regulations provides that a Court may order a person who contravenes a civil remedy provision of the WR Regulations to pay a penalty of up to the maximum permissible under s.846(2)(g) of the WR Act, namely 10 penalty units for an individual.

21. Section 4(1) of the WR Act and s.12 of the FW Act provides that "penalty unit" has the same meaning as in the *Crimes Act* 1914 (Cth). Section 4AA of the Crimes Act defines "penalty unit" to be $110.

22. Therefore, the maximum penalty that may be imposed by the Court for each breach of the WR Act and FW Act (except for section 535(1)) is $6,600 for the Second Respondent. The maximum penalty that may be imposed by the Court for each breach of s.535(1) of the FW Act is $3,300 for the Second Respondent.

23. The maximum penalty that may be imposed by the Court for each breach of the WR Regulations is $1,100 for the Second Respondent.

24. The first step is to identify the separate breaches involved. Each breach of each separate obligation found in the WR Act, Transitional Act and FW Act is a separate breach of a term of an applicable provision for the purposes of section 719 of the WR Act and section 546(1) of the FW Act respectively. However, section 557(1) of the FW Act provides for treating multiple contraventions, involved in a course of conduct, as a single contravention.

25. Second, the Court must consider an appropriate penalty in all the circumstances for each breach.

26. Third, the Second Respondent 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 Second Respondent did. This task is distinct from and in addition to the final application of the "totality principle".

27. Fourth and finally, having fixed an appropriate penalty for each breach, 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. The Court should apply an "instinctive synthesis" in making this assessment. This is what is known as an application of the "totality principle".

Identified breaches:

28. The Statement of Claim alleges that the Second Respondent was involved in the contraventions of the First Respondent of the WR Act, the WR Regulations, the Transitional Act and the FW Act as described in paragraph 4 above.

29. The Applicant submits, and I accept, that there have been:

a) 3 contraventions of the WR Act;

b) 3 contraventions of the Transitional Act;

c) 2 contraventions of the WR Regulations; and

d) 6 contraventions of the FW Act.

30. Therefore, the Second Respondent faces a maximum penalty of $78,100.

31. It is open to the Court to group separate contraventions together where the contraventions may be said to overlap with each other or involve the potential punishment of the Second Respondent for the same or substantially similar conduct.

32. The Applicant conceded that some of the contraventions have common elements and this should be taken into account in considering an appropriate penalty to ensure that the Second Respondent is not punished more than once for the same or substantially similar conduct.

33. The Applicant submits, and I accept, that the contraventions fall into the following 6 groups:

a) Failure to pay the required minimum hourly rates of pay and basic periodic rates of pay (s.182(1) of the WR Act, item 5 of Schedule 16 of the Transitional Act and s.45 of the FW Act);

b) Failure to credit annual leave entitlements (s.234(2) of the WR Act, item 6 of Schedule 16 of the Transitional Act);

c) Failure to pay annual leave entitlements (s.235(1) of the WR Act, item 16 of Schedule 16 of the Transitional Act);

d) Failure to pay annual leave entitlements on termination (ss.44(1) and 45 of the FW Act);

e) Failure to pay annual leave loading on termination (s.45 of the FW Act);

f) Failure to keep records (WR regs.19.4 (1) and 19.12 and s.535(1) of the FW Act).

34. I accept that the maximum penalty that can be imposed on the Second Respondent in this matter is $36,300.

35. It is not inappropriate to consider the maximum penalties that could be imposed on the Second Respondent, as part of the comparative exercise of assessing where the current contraventions sit.

Matters relevant to penalty

36. A non-exhaustive list of factors potentially relevant to the imposition of a penalty under the WR Act have been summarised by Mowbray FM in *Mason v Harrington Corporation Ply Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7. His Honour's statements have been approved in a number of subsequent cases.

37. The Applicant became aware of the breaches when the Applicant received underpayment of wages complaints from Mr Charles on or about 10 January, 2010 and Mr Loss on or about 12 March, 2010.

38. I accept that the breaches in this matter represent a failure to provide basic and important entitlements under the workplace relations legislation. The purpose of the legislation is to provide a safety net which ensures adequate minimum entitlements to employees. I accept that contraventions of these fundamental entitlements undermine the workplace relations regime as a whole and display a disregard for the Respondents' statutory obligations.

39. The Respondents' conduct in breach of the WR Act, the Transitional Act, the FW Act and the WR Regulations spanned the period from October, 2008 to March, 2010 being the entire period of Mr Loss and Mr Charles' employment with the First Respondent. This is a significant period of breach.

40. The First Respondent, and by implication the Second Respondent, received a benefit from the underpayments to Messrs Loss and Charles for a significant period of time. The underpayments have not been rectified, and given that the First Respondent has been wound up in liquidation, it is unlikely that either Messrs Loss or Charles will receive their entitlements. The amount of the lost entitlements is significant in the context of the employees' employment as apprentices.

41. The Second Respondent was responsible for the active, day to day management, direction and control of the First Respondent's operation which included negotiating and determining the employee's wage rates. The Second Respondent's conduct was intrinsically linked to the First Respondent's breach of the WR Act, the Transitional Act, the FW Act and the WR Regulations.

42. The failure to pay the employees their entitlements seems to relate to a failure by the Second Respondent to understand the obligations cast upon the First Respondent by the relevant legislation. By way of example, in his record of interview with a Fair Work Inspector the Second Respondent made comments:

a) consistent with a failure to understand that Mr Loss and Mr Charles were entitled to annual leave;

b) consistent with a failure to understand how to calculate the minimum hourly rate of pay payable to Mr Loss and Mr Charles as apprentices;

c) consistent with a failure to understand how to change the employment status of an apprentice from full-time to part-time;

d) consistent with a failure to understand the difference between part-time and casual employment; and

e) consistent with a failure to understand that part-time employees are entitled to annual leave.

43. Mr Loss was employed by the First Respondent on a full-time basis as a fourth year apprentice chef between 10 October, 2008 and 3 March, 2010. He signed a Training Contract with the First Respondent (signed on its behalf by the Second Respondent) on 7 November, 2008. Mr Loss was aged between 24 and 26 during his period of employment with the First Respondent. He also has a learning disability.

44. Mr Charles was employed by the First Respondent on a full-time basis as a second year apprentice chef between 19 January, 2009 and 14 March, 2010. He signed a Training Contract with the First Respondent (signed on its behalf by the Second Respondent) on or about 18 April,

2009. Mr Charles was aged between 21 and 22 during his period of employment with the First Respondent.

45. The Second Respondent was responsible for the active, day to day management, direction and control of the First Respondent's operation, as well as the employees' day to day activities. The Second Respondent also determined the employees' wage rate, days and hours of work and kept records of the days and hours of work.

46. Mr Loss and Mr Charles were vulnerable employees during their periods of employment with the First Respondent given:

    a) that they were both engaged as apprentice workers;

    b) the age of Mr Charles when he was employed by the First Respondent;

    c) that Mr Loss had a learning disability; and

    d) they were unaware of their industrial entitlements including that they were entitled to paid annual leave as full-time employees of the First Respondent.

47. The First Respondent failed to pay to Mr Loss and Mr Charles:

    a) the basic periodic rate of pay as provided for by s.182(1) of the WR Act, item 5 of Schedule 16 of the Transitional Act and s.45 of the FW Act;

    b) their accrued annual leave as provided for by s.235(1) of the WR Act, item 6(1)(a) of the Transitional Act and ss.44(1) and 45 of the FW Act.

48. The underpaid amount is $20,479.05 gross. Each of the employees' shares of that underpayment was no doubt significant to the employee concerned. They were workers receiving minimum wage.

49. Mr Loss and Mr Charles have been deprived of the benefit of their respective portions of the underpayment for more than 3 years, which the Applicant submits is a significant period of time. The First Respondent, and by implication the Second Respondent, has had the

benefit of the funds constituted by the underpayment during this period.

50. In January, 2009 the Applicant issued a breach notice to the First Respondent in response to a complaint made against it in relation to time worked but for which another employee was not paid. The investigation was finalised when payment was made for the amount of $385.45.

51. There is no evidence about the size of the business conducted by the First Respondent and managed by the Second Respondent. However, the First Respondent appears to have been, at all relevant times, a small business. It is worth pointing out that the Second Respondent has had the opportunity to file evidence and submissions on or before 21 June, 2012 and 28 June, 2012 respectively.

52. The apparent small size of the business and apparent lack of dedicated human resources personnel is not a particularly relevant matter on the question of penalty. No reduction should be afforded to the Second Respondent because of this: *Colis v MacPherson* (2007) 169 IR 30 at [16] (Driver FM). In *Kelly v Fitzpatrick* [2007] FCA 1080 at [28] Tracey J said:

> *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.*

53. Likewise, in *Rajagopalan v BM Sydney Building Materials Ply Ltd* [2007] FMCA 1412 where the Court stated at [27]:

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

54. The First Respondent ceased carrying on a business on or around 13 April, 2012 when it was wound up in insolvency.

55. The Applicant submits that the evidence does not permit of a finding that there was a deliberate campaign on behalf of the Second Respondent to:

a) underpay Mr Loss and Mr Charles;

b) not credit, accrue or pay Mr Loss and Mr Charles their annual leave entitlements,

c) including annual leave loading;and

d) keep the required records.

56. Rather, it seems to be that the Second Respondent did not properly understand or appreciate the minimum hourly rate of pay payable to Mr Loss and Mr Charles, their guaranteed hours of work, their entitlements to annual leave or the way in which any change to the basis of their apprenticeship had to be documented. The Applicant suggests, and I accept, that the relevant breaches fall into the category of carelessness, rather than deliberate action.

57. There is no evidence before the Court that the breaches were attributable to any other person or agent.

58. I accept that the evidence suggests that the Second Respondent did not, and has not, expressed any genuine contrition or taken any corrective action to rectify the underpayments. Further, I accept that the Second Respondent did not co-operate with the Applicant during its investigation into Mr Loss and Mr Charles' complaints.

59. The evidence reveals that on 9 April, 2010 Fair Work Inspector Anthony Rains of the Office of the Applicant issued a Notice to Produce Documents or Records requiring the provision of time and wages records of all employees of the First Respondent. The Respondents did not comply with the notice.

60. On 7 May, 2010 Fair Work Inspector Rains issued another notice requiring the production of all time and wages records of Mr Loss and Mr Charles. The Respondents did not comply with that notice either.

61. The evidence shows that on 1 June, 2010 the wife of the Second Respondent contacted Fair Work Inspector Rains in relation to the

notice issued by him on 7 May, 2010. She said that the required records would be provided by 17 June, 2010 but this did not occur.

62. Further conversations between Fair Work Inspector Rains and the wife of the Second Respondent followed on 22 June, 2010 and 23 June, 2010 but the documents required by the notice were not provided. Consequently, Fair Work Inspector Rains issued a "Failure to comply with a NTP" on 28 June, 2010.

63. On 15 July, 2010 Fair Work Inspector Rains spoke to the wife of the Second Respondent and asked her to provide the timesheets for Mr Loss and Mr Charles. While she said that they would be provided, they were not. They were eventually provided to the Office of the Applicant on 4 January, 2012.

64. Between 27 July, 2010 and 24 September, 2010 Fair Work Inspector Rains engaged in various forms of correspondence with the Second Respondent and his wife in an attempt to arrange a date to conduct a formal record of interview with the Second Respondent. The record of interview eventually occurred on 30 September, 2010.

65. The Second Respondent initially participated in a Court ordered mediation on 17 October, 2011. The mediation was adjourned to allow the Respondents time to provide additional documents to the Applicant and was, eventually, rescheduled to occur on 17 April, 2012. While the First Respondent was wound up in liquidation on 13 April, 2012 the Second Respondent did not appear at the mediation, which was ultimately terminated by the mediator.

66. Following termination of the mediation, the matter was listed for directions on 10 May, 2012. The Second Respondent did not attend the directions hearing.

67. Where those that have contravened the Fair Work Act (or its predecessors) have co-operated and have made admissions or concessions early in the course of an investigation or soon after the commencement of proceedings it is appropriate to allow a discount of penalty: *Mornington Inn Pty Ltd v Jordan* (2008) FCAFC 70 at [74] – [76] and *Fair Work Ombudsman v Contracting Plus Pty Ltd* [2011] FMCA 191 at [125] – [127].

68. The failure of the Second Respondent to provide any timely co-operation with the Applicant is something of weight in fixing the relevant penalties.

69. The Applicant submits, and I accept, that the aspect of general deterrence is important. It is well-established that "the need for specific and general deterrence" is a factor that is relevant to the imposition of a penalty under the WR Act and FW Act: see for example, Mowbray FM in *Pangaea* at [26] - [59].

70. The role of general deterrence in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [93] as follows:

> *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.*

71. Similarly in *CPSU v Telstra Corporation Limited* (2001) 108 IR 228 at 231 where 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 act as a warning to others not to engage in similar conduct.*

72. I accept that part of the purpose in imposing a penalty upon the Second Respondent in this case is to send a clear message to both the Second Respondent and the industry in general that underpayment of wages will not be tolerated. It is particularly important that the penalty demonstrates to employers of workers such as Mr Loss and Mr Charles the importance of complying with Australian workplace laws. Regardless of the size of the First Respondent and its financial

position, the law should mark its disapproval of the Second Respondent's conduct and set a penalty which serves as a warning to others. Steps must be taken by employers (of all sizes) to properly ascertain and comply with minimum entitlements. Compliance should not be seen as the bastion of the large employer, with human resources staff and advisory consultants (accountants, consultants, lawyers) behind them. As Burchardt FM stated in *Fair Work Ombudsman v Promoting U Pty Ltd & Anor* [2012] FMCA 58 at [49]:

> *I think it is also important to bring home to any other employers who are experiencing the sort of cash-flow problems described by the Respondents that they nonetheless do not evade their responsibilities merely because of that circumstance. It is not properly open to an employer simply to avoid or evade their obligations under the Workplace Relations law simply because they are struggling.*

73. Specific deterrence is also of some importance in this case given that the contraventions have not been remedied, and the Second Respondent's lack of co-operation.

74. Gray J in *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* 171 FCR 357 observed at [37]:

> *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.*

Penalties

75. In my view the appropriate penalties in respect of each of the six groups of contraventions identified by the Applicant are as follows:

a) Failure to pay the required minimum hourly rates of pay and basic periodic rates of pay (s.182(1) of the WR Act, item 5 of Schedule 16 of the Transitional Act and s.45 of the FW Act) - $3,630.00;

b) Failure to credit annual leave entitlements (s.234(2) of the WR Act, item 6 of Schedule 16 of the Transitional Act) - $3,630.00;

c) Failure to pay annual leave entitlements (s.235(1) of the WR Act, item 16 of Schedule 16 of the Transitional Act) - $3,630.00;

d) Failure to pay annual leave entitlements on termination (ss.44(1) and 45 of the FW Act) - $3,630.00;

e) Failure to pay annual leave loading on termination (s.45 of the FW Act) - $3,630.00;

f) Failure to keep records (WR regs.19.4(1) and 19.12 and s.535(1) of the FW Act) - $1,815.00.

76. It will be apparent that the above penalties are 55% of the maximum of the penalties that might be imposed on the Second Respondent. The aggregate penalty is $19,965.00 which in my view is an appropriate response to the conduct which led to the breaches. There is nothing in the evidence to suggest that such a penalty would be oppressive or crushing.

77. I make the declarations and orders set out at the commencement of these reasons.

I certify that the preceding seventy-seven (77) paragraphs are a true copy of the reasons for judgment of Jarrett FM published on 21 August 2012.

Associate: L.French

Date: 21 August 2012.