FEDERAL MAGISTRATES COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v TURBO CAFÉ POINT COOK PTY LTD & ANOR [2012] FMCA 795

INDUSTRIAL LAW – civil penalties – breaches of industrial instruments specifying minimum entitlements.

Fair Work Act 2009, s.44(1), s.45, s.90(2), s.546(1), s.546(3)(a), s.550(1), s.557(2)
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, Schedule 16, Item 5
Workplace Relations Act 1996, s.182(1), s.185(2), s.719(1), s.719(2), s.728(1), s.841(a)

Fast Food Industry Award 2010, Schedule A, Item A.2.3, Item A.2.5, Clause 26.2, Clause 28.3
National Fast Food Retail Award 2000

Fair Work Ombudsman v Turbo Café Watergardens Pty Ltd & Anor [2012] FMCA 794
Flattery v Italian Eatery t/as Zeffirelli's Pizza Restaurant [2007] FMCA 9
Kelly V Fitzpatrick (2007) 166 IR 14
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Mornington Inn Pty Ltd v Jordan [2008] FCAFC 70
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B & P Caelli Constructions Pty Limited (2007) 158 FCR 543
Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412
Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor [2011] FMCA 191

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	TURBO CAFÉ POINT COOK PTY LTD
Second Respondent:	DOMENIC VERSACE
File Number:	MLG 853 of 2011

Judgment of:	O'Dwyer FM
Hearing date:	5 April 2012
Date of Last Submission:	5 April 2012
Delivered at:	Melbourne
Delivered on:	6 September 2012

REPRESENTATION

Counsel for the Applicant:	Mr Vallence
Solicitors for the Applicant:	Office of the Fair Work Ombudsman
Counsel for the Respondents:	Mr Biviano
Solicitors for the Respondents:	MNG Lawyers

THE COURT DECLARES THAT:

(1) The First Respondent contravened:

(a) Section 182(1) of the *Workplace Relations Act 1996* (Cth) (WR Act), and Item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) by failing to pay the Employee the guaranteed basic periodical rates of pay as required in the preserved Australian Pay and Classification Scale derived from the *National Fast Food Retail Award 2000*.

(b) Section 45 of the *Fair Work Act 2009* (Cth) (FW Act) by failing to pay the Employee the minimum wage pursuant it Items A.2.3 and A.2.5 of Schedule A of the *Fast Food Industry Award 2010* (the Modern Award).

(c) Section 45 of the FW Act by failing to pay the Employee for overtime work pursuant to Clause 26.2 of the Modern Award.

(d) Section 44(1) of the FW Act by failing to pay the Employee untaken annual leave on termination of her employment pursuant to section 90(2) of the FW Act.

(e) Section 45 of the FW Act by failing to pay the Employee annual leave loading on her untaken annual leave on termination of employment pursuant to Clause 28.3 of the Modern Award.

(2) The Second Respondent was involved in each of the contraventions specified in paragraph 1 above within the meaning of s.728(1) of the WR Act and section 550(1) of the FW Act.

THE COURT ORDERS THAT:

(1) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act that the First Respondent pay an aggregate penalty of $39,000 in respect of the contraventions referred to in declarations 1(a) to 1(e) above.

(2) Pursuant to s.719(1) of the WR Act and s.546(1) of the FW Act that the Second Respondent pay an aggregate penalty of $7,920 in respect of the contraventions referred to in declarations 1(a) to 1(e) above.

(3) Pursuant to s.841(a) of the RW Act and s. 546(3)(a) of the FW Act that the penalties imposed on the First and Second Respondents be paid into the consolidated revenue fund of the Commonwealth.

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

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT MELBOURNE

MLG 853 of 2011

FAIR WORK OMBUDSMAN
Applicant

And

TURBO CAFÉ POINT COOK PTY LTD
First Respondent

DOMENIC VERSACE
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. This proceeding was heard in conjunction with *Fair Work Ombudsman v Turbo Café Watergardens Pty Limited & Anor* [2012] FMCA 794 (the related proceeding) as the Second Respondent was common to both proceedings and relates to similar breaches of workplace relations legislation at two cafés. Whilst the cafes were owned by different legal entities, they were conducted, to all intent and purposes, by the Second Respondent who was the Director, Secretary and sole shareholder of both corporate entities involved.

2. In respect of this proceeding, it concerned an employee by the name of Ms Candice Och (the Employee) and in respect of the other proceeding, it concerned an employee by the name of Ms Natasha Talevski. The facts and circumstances in respect of both employees are

similar, save that the Employee was underpaid by amounts totalling $5,682.35 whilst Ms Talevski was underpaid by an aggregate amount of $4,776.43.

3. This proceeding concerns the fixing of appropriate civil penalties in respect of the breaches committed by the First and Second Respondents.

4. I have had the benefit of written submissions on the part of the Applicant and the Respondents, and a Statement of Agreed Facts, as well as oral submissions delivered at the hearing.

5. The First Respondent admits to contravening the following provisions in respect of the Employee:

   a) Section 182(1) of the *Workplace Relations Act 1996* (the WR Act) and Item 5 of Schedule 16 of the *Fair Work (Transactional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) by failing to pay the Employee the periodic rate of pay as required in the preserved Australian Pay and Classification Scale derived from the *National Fast Food Retail Award 2000*;

   b) Section 45 of the FW Act by failing to pay the Employee the minimum wage pursuant to Items A.2.3 and A.2.5 of Schedule A of the *Fast Food Industry Award 2010* (the Modern Award);

   c) Section 45 of FW Act by failing to pay the Employee for overtime worked pursuant to Clause 26.2 of the Modern Award;

   d) Section 44(1) of the *Fair Work Act 2009* (FW Act) by failing to pay the Employee untaken annual leave on termination pursuant to the National Employment Standards;

   e) Section 45 of the FW Act by failing to pay the Employee annual leave loading on termination of her employment pursuant to Clause 28.3 of the Modern Award.

6. The First Respondent admitted the above contraventions which resulted in an underpayment to the Employee totalling $5,682.35 comprised of:

a) $3702.64 in unpaid wages; and

b) $1979.71 on account of annual leave and annual leave loading.

7. The Second Respondent admits his involvement, within the meaning of s.728 of the WR Act and s.550 of the FW Act, in contravening the WR Act and the FW Act as set out in the above paragraph.

8. On or about 31 October 2011, the Applicant received a cheque made out in favour of her in the amount of $3,772.35 from the First Respondent. The parties agree that the amount now outstanding is $1,910, on which amount the First Respondent has agreed to pay interest.

Background

9. The First Respondent conducted a takeaway food café, which did not offer table service, in a food court located in the Point Cook Town Centre, Shop 410, corner Dunnings Road and Boa Point, Point Cook. The Employee was employed there from December 2009 to approximately 16 August 2010.

10. The First Respondent sold its business to a third party and on 4 November 2011 the First Respondent ceased to employ all employees.

11. The Second Respondent was the sole Director, its Secretary and only shareholder. He admits to having the ultimate responsibility, direction and management of the First Respondent and its operations, including in respect of the Employee, her wages and conditions of employment. The Second Respondent admits to the fact that he was aware of the First Respondent's obligations to pay the Employee certain minimal entitlements set by industrial instruments and that he was the person who hired the Employee on behalf of the First Respondent.

12. The Employee was paid a flat hourly rate of $14, which was in breach of the applicable industrial instrument by which she was entitled to $15.86 per hour. This contravention resulted in an underpayment to the Employee of $1,930.95. After 1 July 2010 the hourly rate applicable increased to $16.47, resulting in an underpayment of $585.39.

There were a number of other underpayments detailed in the Statement of Agreed Facts with the end result being that she was underpaid $3,702.64 in wages.

13. To that amount had to be added the untaken paid annual leave of 93.54 hours which in turn resulted in an underpayment of $1,636.76. To that amount there was a holiday loading of 17.5% resulting in a further underpayment of $294.85.

14. The Statement of Agreed Facts also sets out a history concerning the investigation of the breaches and contraventions which, in summary, shows, in my view, a lack of timely cooperation but ultimately, once proceedings were issued, despite being given opportunities to pay outstanding amounts prior to the issue of proceedings, the Respondents cooperated as is evidenced by the Statement of Agreed Facts and subsequent payment of part of the moneys due.

Submissions

15. In support of the Applicant's submissions, I was referred to the Statement of Agreed Facts and also the affidavit of Ms Kirsty Ford, a Fair Work Inspector who deposed that a search of the Nexus database showed that companies the Second Respondent had been associated with were the subject of three previous complaints for underpayment of employees.

16. One such complaint related to an employee Ms Attard, who was underpaid by $7,900, which underpayment was rectified on 6 November 2009. Another, however, relates to an employee associated with the related proceeding, Mr Gelsomino, which complaint was made in relation to alleged non-payment for time worked, annual leave and personal leave and was lodged on 27 September 2010.

17. The written submissions of the Applicant sets out what is now trite law and a well-followed accepted approach to the determination of appropriate penalties[1]. There is no need to repeat that for the sake of

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1 See *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at [26] – [59]

this judgment. It is noted, however, the maximum penalty for each breach of either the WR Act and the FW Act is $33,000 in respect of a body corporate and $6,600 in respect of an individual.

18. On the facts agreed, there are clearly five breaches of the relevant industrial instruments (although the breaches were committed multiple times over the period of the employment). The grouping of those multiple breaches does condense to a total of five grouped breaches and the Respondents are entitled to the benefit of s.719(2) of the WR Act and s.557(2) of the FW Act in relation to those repeated breaches.

19. As a consequence the maximum penalties that can be imposed in respect of this matter are:

    a) $165,000 on the First Respondent; and

    b) $33,000 on the Second Respondent.

18. The Applicant contends that the contraventions can be further grouped into three as some reflect substantially similar conduct. I agree that such grouping is appropriate in this particular case and as a consequence the following three groupings can be made:

    c) Failure to pay the basic periodic rate of pay and the minimum rate of pay;

    d) Failure to pay annual leave and annual leave loading;

    e) Failure to pay overtime.

20. On this basis therefore the maximum penalties applicable would be:

    a) $99,000 for the First Respondent; and

    b) $19,800 for the Second Respondent.

19. I do not accept the Respondents' contention that all of the breaches should be grouped into one.

Relevant Factors in respect of setting penalty

21. Federal Magistrate Mowbray in *Mason v Harrington Corporation Pty Ltd t/as Pangaea a Restaurant & Bar*[2] set out a non-exhausted list of factors which have potential relevance in setting penalty. I shall address each one of those under separate headings below.

Nature and extent of conduct

22. The Respondents admit that the Employee was employed on a fulltime basis, had a flat rate $14 per hour for all the hours she worked and was not paid annual leave or annual leave loading on termination. It is admitted as a consequence she was underpaid $5,682.35. For the period of 14 months that she was employed by the First Respondent she was underpaid her entitlements.

23. The Applicant contends that this failure to provide basic and important conditions and entitlements under the workplace relations legislation is serious, particularly when regard is had to the purpose of the legislation; namely, to provide a safety net which ensures adequate minimum entitlements to employees, particularly those who are vulnerable or in low income roles. The Applicant also contends that the legislation is also designed to provide an even playing field for all employers with regard to employment costs.

24. It is further said that contravention on these fundamental entitlements undermines the workplace relations regime as a whole and displays a disregard for the Respondents' statutory obligations. The First Respondent, and indeed the Second Respondent who is the controlling mind of the First Respondent and was intimately involved in the management of the First Respondent's business, admits to knowing that there was an obligation to pay the minimum pay under industrial instruments, knew how much was actually being paid to the Employee, but did not either make due inquiry to find out exactly her entitlement, or alternatively, and more capriciously, deliberately ignored the obligation to make the correct payments. To compound culpability, the Applicant highlights the fact that the Second Respondent was made aware of his obligations, and that of the companies he controlled,

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[2] [2007] FMCA7 at [26] – [59]

under relevant Commonwealth workplace laws after complaint was made in November 2009 of an earlier failure to comply.

25. Accordingly, the Applicant submits that in those circumstances both the First and Second Respondents showed a complete disregard of the First Respondent's obligation to pay the Employee her minimum entitlements according to law. There is nothing to indicate that the contraventions would not have continued, but for the intervention of the Applicant. The weight, in my view, to be attached to this aspect of the Respondents' conduct is significant and the contentions of the Applicant in this regard are soundly put.

Nature and extent of loss or damage

26. I am also in agreement with the Applicant's contention that the gross underpayment of $5,682.35 is not insignificant when consideration is given to the fact the Employee was reliant on the minimum terms and conditions of employment required under the respective industrial instruments. It is regrettable, that of the gross amount owing, there appears to have been only $3,772.35 paid to the Applicant. It is also noteworthy that the First Respondent's failure to pay correct wages and entitlements when they became due and payable gave the benefit of the underpayment to the First Respondent over a long period of time.

Similar previous conduct

27. I have already addressed issues concerning the previous conduct and complaints lodged in respect of the Second Respondent's involvement in companies that paid employed staff below minimum entitlements. A significant aspect of this is that he had prior notice of obligations, at least as far back as November 2009, but he failed to properly comply with those obligations. The previous complaints, however, establish a recurring pattern of contravening behaviour over a relatively significant span of time. I am in agreement with the Applicant's contention that the contravening conduct in respect of the Employee is not isolated, or discreet, and shows a general disregard by the Second Respondent of the need to comply with Commonwealth workplace law.

Size of business

28. The First Respondent ceased employing employees on 4 November 2011. However, the Applicant, and indeed the Court, has not been provided with any details as to the size of the business, the number of employees employed by the business at the relevant time and the Respondents' financial position, either in respect of the period where the contraventions occurred or up to the current date. Be that as it may, the Applicant does concede that it is not likely that the business was large. However, the Applicant contends that no discount should be afforded because of the size of the business and relies upon the following statement by Tracey J in *Kelly v Fitzpatrick*[3]:

> *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.*

29. Further, in that regard, the Applicant also relies on *Rajavopalan v BN Sydney Materials Pty Ltd*[4] where it was stated at [27]:

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

30. The Applicant contends that, should I be of the view that the First Respondent's businesses (which is inclusive of the Watergardens business in respect of the related proceeding) were small and they may have been experiencing financial difficulties, any weight to be given to these factors must be balanced by the weight to be attributed to the objective assessment of the seriousness and deliberateness of the contravening conduct, and the need to impose sufficiently meaningful and deterrent penalties. With this contention I agree.

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3 (2007) 166 IR 14 at [?]
4 [2007] FMCA1412 at [27]

Deliberateness of the breaches

31. At the very least, in my view, the evidence demonstrates the Respondent's underpayment and non-payment of the Employee was reckless, if not deliberate or intentional. However, having regard to the earlier notice given to the Second Respondent of obligations arising in respect of workplace laws as early as November 2009, and that the Second Respondent was also a Director of another company that was subject to previous complaints relating to underpayment and non-payment of wages or entitlements, I am of the view that he must have known of the need for him to be diligent and precise in determining the minimum entitlements set by appropriate industrial instruments applying to the Employee's employment.

32. The Respondents became aware of their obligations to the Employee in early September 2010 but continued to commit the contraventions. When made aware of the seriousness of the contraventions, and the possibilities of penalties being imposed, they still nonetheless committed contraventions. In my view the conduct, in all of the circumstances of this case, amounts to something more than reckless.

Involvement of senior management

33. As already indicated, the Second Respondent was intimately involved in the hiring of the Employee, the setting of her wages and had the responsibility of the management and conduct of the First Respondent in relation to the hiring and firing of employees generally, but the Employee in particular.

Contrition, corrective action, cooperation with authorities

34. Under this heading the Applicant speaks in strong terms of the lack of any evidence of remorse on the part of the Respondents, that corrective action was significantly delayed and further that cooperation with the Applicant was minimal. The Applicant highlights that the Respondents were provided with ample opportunity to participate in the investigation or rectification of underpayment prior to litigation and chose to provide limited assistance. Support for that conclusion by the Applicant is the Second Respondent's non-response to an offer to

participate in an investigation and that the First Respondent did not rectify the underpayments in the timeframe required by the Amended Contravention Notice which was issued by the Applicant on 30 March 2011.

35. The Applicant also highlights the Respondent's initial understatement of the time that the Employee worked for the First Respondent which, on further investigation, clearly showed such a suggestion to be misleading. Again after the litigation was initiated the Respondent's cooperation was limited and they have failed to provide the evidence that payments made to the Employee had been directly taxed.

36. The Applicant also highlights another fact that proceedings had been issued against a company associated with the Second Respondent for similar breaches in similar circumstances (i.e. the related proceeding). Further, the Respondents failed to provide the Applicant with any evidence that other staff that continued to be employed by the First Respondent were being paid in accordance with appropriate industrial instruments. That lack of cooperation and evidence in that regard, the Applicant contends, demonstrates a lack of regard for the seriousness of the contraventions, the gravity of the proceedings before the Court and, I would add, an acknowledgement of the seriousness of the obligations imposed upon employers to comply with workplace relations legislation.

37. It is, however, accepted that, after some delay, the Respondents did cooperate in the production of a Statement of Agreed Facts which in turn, lessened the cost and shortened the time to finalisation of the litigation. However, the Applicant does highlight a lack of timely response to settling the agreed statement on the part of the Respondents.

38. However, despite that apparent cooperation, and the saving of the public purse in shortening the litigation process, the Applicant resists any significant discount arising as a consequence. The Applicant, in that regard, relies upon the comments of Stone and Buchanan JJ in *Mornington Inn Pty Ltd v Jordan*[5] when they said:

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[5] [2008] FCAFC 70 at [74] – [78]

... the benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability:

(a) has indicated an acceptance of wrongdoing and a suitable credible expression of regret; and/or

(b) has indicated a willingness to facilitate the course of justice.

39. In a similar vein, the Applicant also relies upon the statement of Federal Magistrate Burnett in *Fair Work Ombudsman v Contracting Plus Pty Ltd & Anor*[6] where he said:

> *Although the applicant concedes that the respondents have admitted liability and could be said to have cooperated by partaking in the investigation, at least in a limited fashion; particularly by engaging in the record of interview process; by providing some necessary records and, by signing the agreed statement of facts, although that itself was only agreed on the day of trial and, of course, only after some delay, the applicant says that the Court should not be too anxious to afford the respondent a significant discount for its admission and conduct.*
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> *In considering whether or not a discount should be applied, I have regard to the observations of Branson J in Mornington Inn Pty Limited v Jordon [5] where her Honour said:*
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> > *'The rationale for providing a discount for early plea of guilty in a criminal case does not apply neatly to a case such as the present, where a civil penalty is sought and the case proceeds on pleadings. Nevertheless, in our view, it should be accepted, for the same reasons as given in Cameron, that a discount should not be available simply because a respondent has spared the community the cost of a contested hearing. Rather the benefit of such a discount should be reserved for cases where it can fairly be said an admission of liability (a) has indicated an acceptance of wrongdoing and suitable and credible expression of regret and/or (b) has indicated a willingness to facilitate the course of justice.'*
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> *In my view this is a case where neither of those qualities can be demonstrated and accordingly, I do not consider that any discount ought to be provided in this instance on this basis.*

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6 [2011] FMCA191 at [125]-[127]

40. The Court is not aware of the Respondents making any expression of regret, or remorse or apologising to the Employee and it is hard to find, in the circumstances of this case, that there is evidence of genuine contrition and corrective workplace practices. I am of the view, as urged upon me by the Applicant, that the admission of liability and acceptance of the inevitable outcome of the case against the Respondents, and accordingly the weight to be attributed to the admissions made, ought to be limited to the consideration of the time and cost impact only. Accordingly the discount that should be attributable to this aspect of the conduct of the Respondent is limited and no more than 10 per cent.

Ensuring compliance with the minimum standards

41. Workplace relations laws are there to protect an employee by providing an effective safety net of minimum terms and conditions. These are considered important objectives of the legislation which in turn is reflected in the significant increase in maximum penalty to apply to breaches of the legislation that came into effect in August 2004. They are substantial penalties and the courts have reflected the need for ensuring compliance through the imposition of significant penalties where breaches have been proved.

General and specific deterrents

42. I, like the Applicant, am of the belief that there is a strong need for both general and specific deterrents in respect of this case.

Specific deterrents

43. The observations of Gray J in *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union*[7] are pertinent in this particular case:

> *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 the party as to things like remorse and steps taken to ensure that no future breach will occur.*

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7 171 FCR 357 at [37]

44. In this particular case I am satisfied that, although the First Respondent's business has been sold, the First Respondent remains a registered company and capable of future employment of staff. When that fact is also combined with the fact that the Second Respondent as a Director of the First Respondent and also as a Director of the Respondent in the related proceeding, and the fact there is a history of non-compliance with workplace relations laws as demonstrated by the previous complaints received by the Applicant, specific deterrence is a significant component of assessing the penalty so that the Respondents are left in no doubt that underpayment of wages will not be tolerated.

General deterrents

45. The role of general deterrents in determining the appropriate penalty is illustrated by the comments of Lander J in *Ponzio v B & T Caelli Constructions Pty Limited*[8] when he said:

> *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 (1972) 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 a 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.*

46. In the setting of any penalty for contraventions of the WR Act and/or FW Act the question of setting a penalty that would act as a general deterrent always looms large in the determination. It is appropriate for any court to hold, as it was held to be in *Flattery v Italian Eatery t/as Zeffirelli's Pizza Restaurant*[9], that "*a clear message needs to be sent to both the [employer] and the industry in general that underpayment of wages will not be tolerated.*"

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8 (2007) 158 SCR 543 at [93]

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47. I accept the Applicant's submission that general deterrents are important in the present case as it is important to publicly denounce repeated contravening conduct such as that perpetrated by the Respondents in this instance. Speaking generally, such contraventions are prevalent, often go undetected, and they undermine the system of workplace laws which are designed to protect employees and to provided an "even playing field" for employers in like industries.

48. In determining the appropriate penalty by way of a general deterrent it is not, in my view, appropriate to significantly discount a penalty because a Respondent's enterprise is small in size or it is facing financial difficulties. It is incumbent upon the Court to show the community's disapproval of the conduct and impose a penalty which serves as a warning to others.

49. There is a need, in my view, to send a message to the community at large, including small employers, that the correct entitlements of employees must be paid and that steps must be taken by employers (of all sizes) to actively ascertain what are, and comply with, minimum entitlements. Compliance should not be seen as the bastion of the large employer with human resources staff and advisory consultants behind them.

Instinctive synthesis test

50. It is appropriate to evaluate the aggregate penalty to determine whether it is a proportionate response to the conduct which led to the contraventions, and is not oppressive or crushing. In this regard I think it is appropriate to give recognition to the fact that the Second Respondent in this proceeding is also the Second Respondent in the related proceeding and some consideration should also be given to the aggregate penalty he will suffer as a consequence of these breaches and the other breaches admitted in the related proceeding.

Conclusion

51. The Applicant recommends a penalty set at the mid range of the scale, being 30 – 40% of the maximum penalty to be an appropriate response to the Respondents' conduct. On that basis, the First Respondent

would attract a penalty between $29,700 to $39,600 and the Second Respondent would attract a penalty between $5,940 and $7,920.

52. For the reasons set out above, but in particular the conduct of the Second Respondent in his failure to comply with workplace relations obligations, even when alerted to them, his lack of demonstrable contrition, the lengthy time over which the breaches persisted, the committal of similar breaches by another company of which he was the controlling mind and where he was intimately involved in the hiring and management of paying wages, attracts the higher end of the suggested range of penalty.

53. Accordingly, orders are made that will see a penalty of $39,000 imposed on the First Respondent and $7,920 on the Second Respondent.

I certify that the preceding fifty-three (53) paragraphs are a true copy of the reasons for judgment of O'Dwyer FM

Associate:

Date: 6 September 2012