FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v KENSINGTON MANAGEMENT SERVICES PTY LTD (No.2) *[2012] FMCA 586*

INDUSTRIAL LAW – Employer's failure to pay employee entitlements to resident caretakers at retirement village – underpayments totalling $23,338.38 – disregard of minimum hourly rates of pay under statute and employer's greenfields agreement – total penalties of $22,000 and compensation ordered.

Workplace Relations Act 1996 (Cth), ss.182(1), 185(2), 346R, 719, 722, 841

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560, [2008] FCAFC 8
Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39
Construction, Forestry, Mining and Energy Union v Williams (2009) 262 ALR 417, [2009] FCAFC 171
Director of Public Prosecutions v Merriman [1973] AC 584
Fair Work Ombudsman v Kensington Management Services Pty Ltd [2012] FMCA 225
Gibbs v Mayor, Councillors and Citizens of City of Altona (1992) 37 FCR 216
Kelly v Fitzpatrick (2007) 166 IR 14, [2007] FCA 1080
Mason v Harrington Corporation Pty Ltd [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383
Sharpe v Dogma Enterprises Pty Ltd [2007] FCA 1550

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	KENSINGTON MANAGEMENT SERVICES PTY LTD ACN 064 931 415
File Number:	SYG844 of 2011
Judgment of:	Smith FM
Hearing date:	29 June 2012
Delivered at:	Sydney
Delivered on:	26 July 2012

REPRESENTATION

Counsel for the Applicant:	Ms F Hancock
Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondent:	Mr S Meehan
Solicitors for the Respondent:	Macpherson + Kelley Pty Ltd

THE COURT DECLARES THAT:

(1) During the period 17 January 2009 to 26 January 2009, the respondent contravened:

(a) sub-section 182(1) of the *Workplace Relations Act 1996* (Cth) **(WR Act)** by failing to pay Mr Ernst John Walder in accordance with the basic periodic rate of pay provisions derived from the *Miscellaneous Workers General Services (State) Award* (NSW) **('the first contravention')**; and

(b) sub-section 185(2) of the WR Act by failing to pay Mr Ernst John Walder in accordance with the default casual loading percentage **('the second contravention')**.

(2) During the period 27 January 2009 to 15 April 2009, the respondent contravened clause 10 of the *'Kensington Management Services Pty Ltd Greenfields Agreement 2007'* (agreement number 073039842) **(Agreement)** by failing to pay Mr Ernst John Walder and Ms Caroline Kilbourne in accordance with the hourly rates of pay set out at Schedule A of the Agreement **('the third contravention')**.

THE COURT ORDERS THAT:

(3) Pursuant to sub-section 719(2) of the WR Act, there be imposed on the respondent a penalty of $3000 for the first contravention.

(4) Pursuant to sub-section 719(2) of the WR Act, there be imposed on the respondent a penalty of $3000 for the second contravention.

(5) Pursuant to sub-section 719(2) of the WR Act, there be imposed on the respondent a penalty of $16,000 for the third contravention.

(6) The penalties payable under the above orders must be paid to the Commonwealth pursuant to s.841 of the Act.

(7) Pursuant to sub-section 719(6) of the WR Act, the respondent pay an amount of $22,987.38 to Mr Ernst John Walder in respect of outstanding wages and casual loading entitlements.

(8) Pursuant to sub-section 719(6) of the WR Act, the respondent pay an amount of $351.00 to Ms Caroline Kilbourne in respect of outstanding wages.

(9) Pursuant to section 722 of the WR Act, the respondent pay the following amounts to the following employees representing interest on outstanding wages and casual loading entitlements for the period from 16 April 2009 to 26 July 2012.

(a) Mr Ernst John Walder: $6,145.45.

(b) Ms Caroline Kilbourne: $93.84.

(10) Payments required under these orders are to be made within a period of 28 days.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG844 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

KENSINGTON MANAGEMENT SERVICES PTY LTD
ACN 064 931 415
Respondent

REASONS FOR JUDGMENT

1. This judgment explains the above orders, which are made to give effect to my findings and reasons published on 27 April 2012 (see *Fair Work Ombudsman v Kensington Management Services Pty Ltd* [2012] FMCA 225), and after receiving additional evidence and submissions in relation to penalty.

2. My judgment explained how Mr Walder and his partner Ms Kilbourne were chosen by Kensington Management Services Pty Ltd ('Kensington') to fill a position as caretaker at a retirement village which was under development near Albury in NSW. Kensington appointed them both to the one position, and required at least one of them to be in attendance and to undertake the responsibilities of the position at all times during specified 'attendance hours' totalling 121.5 hours per week, being all periods during the week and on weekends when the village manager was not present. It was also a condition of their employment that they should live together in designated caretaker's accommodation in the village. They were given, and accepted, a letter of appointment which told them that they

would, in effect, be paid a single wage consisting of a weekly 'on call allowance' of $115.13 as well as the benefit of the accommodation.

3. The couple moved into the village, and Mr Walder undertook all the duties of caretaker for the required attendance hours from 17 January 2009 until 15 April 2009, except on three days when he was absent on volunteer fire-fighting duties. Ms Kilbourne filled the caretaker position at those times. They were told that they did not need to submit time-sheets for the periods when they performed particular caretaking activities, but Mr Walder submitted time-sheets showing some periods when he undertook additional duties of gardening and cleaning. The promised weekly remuneration was paid into his bank account, together with some additional payments for these extra duties. No additional payments were claimed by Ms Kilbourne.

4. In the present proceedings, the Fair Work Ombudsman claimed that the remuneration given to the couple as a wage for their caretaking employment over this period was not calculated in accordance with the minimum hourly rates for a caretaker with a loading for casual employment, which were applicable by force of law. Over the relevant period, the required rates were found in the Kensington Management Services Greenfields Collective Agreement ('the Kensington Greenfields Agreement'), or, to the extent that its rates fell below guaranteed minimum rates, the basic rates derived from the *Miscellaneous Workers General Services (State) Award* (NSW) ('the Award') as it stood at 26 March 2006.

5. The Ombudsman contended that Mr Walder and Ms Kilbourne were entitled to be paid wages calculated by applying these hourly rates to the specified attendance hours for which Mr Walder undertook the duties of caretaker, and for which Ms Kilbourne did so on the three days of his absence. If this was the correct approach to calculating their entitlements, it is clear that there were substantial underpayments, even if a deduction is made for a notional amount of $300 per week for rent which was shown on Mr Walder's payroll advices. Moreover, the Ombudsman disputed that a deduction for rent was legally permissible.

6. The Ombudsman sought the imposition of pecuniary penalties under s.719(1) of the *Workplace Relations Act 1996* (Cth), in respect of

breaches of three 'applicable provisions' resulting in the underpayment of wages, being:

i) In the period 17 to 26 January 2009, the failure to pay to Mr Walder at least the guaranteed basic rate of pay required by s.182(1) of the Act which derived from the Award rate in relation to caretakers.

ii) In the period 17 to 26 January 2009, the failure to pay Mr Walder a guaranteed 20% casual loading on that rate of pay, required by s.185(2) of the Act.

iii) In the period 27 January 2009 to 15 April 2009, the failure to pay Mr Walder, or Ms Kilbourne in his absence, the casual hourly rate of pay for caretakers, inclusive of casual loading, as specified in the Kensington Greenfields Agreement and varied by an undertaking given by Kensington on 27 January 2009 under s.346R of the Act.

7. The maximum available penalty for each of these contraventions is $33,000.

8. The Ombudsman also sought an order under s.719(6) of the Act, that Kensington pay compensation for the underpayments to Mr Walder and Ms Kilbourne. He has calculated this as $22,987.38 for Mr Walder and $351 for Ms Kilbourne, if allowance is made for rental deductions. If, as he contends, rental deductions were unlawful, then they suffered an additional underpayment of $3,900. Interest under s.722 is claimed on any compensation in respect of the period from the end of their employment in April 2009 until judgment.

9. Kensington has not claimed that the wages actually paid to Mr Walder were calculated by reference to the rates set out in its own Greenfields Agreement or the minimum rates under the Act. Manifestly they were not so calculated. However, it disputed that it is liable for penalties or compensation under the terms of the Greenfields Agreement and the legislation on their proper construction. In particular, it disputed that the caretaker attendance hours specified in its employment contract should be treated as hours of 'work' in relation to the wage rate tables found in either the Award or the Greenfields Agreement.

10. In my published judgment, I upheld the case presented by the Ombudsman, except in so far as it contended that Kensington's deduction of $300 per week for rent was unlawful. As a consequence, it is appropriate now to make the above three declarations, and the above orders for the payment of compensation and interest. This accepts the terms of short minutes presented to the Court by the Ombudsman.

11. My present judgment now provides my reasons for concluding that penalties of $3,000, should be imposed on Kensington in relation to each of the first two contraventions, and a penalty of $16,000 in relation to the third.

12. The Fair Work Ombudsman's written submissions on penalty addressed headings taken from the well-known list of sentencing considerations suggested in this area by Mowbray FM in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7, and summarised by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14, [2007] FCA 1080 at [14]. The list of considerations can guide, but is not a substitute for *"the unrestrained statutory discretion"* (cf. Gyles J in *Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550 at [11]). Ultimately, I must arrive at an amount within the range of penalties provided in the legislation which is proportionate to the gravity of the offences committed and also takes into account other sentencing considerations including deterrence (cf. Graham J in *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560, [2008] FCAFC 8 at [54]). The matters which become determinative in each case differ with the particular circumstances, and recent judgments of the Full Court have emphasised the discretionary nature of the power to impose civil penalties for breach of industrial legislation, and have supported a mental process of 'instinctive synthesis' (cf. *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (supra) at [27]).

13. The non-exhaustive list of considerations suggested in the above authorities is:

- The nature and extent of the conduct which led to the breaches.
- The circumstances in which that conduct took place.

- The nature and extent of any loss or damage sustained as a result of the breaches.
- Whether there had been similar previous conduct by the respondent.
- Whether the breaches were properly distinct or arose out of the one course of conduct.
- The size of the business enterprise involved.
- Whether or not the breaches were deliberate.
- Whether senior management was involved in the breaches.
- Whether the party committing the breach had exhibited contrition.
- Whether the party committing the breach had taken corrective action.
- Whether the party committing the breach had cooperated with the enforcement authorities.
- The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements and
- The need for specific and general deterrence.

14. I have considered all of these matters, and propose to address them in the course of a more focused judgment, which discusses the circumstances of the contraventions, the situation of Kensington, the need for deterrence, and mitigating considerations, before explaining the penalties which I have arrived at.

15. The three contraventions which I found in my judgment attract the statutory aggregation of repeated breaches of the same entitlements, pursuant to s.719(2) of the Workplace Relations Act. This provision provides:

Imposition and recovery of penalties

...

(2) Subject to subsection (3), where:

(a) 2 or more breaches of an applicable provision are committed by the same person; and

(b) the breaches arose out of a course of conduct by the person;

the breaches shall, for the purposes of this section, be taken to constitute a single breach of the term.

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

16. Kensington did not dispute that the basic wage entitlements under s.182, the casual loading entitlements under s.185, and the rate of pay entitlements under the Kensington Greenfields Agreement concerned different 'applicable provisions', and that on the findings made in my principal judgment it was liable for three penalties in accordance with the usual manner in which provisions such as s.719(2) are applied. This was explained by Gray J in *Gibbs v Mayor, Councillors and Citizens of City of Altona* (1992) 37 FCR 216 at 223, where his Honour said:

> *The object of s.178(2) appears to be that a party bound by an award and pursuing a course of conduct involving repeated acts or omissions, which would ordinarily be regarded as giving rise to a series of separate breaches, should not be punished separately for each of those breaches. 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.*

17. These observations tend to suggest that normally it is appropriate to impose separate penalties for breaches of different entitlement provisions, even where they all 'arose out of a course of conduct' by the employer, in the sense that they all shared a common cause or background. Numerous judgments of this Court and the Federal Court have proceeded on that basis. They usually arrive at separate penalties

for multiple failures to pay separate types of entitlements, and then address the possibility that the resultant penalties might, in aggregate, exceed an amount which is 'just and appropriate' in all the circumstances, by applying a 'totality principle' which might require further adjustment of the penalties (see *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 at [5]-[9], [43]).

18. However, beyond the statutory aggregation of contraventions under s.719(2), and before applying the 'totality principle', the sentencing discretion also allows a further aggregation of penalties for groups of different contraventions forming part of one course of conduct. A discretion to do this has been said to arise:

> *"where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise"* (see *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417, [2009] FCAFC 171 at [15], quoting Lord Diplock in *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607).

19. The mere presence of a 'course of conduct' for the purposes of the statutory aggregation of contraventions repeated over a period of time usually does not necessarily lead to a further aggregation under this principle, and there is a need to identify something which justifies it. The authorities clearly hold that the adoption of a further grouping or aggregation of penalties is discretionary (cf. *Mornington Inn* (supra) at [58]). In *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39, Middleton and Gordon JJ said:

> *[39] As the passages in Williams 262 ALR 417 explain, a "course of conduct" or the "one transaction principle" is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the legal and factual elements of two or more offences for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is*

> *"the same criminality" and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.*

20. In the present case, counsel for Kensington submitted that the three potential penalties resulting from applying s.719(2) in relation to all of its failures to pay Mr Walder and Ms Kilbourne their entitlements over the period of their employment should be addressed with only one penalty under the 'one transaction' principle. He submitted that essentially all the contraventions arose from Kensington's failure to appreciate throughout their employment that they were entitled to hourly wage rates for all of their required 121.5 'attendance hours', and that *"the Court should exercise care to ensure that Kensington is not punished twice for what is essentially the same contravening conduct"*.

21. However, I am not persuaded that only one penalty should be imposed on Kensington. I consider that the three entitlements arose from different legislative sources which changed over the period of the employment, and that the present circumstances warrant recognition of this in separate penalties. I accept that there is a substantial degree of overlapping culpability on the part of Kensington, and that the underlying reason for its failure to recognise and pay all three entitlements is the same. However, that reason does not reflect to the excuse of Kensington, but reveals a continuing failure adequately to appreciate and respond to the changing sources of its employees' entitlements under law.

22. As will appear, I do not accept the suggestion that the contraventions arose from a single mistake which was reasonable or excusable. Rather, I consider that there was a failure by Kensington over a period of time before and during the employment of Mr Walder and Ms Kilbourne to review and consider the propriety of how they were paid, in the light of current industrial legislation and the terms of its own Greenfields Agreement. There was a particular failure to appreciate during the first part of their employment, the significance of the failure of the Greenfields Agreement to pass the 'fairness test'. There was then a failure to review the employees' remuneration in the light of the lodgement of varied rates under that agreement. I do not

consider that the continuing underlying reasons for the three contraventions require that only one penalty should be imposed.

23. As my principal judgment found, the contraventions all resulted from Kensington offering, and then paying, Mr Walder and Ms Kilbourne a single salary of $115.13 per week, without any reference to their actual hours of work or to their required hours of attendance at the retirement village for the performance of all the duties of a caretaker by at least one of them. Such a salary was clearly not provided for in Kensington's own 2007 Greenfields Agreement. This happened notwithstanding that Kensington's letter of appointment dated 12 January 2009 expressly stated that the Greenfields Agreement 'governed' *"your terms and conditions of employment"*. It should have been manifest at that time that, in fact, the agreement provided only an hourly rate of pay for the work of caretakers, whether 'casual' or 'permanent'.

24. Moreover, shortly before offering the employment on these contradictory terms, Kensington had been informed on 19 December 2008 that the rates of pay under its Greenfields Agreement had failed the statutory 'fairness test'. Its relevant managers should have become aware from the correspondence that higher hourly rates of pay and loadings were payable to caretakers under the award which the Greenfields Agreement had attempted to exclude.

25. It was only when Kensington lodged a variation which increased the hourly rates of pay on 27 January 2009 that the Greenfields Agreement could become the lawful source of entitlements of Kensington's employees into the future. Moreover, Kensington could not be confident of the lawfulness of even these rates, until it was informed that the varied agreement had passed the fairness test on 9 February 2009. However, the employment of Mr Walder and Ms Kilbourne had commenced on 17 January 2009, and continued until 15 April 2009 on terms which failed to recognise the contemporaneous dealings between Kensington's solicitor and the Workplace Authority concerning the Greenfields Agreement, and ignored the hourly rates of pay found in both versions of the Greenfields Agreement and in the relevant award.

26. In my principal judgment, I explained the manifest disconformity of the remuneration offered to Mr Walder and Ms Kilbourne with the Greenfields Agreement which it purported to implement, and the absence of explanation from Kensington. I said:

> *55. It is apparent that the employment agreement made with Mr Walder and Ms Kilbourne, and Mr Walder's pay advices purporting to implement its provisions, had no regard to the hourly basic and casual rates for caretakers provided under the Kensington Greenfields Agreement, or under the preserved parts of the Award with the APCS guaranteed casual loading. Neither of these statutory sources of their entitlements contained any provision for caretakers to be paid only a small fixed salary designated as "an on call allowance for your caretaking duties" together with a notional value for the provision of compulsory accommodation. Kensington did not contend that the Workplace Relations Act allowed it to do this, and it has not yet explained how it regarded the legality of its calculation of the wages paid to Mr Walder.*
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> *56. Kensington did not argue that, under the Greenfields Agreement, a caretaker was a 'managerial employee' who under cl.11 was to be "paid a salary to be agreed upon by the parties at the commencement of employment". Prima facie, therefore, an employee classified as a 'casual caretaker' over the period of Mr Walder's employment was entitled by law to the specified hourly rate for every hour for which he or she was 'engaged to work', which was to be paid at $19.61 under the approved variation subsequent to 27 January 2009, and at $19.07 for the preceding period under the preserved APCS Award rate with the guaranteed 20% loading for that period.*
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> ...
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> *61. ... Kensington took general issue with the assumption that all the agreed attendance hours attracted the hourly rates under the Kensington Greenfields Agreement and the preserved APCS. It submitted that only some of those hours attracted the specified hourly rates, but never satisfactorily formulated how they were to be defined and identified from the evidence before me. At first, Kensington suggested that they were only entitled to hourly rates for such periods as were occupied in responding to emergency calls, but this contention was later abandoned by its counsel, who*

accepted that their duties encompassed more than this. As I understood Kensington's case at the end of the trial, it submitted that only times 'actively' occupied by Mr Walder or Ms Kilbourne in non-passive caretaking duties could attract the relevant hourly rates. Obviously, it could not clearly identify these hours, since it kept no records of them and did not require the employees to keep work-sheets to allow them to be identified. However, its submissions suggested that I could infer that their 'active' hours of caretaking duties were probably fewer than would attract remuneration exceeding the wages in fact paid to Mr Walder, so that, at least, the Ombudsman had failed to establish any underpayments contravening the provisions of the Workplace Relations Act. It did not attempt to prove that, in fact, this was so, but only that the Ombudsman had not shown otherwise.

62. *I do not accept these submissions. In my opinion, they propound a narrow and meaningless interpretation of the 'work' of a caretaker in the present situation, which is inconsistent with the correct understanding of the preserved APCS rate derived from the Award, and with the wage rates provided for caretakers in the Greenfields Agreement, and with the work and responsibilities for which Kensington in fact employed its caretakers.*

...

64. *The ordinary concept of a 'caretaker' itself suggests that the occupation may not always require activity by way of specific physical or mental exertion during the periods of employment, and that in some situations the employment of a caretaker can encompass a caretaker's periods of permitted sleep or private activities when not called upon to perform actual duties. The circumstance giving the character of 'work' even to these periods, is that the caretaker is expected immediately to interrupt his or her sleep or other private activity, and to immediately assume a caretaker's responsibility for the employer's premises and for the employer's business undertaken on them.*

27. Shortly before the penalty hearing, Kensington's Chief Executive Officer, Mr Lollo, swore an affidavit, which said:

4. *I was responsible for setting the remuneration package for Ernst Walder and Caroline Kilbourne. Unfortunately, in structuring the remuneration package for Ernst and*

Caroline, I was unaware of any requirements in the Workplace Relations Act 1996 *or any applicable transitional rules affecting guaranteed hours for casual employees which would have impacted on the arrangement for Ernst and Caroline.*

5. *In structuring the remuneration package, I had regard to the following factors:*

   a. *That Ernst and Caroline would be provided with a home at the village and would not have to pay the usual operating fees;*

   b. *The village was only small at that stage and I anticipated that there would be very little emergency call responses;*

   c. *Ernst and Caroline would be able to enjoy all of the facilities of the village;*

   d. *I believed as casual workers they would have very significant periods of free time when they would not be performing active duties; and*

   e. *The remuneration arrangements were structured in a way so Ernst and Caroline would not have to pay fringe benefits tax in respect of accommodation made available to them.*

28. There are several reasons why I have not found this explanation satisfactory. Significantly, Mr Lollo's affidavit did not address whether he or other directors of the company were aware that the offered remuneration by way of a very small fixed salary and free accommodation was not provided for in the terms of the Greenfields Agreement. Nor whether he was aware that the structure of the remuneration was inconsistent with the provisions for hourly rates of pay for caretakers' work contained in both the Greenfields Agreement and the NSW award which it attempted to exclude. He did not address whether he or someone else performed calculations, and on what basis, to satisfy himself that the offered salary would provide remuneration no lower than would be provided under the minimum hourly rates required by law under those provisions, and to ensure that this could be demonstrated. He did not address whether he sought or obtained advice about these matters from the company's legal advisers, in a

situation where the company had recently received correspondence from the Workplace Authority drawing attention to the relevant legislation, and was currently employing solicitors to make its Greenfields Agreement compliant with law. All these matters are obviously pertinent when considering whether the contraventions were excusable.

29. A possible inference from Mr Lollo's silence about these matters was confirmed in his oral evidence. It was clear that neither he nor his company's board had considered any of the above matters, before directing the terms of remuneration to be offered and paid to Mr Walder and Ms Kilbourne. Mr Lollo appears not to have been aware that his company's own Greenfields Agreement provided hourly rates of pay for the work of caretakers. The picture which emerged from Mr Lollo's oral evidence was not that Kensington sought, and obtained, advice about the legality of the proposed remuneration of the caretakers. It was that he and his board unthinkingly implemented a long-standing policy of the company's board and its proprietors for the remuneration of caretakers at retirement villages established and conducted by the 'Green Group' of companies, which had been unchanged since before he commenced his employment with the Green Group in 2000. I find that neither he nor the company's board thought to review this policy, notwithstanding that the company had sought to avail itself of the liberation of employment practices provided under the Work Choices legislation, and was contemporaneously purporting to bring its Greenfields Agreement into conformity with that legislation.

30. Mr Lollo's best excuse was *"given the number of employees here ... we do not really rely on or understand a lot of the IR laws. We just get external advice on that"*. However, he gave no evidence that the terms of employment of Mr Walder and Ms Kilbourne had been submitted to, and passed review by, the company's external advisors.

31. I was unpersuaded by Kensington's attempt to give a gloss of reasonableness to the significant underpayment of the wages legally required to be paid to Mr Walder and Ms Kilbourne. As I explained in my judgment, in fact the duties for which the caretakers were employed by Kensington obviously extended far beyond being

required to respond to an infrequent emergency call. This should have been apparent to Mr Lollo and his board, not only from the standard 'job description' attached to the letter of offer, but also from the range of added duties directed by the village manager. I set these out in my principal judgment. Moreover, as I explained, it is clear that the caretakers were chosen for their capacities to assume substantial responsibility for Kensington's property and business interests over all of their required attendance hours, and that they were truly 'caretakers' for their employer's property and business interests over that period in the absence of any other employees on the premises. As Mr Ward conceded, their after-hours presence on the village premises as designated 'caretakers' was an important marketing feature for Kensington's business.

32. In my opinion, the situation of the caretakers was far from comparable to a retired couple ordinarily resident in the village, since they were prevented from leaving the village together and enjoying a normal relaxed life at all times outside business hours, and they were expected at these times to be available to respond immediately to their employer's demands and expectations. I consider that it was disingenuous for Kensington to suggest otherwise. Their employment on the premises at these times was 'casual' only in the sense that they had agreed to forego entitlements given only to 'permanent' employees. A similar misuse of language was involved by characterising as an 'on call allowance' a salary intended to remunerate the performance of all their important duties. The suggestion that the remuneration structure advantaged the employees by saving them fringe benefits tax was similarly flawed. In short, in my opinion, Kensington's rationalising of a lower than subsistence level of remuneration paid jointly to these full-time caretakers does not stand up to close scrutiny.

33. Implicit in Kensington's response to the present prosecution, is a factual contention that the application of the statutory hourly wage rates to the attendance hours for work required of Mr Walder and Ms Kilbourne would have resulted in an unreasonably high level of remuneration, and that they were sufficiently remunerated by the payment of $115.13 per week and the provision of unfurnished caretaker's accommodation. However, I am unpersuaded that such a

conclusion is obvious, or supported by the evidence before me. In the absence of a serious attempt by Kensington to record by way of time-sheets or otherwise the actual activities undertaken by Mr Walder and Ms Kilbourne while working at the village, and in the absence of evidence showing the accepted or general levels of remuneration for comparable caretakers in the relevant industry, I was unconvinced by the suggestion that Kensington was altruistic when providing them with accommodation and employment on the terms offered. It appeared to me that a darker picture was equally available, leaving open the possibility that there may have been an unfair exploitation of the time and qualifications of these employees.

34. The Court is not expected to be able to arrive at conclusions on these matters before imposing a penalty, even at a significant level. The evidence has left me unpersuaded as to either scenario. However, I am able to arrive at an appropriate penalty on an assumption that the minimum wage rates which I have found were required by law were properly and reasonably expected to be observed by an employer, and that Kensington has not been able to satisfy me that it has an acceptable excuse for its underpayment of the minimum remuneration required by force of law.

35. When considering the seriousness of Kensington's failure to appreciate and pay the required hourly wage rates, it is appropriate to consider not only the circumstances narrated above and in my principal judgment, but also the general circumstances of the employer.

36. Kensington's evidence presented in chief during trial and for the penalty hearing gave little information as to its corporate and business structure and background. Notwithstanding this, I was asked to accept Mr Lollo's description of Kensington as *"a small employer"*, and to impose a single penalty *"in the low range"*.

37. Some pertinent background only emerged under questioning during Mr Lollo's oral evidence. The most recent company search in evidence shows that Kensington Management Services Pty Ltd in December 2010 was a company with a share capital of $2 owned by Anthony Kenneth Green. Its board of directors consisted of Mr Lollo, Shaun Anthony Green, Anthony Kenneth Green, Marlene Anne Green, and Colin Brian Ward. Mr Lollo said that Mr Ward's presence on the

board was temporary, and has ceased. Mr Lollo said that the business of Kensington is managed as part of a group of 'about' 13 companies with essentially common board members drawn from the Green family. There is a functional distribution of group activities and business assets between the group companies and Green family trusts. Thus, the land upon which the Albury retirement village was developed was owned by a Green family trust, the village was marketed and developed in the name of AM Investment Pty Ltd, and its employees were engaged and provided by the present respondent company. This structure is presented externally with the use of two business names 'Green Group' and 'Choice Retirement Communities', which were registered in the name of one of the Green Group companies, AM Investments Pty Ltd.

38. No evidence was presented of the financial position of Kensington, of the group of companies with common boards of directors and proprietors, or of any other entities involved in the businesses of the Green Group. However, Mr Lollo did not dispute the accuracy of a description of the business of the group, including its development of the Kensington retirement village at Albury, which currently appears on a shared website. This includes the statements:

> *'Choice Retirement Communities' is the retirement village arm of a private and family owned Queensland based organisation, the 'Green Group'.*
>
> *The owners, the Green family, have 24 years continuous experience in the retirement village industry having successfully developed and operated 'Argyle Gardens Bundaberg', 'Carlyle Gardens Bargara', 'Carlyle Gardens Mackay' and 'Carlyle Gardens Townsville' which now collectively boast over 1,200 houses and nearly 2,000 happy residents. Each of these Queensland based lifestyle estates are highly regarded in the retirement village industry and have won many Housing Industry Awards.*
>
> *'Choice Retirement Communities now look forward to bring their wealth of experience and reputation for excellence to New South Wales and Victoria with the commencement of Kensington Gardens Albury followed shortly thereafter by Kensington Gardens Shepparton.*
>
> ...

Welcome to the Green Group of Companies.

As an entity, the Green Group source, design, construct and manage quality retirement villages, shopping centres and other commercial properties. The group has also purchased quality commercial and retail assets for redevelopment and investment. Today, the continued building of a quality asset portfolio and adaptable management systems with extensive personal involvement from a small and committed team, drive the organisation forward.

...

THE GREEN GROUP OF COMPANIES is a private and family owned Queensland based organisation.

Established in 1984 in Bundaberg by founders Tony & Marlene Green, the Green Group has steadily grown from a small company developing one retirement village to a group of companies managing an investment portfolio in excess of 160 million dollars. A development book in excess of 200 million dollars further underpins the future growth of the Group.

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Today, the continued building of a quality asset portfolio and adaptable management systems with extensive personal involvement from a small committed team, drive the organisation forward.

OUR VISION:

A respected family owned company admired for its success, integrity and ethics. The company will control a diverse range of quality assets and businesses, to which our people are committed and skilled.

OUR MISSION:

We are a family owned organisation dedicated to achieving a successful and enduring business. We specialise in lifestyle estates and have complimentary enterprises in property development and investment based on efficiency, innovation and diversity with a strong commitment to an exciting future.

39. Mr Lollo confirmed that he held the position of CEO for all of the companies in the Green Group, and that they were managed from a common 'head office' in Bundaberg, Queensland. When invited to describe the number of employees of the group, he said: *"there's five in head office, two in Cairns, three in Maryborough and ... probably a dozen in the two villages"* at Albury and Shepparton (Transcript, page 20). Mr Lollo acknowledged that all Green Group employment and pay-roll matters were controlled and administered from the head office, including by the employment of a pay-roll clerk. He denied that there was *"a designated Industrial Relations or Human Resource Manager from whom I was able to take advice"*. I accept this disclaimer, but note that Ms Fraser in 2009 initially referred Workplace Inspector Bodkin to *"group HR mgr Nicole Dyckhoff, who is based at head office in Bundaberg"*.

40. As I have noted, it is apparent from the correspondence tendered by the Ombudsman that the company was able to engage the services of a Brisbane solicitor to conduct its correspondence with the Workplace Authority arising from the disallowance in December 2008 of its 2007 Greenfields Agreement, and with the Fair Work Ombudsman during 2010 when investigating the complaints of Mr Walder and Ms Kilbourne. No suggestion was made by Kensington that it could not afford to obtain the best available external advice as to its obligations under industrial law.

41. In all the above circumstances, I accept that Kensington might be regarded as a 'small employer' in terms of numbers of employees. However, I do not accept that this finding excuses the failure of its board and managers to obtain, consider, and implement proper advice as to the legality of its remuneration policies and practices in relation to the caretakers employed at its retirement village at Albury. It is reasonable to expect that the CEO and Board of a company with the above business background and group resources could, and should, have obtained advice either internally or externally which would have alerted them to the unlawfulness of the remuneration offered and paid to Mr Walder and Ms Kilbourne. I consider that the circumstances of the contraventions show serious failures on the part of the senior managers of Kensington, including its board, in this respect. The

failures were inexcusable and continuing, and warrant the imposition of a penalty for each of the contraventions.

42. I accept that the penalties should be mitigated by reason of the absence of a previous finding of breach of relevant industrial laws on the part of Kensington. I also accept that my above findings have not included findings of knowing or deliberate contravening conduct by the employer's managers during the period of the employment of Mr Walder and Ms Kilbourne. These factors point against penalties in the higher ranges.

43. However, I consider that there is a need for a 'real' level of penalties, being one which will not appear token or insignificant in the circumstances. While the contraventions occurred over a relatively short period and concerned only two employees, on Mr Lollo's evidence they were the result of a general employment policy in relation to caretakers at retirement villages implemented by direction of the most senior managers and proprietors of the Green Group, and of a pervasive failure to appreciate the patent disconformity between the Kensington Greenfields Agreement and the remuneration actually paid. This resulted in a degree of underpayment of mandatory minimum wages which was very substantial.

44. There is no evidence of any 'contrition' or 'remedial action' taken to review and align the Green Group's remuneration policy for caretakers with the terms of the Kensington Greenfields Agreement. Nor that any actions are proposed to be taken by Kensington in the light of my judgment. No payments have been made or offered to be made to these particular employees in respect of the underpayments, whether before or after my judgment on liability. The flavour of the evidence and submissions of Kensington upon sentencing was that its proprietors and managers continue to believe that the caretakers were adequately and lawfully remunerated under a policy which had been implemented for a long time by the Green Group in relation to its retirement villages.

45. In these circumstances, I consider that the penalties should attempt, at an appropriate extent permitted by the maximum penalties provided by the legislation, to convey a deterrent message to Kensington, and to encourage its board and managers to perform a proper review of the legality of its remuneration practices in relation to its employed

caretakers and other employees. I am not persuaded by Kensington's submission that *"the risk of re-offending is low or non-existent"*, so as not to call for deterrent penalties.

46. I consider that the circumstances also require a strong deterrent message to other similar employers, who might be tempted to imitate Kensington in its disregard of the legal entitlements of its employees and its carelessness as to compliance with industrial legislation. It is particularly important that all employers should understand and meet the legal standards of minimum employee entitlements, particularly where those entitlements arise from a special collective agreement adopted for the benefit of the particular employer and its employees.

47. The Ombudsman accepted in submissions that Kensington had shown 'cooperation' with his inspectors in the course of the proceedings leading to the present application. However, Kensington fully exercised all its rights and put the Ombudsman to proof and otherwise in defence of the application, and the public purse was spared no expense. In the circumstances, I do not propose significantly to mitigate penalties upon this consideration.

48. Considering all of the above matters, I have concluded that the first two contraventions should attract lower penalties than the third. This would reflect the concurrent nature of the two contraventions and the short period in which they occurred. However, they deserve a real level of penalty, since they occurred shortly after Kensington had been told by the Workplace Authority that the hourly rates of pay for caretakers under its Greenfields Agreement did not pass the 'fairness test', and that the basic minimum hourly rate and loading derived from the relevant awards should be applied. I consider that each contravention should attract a penalty of $3,000.

49. The third contravention was, in my opinion, more serious. It encompasses repeated and significant breaches of the varied terms of Kensington's own Greenfields Collective Agreement over the remaining period of employment of Mr Walder and Ms Kilbourne. Moreover, the importance of complying with the provisions of the varied rates of pay under the Greenfields Agreement should have been apparent from Kensington's contemporaneous correspondence with the

Workplace Authority. I consider that a penalty of $16,000 is appropriately imposed.

50. This results in total penalties of $22,000, which in all the circumstances I do not regard as unfairly oppressive nor as requiring adjustment under the totality principle.

51. I shall therefore make the declarations and orders set out at the commencement of this judgment.

I certify that the preceding fifty-one (51) paragraphs are a true copy of the reasons for judgment of Smith FM.

Associate: Per K.G.

Date: 26 July 2012