

**IN THE FEDERAL CIRCUIT COURT OF  
AUSTRALIA  
AT MELBOURNE**

**FILE NO: (P)MLG978/2012**

**FAIR WORK OMBUDSMAN  
APPLICANT**

**AUSTRALIAN SALES AND PROMOTIONS  
PTY LTD  
(ACN 104 339 273)  
RESPONDENT**

**ORDER**

**BEFORE: JUDGE HARTNETT**

**DATE: 7 October 2013**

**MADE AT: MELBOURNE**

**APPEARANCES:** By Mr Irving of Counsel appearing on behalf of the Applicant and Mr O'Grady of Counsel appearing on behalf of the Respondent

**THE COURT DECLARES THAT:**

The Respondent contravened:

- a) Section 45 of the *Fair Work Act 2009* (Cth) ('the FW Act'), by failing to pay Mary Erwin, Elizabeth Nicole Erwin, Mark Pearton, Tegan Robinson and Hsiu Wen Chuang the minimum wages, casual loading and Saturday loading to which they were entitled pursuant to cl.13.2 of the *General Retail Industry Award 2010* ('the Modern Award') in the following amounts:



<i>Employee name</i>	<i>Minimum wage</i>	<i>Casual</i>	<i>Saturday</i>
	<i>(Modern Award</i>	<i>loading</i>	<i>loading</i>
	<i>cl.17)</i>	<i>(Modern</i>	<i>(Modern</i>
		<i>Award</i>	<i>Award</i>
		<i>cl.13.2)</i>	<i>cl.13.2)</i>
Mary Erwin	\$1,037.51	\$174.05	-
Elizabeth Erwin	\$531.41	\$89.15	-
Mark Pearton	\$1,463.40	\$201.60	\$65.84
Tegan Robinson	\$2,946.19	\$702.38	\$478.94
Hsiu Wen Chuang	\$1,178.77	\$196.04	-

- b) Section 45 of the FW Act, by failing to pay Mary Erwin and Mark Pearton the Sunday travelling time reimbursement pursuant to cls.20.4(a) and (c) of the Modern Award in the following amounts:-

<i>Employee name</i>	<i>Sunday travelling time</i>
	<i>(Modern Award cl.20.4(c))</i>
Mary Erwin	\$126.12
Mark Pearton	\$60.09

- c) Section 323(1) of the FW Act, by failing to pay Mary Erwin, Elizabeth Nicole Erwin, Mark Pearton, Tegan Robinson and Hsiu Wen Chuang the amounts payable to them in relation to the performance of work in full, in money and at least monthly.
- d) Section 535(1) and 535(2) of the FW Act, by failing to make and keep for seven years, records relating to Mary Erwin, Elizabeth Nicole Erwin, Mark Pearton, Tegan Robinson and Hsiu Wen Chuang of the kind prescribed by the *Fair Work Regulations 2009* (Cth) ('FW Regulations') in a form, and including information prescribed by FW Regulations 3.32(d), 3.32(e), 3.33(1), 3.33(2), and 3.33(3); and

- e) Section 536(1) of the FW Act, by failing to provide Tegan Robinson with a payslip within one working day of making payment to her in relation to the performance of work.

**THE COURT ORDERS THAT:**

- (1) Pursuant to s.546(1) of the FW Act, the Respondent pay an aggregate penalty of \$23,100 for its contraventions of the FW Act referred to in the above declarations.
- (2) Pursuant to s.546(3)(a) of the FW Act, the Respondent pay the penalty referred to in order 1 above to the Commonwealth within 30 days of the date of this Order.



**DATE ENTERED: 7 October 2013**

**FEDERAL CIRCUIT COURT OF AUSTRALIA**

*FAIR WORK OMBUDSMAN v AUSTRALIAN  
SALES AND PROMOTIONS PTY LTD*

[2013] FCCA 1502

**Catchwords:**

INDUSTRIAL LAW – Penalty hearing – pecuniary penalties – contraventions of the *Fair Work Act 2009* (Cth) and the *General Retail Industry Award 2010* – underpayment of employees – failure to make and keep pay records – failure to provide a payslip – Agreed Statement of Facts – breaches admitted – grouping of contraventions – consideration of matters relevant to penalty.

**Legislation:**

*Evidence Act 1995* (Cth), s. 191

*Fair Work Act 2009* (Cth), ss. 45, 323, 323(1), 357, 535, 535(1), 535(2),  
536(1), 546(1), 546(3)(a), 557

*Fair Work Regulations 2009* (Cth), Regs. 3.32(d), 3.32(e), 3.33(1), 3.33(2),  
3.33(3)

*General Retail Industry Award 2010* cls.13.2, 20.4(a), 20.4(c)

**Cases cited:**

*Kelly v Fitzpatrick* [2007] FCA 1080

*Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar* [2007]  
FMCA 7

*Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550

*Re Trade Practices Commission v CSR Limited* [1990] FCA 521

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	AUSTRALIAN SALES AND PROMOTIONS PTY LTD
File Number:	MLG 978 of 2012
Judgment of:	Judge Hartnett
Hearing date:	5 August 2013
Delivered at:	Melbourne
Delivered on:	7 October 2013

**REPRESENTATION**

**Counsel for the Applicant: Mr Irving**

**Solicitors for the Applicant: Fair Work Ombudsman**

**Counsel for the Respondent: Mr O'Grady**

**Solicitors for the Respondent: Norton Rose Fulbright Australia**

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<i>Employee name</i>	<i>Minimum wage</i>	<i>Casual loading</i>	<i>Saturday loading</i>
	<i>(Modern Award cl.17)</i>	<i>(Modern Award cl.13.2)</i>	<i>(Modern Award cl.13.2)</i>
Mary Erwin	\$1,037.51	\$174.05	-
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Wen Chuang the amounts payable to them in relation to the performance of work in full, in money and at least monthly.

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**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT MELBOURNE**

**MLG978 of 2012**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**AUSTRALIAN SALES AND PROMOTIONS PTY LTD**  
Respondent

**REASONS FOR JUDGMENT**

1. This application was commenced by the Fair Work Ombudsman ('the Applicant') filing an Application and Statement of Claim (dated 8 August 2012) on 9 August 2012 against Australian Sales and Promotions Pty Ltd ('the Respondent'). The Respondent carries on a business of marketing and selling goods and services, including marketing and selling in the energy, charity and banking industries through the operation of an outbound call centre, in the placement of sales people in shopping centres, and through door-to-door sales, to final consumers for personal or household consumption, including in the States of Victoria and Queensland. The Respondent engaged approximately 210 workers at the relevant time.
2. The Respondent admits that it contravened the *General Retail Industry Award 2010* ('the Modern Award') and the *Fair Work Act 2009* (Cth) ('the FW Act') in relation to five former employees: Mary Erwin, Elizabeth Nicole Erwin, Mark Pearton, Tegan Robinson and Hsiu Wen Chuang ('the Employees') who were engaged to provide door-to-door sales work in and for the business of the Respondent. The contraventions arise from the Respondent's failure to pay the Employees the rates of pay in the Modern Award and the Respondent's



failures to make and keep records as required by the FW Act. At the commencement of their engagement the Employees were each required to execute standard form contracts that stated they were not employees. The Respondent now admits that the Employees, at all relevant times, were employees and not independent contractors as the Respondent had earlier claimed.

3. In respect of these proceedings, the Applicant relied upon, in addition to the Statement of Claim, the following documents tendered in evidence:-

- a) a document headed "Statement of Agreed Facts" dated and signed by the parties on 28 March 2013. This document is relied upon pursuant to s.191 of the *Evidence Act 1995* (Cth);
- b) an Affidavit of Tegan Grace Robinson affirmed 1 May 2013;
- c) an Affidavit of Mark Stephen Pearton affirmed 17 May 2013;
- d) an Affidavit of Mary Adelaide Erwin affirmed 14 May 2013;
- e) an Affidavit of Elizabeth Nicola Erwin affirmed 14 May 2013;  
and
- f) an Affidavit of Fair Work Inspector, Kez Ma, affirmed 21 June 2013.

4. The Respondent relied upon the following documents tendered in evidence:-

- a) an Affidavit of Paul Ainsworth affirmed on 9 July 2013;
- b) an Affidavit of Natalie Gurman sworn on 17 July 2013; and
- c) a document headed "Contractor Agreement" between the Respondent and Mary Adelaide Erwin dated 4 October 2011 wherein Mary Adelaide Erwin is referred to as 'the Contractor'.

5. Each of the Applicant and Respondent filed Submissions on Penalty and the Applicant filed Further Submissions in Reply.

6. I make findings of fact on the totality of the evidence before me, as have been agreed to by the parties, and as are set out in the Statement of Agreed Facts.
7. The engagement of the Employees by the Respondent, the work performed by them and remuneration paid to them was as set out in paragraphs 6 to 26 of the Statement of Agreed Facts and is as follows:-
- a) The Respondent caused to be published advertisements on the websites [www.seek.com.au](http://www.seek.com.au) ('Seek') and [www.gumtree.com.au](http://www.gumtree.com.au) ('Gumtree'), to which the Employees responded.

- i) On 'Seek' the advertisement was in words to the following effect:-

Our success relies on you. We are looking for dynamic, friendly and highly motivated individuals who can work as a team. People who smile. People who have fun. People who can sell. People who want to make a difference. People just like us.

ASAP Pty Ltd is seeking to hire freelancers in the sales and marketing industry to supply services for projects.

No experience needed ...

To do this job well you don't need any experience but we do ask that you come with an open mind, because we provide you with all the training you need!!

What's in it for you??

Hmm well, apart from working with a great bunch of people, you also get to have fun doing the things you love. Oh and course there are also fantastic benefits. Not only will we challenge you to grow and listen to your ideas, but some of the many benefits we will offer you include ...

• OTE \$600-\$850

• Bonuses

- Weekly Pay
- Company progression Opportunities
- Social Functions
- Great working Environment
- Sponsorship Opportunities

Come in and pay us a visit ...

If you think this is your dream job; you are available FULL TIME and want an exciting opportunity please apply now!

**ALL TRAVELLERS WELCOMED!!**

**We can't wait to hear from you!!!!**

b) Before the Employees were engaged, the Respondent required each of the Employees to attend:-

- i) a group interview; and
- ii) an induction training session (**Initial Training**);

at the Respondent's premises. The Employees were not paid for their participation in the Initial Training. In accordance with the Energy Assured Code of Practice (Code), members subject to the Code could only engage "Sales Agents" who had the requisite experience and training to perform sales activities.

c) After the Employees had completed the group interview and Initial Training, the Respondent required each of the Employees to complete and sign:-

- i) a document titled "Contractor Agreement" (**Contractor Agreement**);
- ii) a document titled "Summary of Contractor Information";
- iii) a document titled "Occupational Health and Safety Manual";

- iv) a document titled "Code of Conduct" (Code of Conduct);
  - v) a document titled "Representative Commission Remuneration & Reward Structure Commission" (Commission Structure). The Commission Structure set out that door-to-door contractors would be paid commission ranging from \$7.50 to \$30.00 per energy sale;  
  
(collectively, the Contractor Documents).
- d) The Employees completed and signed the Contractor Documents at the Respondent's induction training sessions.
  - e) The Respondent engaged the Employees in the following periods:-
    - i) Mary Erwin: 4 October 2011 to 12 October 2011;
    - ii) Elizabeth Erwin: 4 October 2011 to 12 October 2011;
    - iii) Mark Pearton: 3 May 2011 to 17 May 2011;
    - iv) Tegan Robinson: 17 October 2011 to 7 November 2011; and
    - v) Hsiu Wen Chuang: 30 June 2011 to 11 July 2011.

#### **Work performed by Employees**

##### **Nature of work**

- f) During their periods of engagement the Employees were required by the Respondent:-
  - i) to attend the Respondent's premises in the morning and participate in group activity or training during which the Employees were required to practice sales pitches or dialogue suggested by the Respondent (Follow Up Training);
  - ii) to proceed to engage in door-to-door sales of energy goods and services to households on behalf of the Respondent's client, Energy Australia; and

- iii) to notify the Respondent of all sales at the end of each day so that the sales could be processed.

#### Control

- g) The Respondent directed the Employees as to the location, time and manner in which they were to perform the door-to-door sales work:-
  - i) The Contractor Agreement provided that each of the Employees "Sales Territory" was "as directed".
  - ii) The Employees were required to attend the Respondent's premises by 9:30am each morning and were driven to a location specified by the Respondent.
  - iii) The Employees were required to return to a specified pick up point at the relevant location by 6:00pm and were driven back to the Respondent's premises.
  - iv) The Code of Conduct required the Employees to "call or SMS your team leader if you are running late, also you must never leave the field without your team or in extreme circumstances at least call your team leader prior to leaving."
  - v) The Employees were required to work full-time hours Monday to Friday.
  - vi) The Employees were provided with sales scripts to follow in the Initial and Follow Up Training.

#### Uniform, tools and equipment

- h) Whilst the Respondent did not provide the Employees with any item of uniform with its logo or branding on it, the Respondent provided to the Employees items of clothing that displayed its clients branding. The Employees were required to wear the clients' clothing for each relevant campaign of the clients. The clothing provided included a jacket and/or T-shirt with the client's logo or branding (such as Tru Energy or Plan International), an

identification badge, a pen, clipboard and sales forms for the Employees to perform the door-to-door sales work.

- i) The Employees were required to return the clients' clothing at the end of each campaign. If the Employee failed to return the clothing, the Employee would be required to make payment to the Respondent to cover the cost of the clothing.

#### Presentation to the public

#### j) The Employees:-

- i) by reason of their uniform, identification badge, sales forms and sales pitch, presented to households as the public face of the Respondent's client; and
- ii) did not promote to the public any business of their own.

#### Delegation

- k) Whilst the Contractor Agreement provided that the Employees could delegate or subcontract their work with the consent of the Respondent, the Employees did not obtain the Respondent's agreement to engage any other persons to carry out the work and did not engage any other persons to carry out the work.
- l) Clause 5.1 (b) of the Contractor Agreement stated: "The Contractor must (b) not engage any other person to perform marketing services without the prior written consent of the Respondent.
- m) Clause 19.2 of the Contractor Agreement stated: "Neither party may assign or transfer, whether in whole or in part, the benefit of this agreement or any rights or obligations hereunder, without the prior written consent of the other party."

#### Australian Business Number

- n) Whilst the Contractor Agreement required the provision of an Australian Business Number, the Respondent did not require the Employees to have an Australian Business Number before they commenced work.

### Remuneration

- o) The Respondent:-**
  - i) determined the Employees' commission structure and rates without negotiation with the Employees; and**
  - ii) reserved to itself the right to vary unilaterally the Employees' commission rates, sales targets and sales territory.**
- p) Clause 7 of the Contractor Agreement stated that the Respondent will have the right to decrease, increase or otherwise vary the Employees' rate of commission, sales targets or sales territory without the consent of the Employees by giving them 7 days written notice.**

### Qualifications or experience

- q) The Employees were not required to have any qualifications or prior experience to perform the work for the Respondent.**

### Own business, goodwill or saleable assets

- r) In performing work for the Respondent, the Employees:-**
  - i) were not conducting their own businesses; and**
  - ii) did not obtain goodwill or other assets that they could sell on their own account.**

### Conclusion

- s) By reason of the matters agreed at all relevant times:-**
  - i) the contract under which the Employees performed the door-to-door sales work for the Respondent was a contract of employment rather than a contract for services; and**
  - ii) the relationship between the Employees and the Respondent was one of casual employment rather than independent contracting.**

**AMOUNTS PAID BY RESPONDENT TO EMPLOYEES**

- t) The Respondent paid the Employees the following amounts for work performed by them during their periods of engagement:-
- i) Mary Erwin: \$0.00;
  - ii) Elizabeth Erwin: \$0.00;
  - iii) Mark Pearton: \$30.00;
  - iv) Tegan Robinson: \$20.00; and
  - v) Hsiu Wen Chuang: \$0.00.
- u) At the end of each of the Employee' periods of engagement, the Employees requested payment from the Respondent for outstanding commission payments. The Respondent advised the Employees that it would need to hold payment of any commission payable for a period of 90 days in case any sales were cancelled or a complaint was made by a customer to the Energy Ombudsman.

**Contraventions**

8. The Respondent agreed that technically there were five separate categories of admitted contraventions, being:-
- a) the failure to pay wages, casual loading and Saturday loading to the Employees pursuant to cl.13.2 of the Modern Award, in contravention of s.45 of the FW Act;
  - b) the failure to pay Mary Erwin and Mark Pearton the Sunday travelling time reimbursement pursuant to cls.20.4(a) and (c) of the Modern Award, in contravention of s.45 of the FW Act;
  - c) the failure to pay the Employees the amounts payable to them in relation to the performance of work in full, in money and at least monthly, in contravention of s.323 of the FW Act;
  - d) the failure to make and keep pay records for each Employee in accordance with the FW Regulations, in contravention of s.535 of the FW Act; and



- e) the failure to provide Tegan Robinson with a payslip in accordance with s.536(1) of the FW Act.
9. On the hearing of the matter, the parties agreed that there should be a grouping of the contraventions, by application of s.557 of the FW Act. That grouping is as follows:-
- a) the s.323 of the FW Act contravention grouped with the wages contraventions;
- b) the allowance contravention;
- c) the failure to make and keep pay records for the employees in accordance with the FW Regulations, in contravention of s.535 of the FW Act; and
- d) the failure to provide a pay slip to Tegan Robinson, in contravention of s.536 of the FW Act.
10. Post grouping of contraventions, the maximum penalty for each payment contravention of s.45 of the FW Act is \$33,000. The maximum penalty for each other contravention being the failure to make and keep records and the failure to issue a payslip is \$16,500. The maximum penalty that can be imposed for all four contraventions is \$99,000. The Applicant proposed that the penalty be between \$40,920 and \$51,892. The Respondent proposed that it be \$6,930.
11. The Court is required to fix an appropriate penalty in respect of each of the four groups of contraventions. The Court, in application of the "totality principle", then proceeds to examine the aggregate penalty to determine whether it is an appropriate response to the conduct which led to the breaches (*Kelly v Fitzpatrick* [2007] FCA 1080 ('Kelly') at paragraph 30 per Tracey J).

### **Factors relevant to determining penalty**

12. The factors relevant to the imposition of a penalty in proceedings such as this have been summarised by Mowbray FM (as he then was) in *Mason v Harrington Corp Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7 at paragraphs 26 to 59 as follows:-
- a) the nature and extent of the conduct which led to the breaches;

- b) the circumstances in which the conduct took place;
- c) the nature and extent of any loss or damage sustained as a result of the breaches;
- d) whether there had been similar previous conduct by the respondent;
- e) whether the breaches were properly distinct or arose out of the one course of conduct;
- f) the size of the business enterprise involved;
- g) whether or not the breaches were deliberate;
- h) whether senior management was involved in the breaches;
- i) whether the party committing the breach had exhibited contrition;
- j) whether the party committing the breach had taken corrective action;
- k) whether the party committing the breach had cooperated with the enforcement authorities;
- l) the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and
- m) the need for specific and general deterrence.

13. This summary was adopted by Tracey J in *Kelly* at paragraph 14. While the summary is a convenient checklist, it does not prescribe or restrict the matters which may be taken into account in the exercise of the Court's discretion (*Sharpe v Dogma Enterprises Pty Ltd* [2007] FCA 1550).

### **Consideration**

14. The Employees performed, in total, 426 ordinary hours and 25.5 Saturday hours of work. They were paid in total, \$50. The total underpayment of the Employees was \$9,201.48. On 18 May 2012, representing some considerable delay and being six to ten months, the

Respondent made payment of the total amount owing to the Employees with no admission as to liability. Following the issuing of proceedings in August 2012, the Respondent advised the Applicant on 3 September 2012 it did not intend to defend the proceedings. The Respondent co-operated with the Applicant. The parties have agreed to the making of declarations in the form the Court will make. No previous offences have been prosecuted by the Applicant against the Respondent.

15. In the Applicant's submission, the contraventions are serious and the vulnerability of the Employees, significant. They were all women aged between 21 and 26 years, other than Mark Pearton. Three of the five were in Australia on temporary visas. They all performed work which fell within Level 1 of the classification of Retail Employee under the Modern Award, which is the lowest classification level for adults.
16. Despite the advertisement placed by the Respondent on various websites, the Employees were never given "weekly pay". In fact, they were required to sign standard form agreements prior to their commencement of employment that provided for quarterly payments of remuneration and commission only payment, not payment for ordinary time. The advertisements placed by the Respondent bore no resemblance to the actuality of the employment of the Employees.
17. The Employees undertook training by the Respondent for which they were entitled to be paid. They were not. Some of the Employees received no Saturday loading nor Sunday travelling time as required to be paid to them. They worked long hours for the Respondent and requested payment of outstanding monies owed to them until the commencement of the Applicant's investigation. They found it personally difficult to make these requests for monies to which they were entitled, and their living arrangements were for the most part financially precarious. The Affidavit of Mary Erwin affirmed 14 May 2013 highlights, in particular, the extreme vulnerability of the Employees.
18. These contraventions were repeated as between the Employees and involved not simply underpayment, but in fact no payment for work performed. The Employees had limited experience in, and knowledge of, the Australian workplace relations regime. They had not worked as independent contractors. The Employees were willing to consider any

type of work as they were desperate for work and desperate for payment for the work performed by them. They included highly vulnerable, foreign nationals in need of remuneration to meet the daily necessities of life. Each of the Employees left the employment in relatively short times frames when it became apparent that the hours were arduous and payment was not forthcoming. Thus, the amounts owing in wages not paid was not high, relatively speaking. Nevertheless the wages which should have been paid represented critical sums owing to vulnerable young people. What occurred is completely unacceptable to any fair-minded person. The fact that they, or most of them, were not paid at all, meant they were forced to expend minimum savings and exist on the charity of others. They were delayed in obtaining other paid employment. They were all psychologically adversely affected. Their experience with the Respondent employer made them wary of the manner in which they would be treated by other Australians employers. There has been no apology provided to the Employees by the Respondent. There is some need in these circumstances not only for general deterrence to those operating within the industry who are engaged in door-to-door sales and who need to comply with established minimum entitlements which includes ensuring a correct classification of employees, but also a specific deterrence in respect of the Respondent given the poor treatment of these Employees.

19. The Respondent, in not paying the Employees, deprived them of the guaranteed safety net that is, adequate minimum entitlements for employees. Likewise, the Respondent gave itself a competitive edge with respect to other businesses operating in the area that were paying their employees legal entitlements. All of the above are serious matters which require a penalty that will deter the Respondent and act also as a general deterrence. This is necessary to the extent that some care needs to be taken to obtain legal advice with accurate and complete instructions given on the issue, sometimes vexed, of the characterization of a workforce as employees or independent contracts. The Respondent's argument repeatedly put in its submissions about reliance on legal advice would have more force if it had sought a more detailed non-preliminary advice and had provided instructions consistent with the facts in this matter.

20. There is little evidence of any corrective action being taken by the Respondent and the evidence as contained in Natalie Gurman's Affidavit does not advance the cause of the Respondent to the level where the Court is so satisfied. The Court considers there remains a potential for the committing of further contraventions. Obviously this is concerning and needs further addressing by the Respondent, in particular, the making of necessary adjustments to its core business model. The evidence suggests that the Respondent considers that it cannot be liable if there is a third party interposed, which negates its responsibility for complying with workplace law. The Respondent is still trading and still appears to rely on much the same type of workforce (including contractors, albeit through third parties) for much the same type of work, notwithstanding that one client may have changed.
21. The Respondent has a large number of staff and operates nationally. It has a financial capacity to pay the penalties as sought by the Applicant, a factor of limited relevance to the Court's consideration in any event. The Court is mindful in these circumstances of imposing a penalty at a meaningful level. The Respondent's answer to the committing of the contraventions is not one tied to financial difficulty, but rather misclassification of its employees. The Respondent does argue however that the Court should consider its incurring of legal costs, but in the circumstances of this case that does not operate to mitigate penalty.
22. In *Re Trade Practices Commission v CSR Limited* [1990] FCA 521, French J (as he then was) noted at paragraph 40:-
- "The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."*
23. Based on the information disclosed in the complaints made to the Applicant, the Respondent appears to have relied on the engagement of independent contractors and commission only payment structures for a lengthy period. The Respondent has now acknowledged that this was

not an appropriate characterisation of its relationship with the Employees.

24. The Respondent sought a quick, preliminary legal opinion from its lawyers as to the classification of the Employees as employees or independent contractors. The facts going to establish the Employees characterisation were not provided in a complete or meaningful manner by the Respondent through its senior management to its lawyers. The Respondent then relied and acted upon that legal advice and determined that its establishment of a business model involving senior managers which later included Paul Ainsworth and Natalie Gurman, and the misclassification of some of its workforce allowed it to avoid the obligations imposed upon employers under the FW Act.
25. The Court does however proceed on the basis that the Respondent did not know and was not reckless as to whether the contract between it and the Employees was a contract of employment rather than a contract for services (s.357 of the FW Act).
26. To the extent the Applicant's submissions went to this Court imposing a penalty, fixed by reference to the fact that the Respondent must have known at the relevant time that the Employees were not independent contractors, I disregard them. That proposition is not sustainable on the Facts Agreed in the proceedings and the Applicant has not proceeded against the Respondent under s.357 of the FW Act being within Division 6, Sham arrangements. A defence to such proceeding is available to the Respondent with the onus of establishing the exception falling with it, which would have been pursued by it, had such a charge been levelled at it. The Applicant has determined not to bring such a proceeding against the Respondent, and not to allege effectively aggravating circumstances.
27. The Applicant proposes a penalty of 65 to 75 per cent of the maximum possible penalty for the minimum wage, casual loading, Saturday loading and payment in full/frequency of payment contraventions (Category 1); 50 to 60 per cent for the Sunday travelling time contravention (Category 2); 60 to 70 per cent for the records contravention (Category 3); and 20 to 30 per cent for the payslip contravention (Category 4). This produces in total and before discount a range of between \$51,150 and \$61,050.

28. The Respondent's position is that a penalty in the range of 10 per cent of the maximum is appropriate having particular regard to:-
- a) the Respondent's genuine, well founded belief that the Employees were contractors;
  - b) the relatively small amounts underpaid to the Employees;
  - c) that the admitted contraventions resulted from the single decision to classify the Employees as independent contractors, and not employees;
  - d) the difficult legal question of whether a person is an employee or an independent contractor;
  - e) the Respondent's cooperation in rectifying the underpayments and not defending these proceedings;
  - f) the little deterrence value of any significant penalty; and
  - g) all other mitigating circumstances set out above.

The Respondent then seeks a minimum of 30 per cent reduction on penalty.

29. The Applicant rejects the Respondent's submitted penalty range as being entirely inappropriate in the circumstances, and not reflective of the objective seriousness of the conduct, the need for deterrence or the subjective circumstances of the Respondent. A penalty in the range proposed by the Respondent, it argues, would not appropriately deter either the public or the Respondent from further contraventions.
30. The parties have agreed to the grouping of contraventions and thereby a maximum penalty of \$99,000. The Applicant proposes a penalty range of between \$51,150 to \$61,050. The Applicant acknowledges that the Respondent is entitled to a 15 to 20 per cent reduction on that penalty. A 15 per cent reduction on those aggregate ranges equates to a penalty range of \$43,477.50 to \$51,892.50. A 20 per cent reduction equates to a range of \$40,920 to \$48,840.
31. The Court determines that for the Category 1 contraventions the penalty should be 50 per cent (\$16,500), for the Category 2

contraventions the penalty should be 40 per cent (\$13,200) and for the Category 3 and 4 contraventions the penalty should be 10 per cent (\$1,650 each). This is a total sum of \$33,000. A discount to that sum is applied of 30 per cent. Thus, \$33,000 less \$9,900 leaves a penalty of \$23,100 to be paid by the Respondent to the Commonwealth of the maximum penalty.

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I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Hartnett

Associate

Date: 7

