FEDERAL CIRCUIT COURT OF AUSTRALIA

FAIR WORK OMBUDSMAN v ALARCORP PTY LTD & ANOR *[2013] FCCA 1748*

Catchwords:
INDUSTRIAL LAW – Penalty hearing for contravention of WR and FW Acts – where parties agreed statement of facts and penalties – court's position where parties in dispute upon matters contained in submissions – test applicable to agreed penalties.

Legislation:
Workplace Relations Act 1996 (Cth), ss.728(2)(c), 841
Fair Work Act 2009, sub-ss.546(3), 550(1)

Cases cited:
Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72
NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission (1996) 71 FCR 285
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
Wells v Locarno Management Pty Ltd [2008] FCA 1034
Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar [2007] FMCA 7
Kelly v Fitzpatrick (2007) 166 IR 14
Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith [2008] FCAFC 8
Fair Work Ombudsman v New Image Photographics Pty Ltd & Anor (No 2) [2013] FCCA 209

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	ALARCORP PTY LTD (ACN 003 349 184)
Second Respondent:	RAYMOND ERIC BRYANT
File Number:	SYG 2809 of 2012
Judgment of:	Judge Raphael

Hearing date:	24 October 2013
Date of Last Submission:	24 October 2013
Delivered at:	Sydney
Delivered on:	24 October 2013

REPRESENTATION

Solicitors for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr G Boyce
Solicitors for the Respondents:	Moray & Agnew

THE COURT DECLARES THAT:

(1) The first respondent, Alarcorp Pty Ltd, contravened the following provisions:

(a) Clause 43 of Schedule 8 of the *Workplace Relations Act 1996* (Cth) (**WR Act**), by failing to pay Elizabeth Egan, David Ramsay, Wayne gilbert and Nichole Rose the Annual Holidays Loading during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 11.2.3 of the *Security Industry (State) Award* (**Security NAPSA**);

(b) Clause 43 of Schedule 8 of the WR Act, by failing to pay David Allan, Mark Birch and Wayne Gilbert the applicable Night Span penalty rate during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 21.3 of the Security NAPSA;

(c) Clause 43 of Schedule 8 of the WR Act, by failing to pay the Employees the applicable Saturday Span penalty rate during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 21.3 of the Security NAPSA;

(d) Clause 43 of Schedule 8 of the WR Act, by failing to pay the Employees the applicable Sunday span penalty rate during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 21.3 of the Security NAPSA;

(e) Clause 43 of Schedule 8 of the WR Act, by failing to pay all David Allan, Elizabeth Egan, David Ramsay, Wayne Gilbert and Nichole Rose the applicable Public Holiday Span penalty rate during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 21.3 of the Security NAPSA;

(f) Clause 43 of Schedule 8 of the WR Act, by failing to pay the Employees the applicable overtime penalty rate during the period from 1 December 2006 to 31 December 2009 in contravention of clause 22 of the Security NAPSA;

(g) Clause 43 of Schedule 8 of the WR Act, by failing to pay the correct call back rates to Mark Andrew Birch, Adam Reddell,

David Allan and Nichole Rose during the period from 1 December 2006 to 31 December 2009 in contravention of clause 23 of the Security NAPSA;

(h) Clause 43 of Schedule 8 of the WR Act, by failing to pay a gun allowance to David Ramsay during the period from 1 December 2006 to 31 December 2009 in contravention of subclause 12.6 of the Security NAPSA;

(i) Section 45 of the *Far Work Act 2009 (Cth)* (**FW Act**), by failing to pay the Employees the applicable MA Saturday Span penalty rate during the period from 1 January 2010 to 19 February 2011 in contravention of subclause 22.3 of the *Security Services Industry Award 2010* (**Security Modern Award**).

(j) Section 45 of the FW Act, by failing to pay the Employees the applicable MA Sunday Span penalty rate during the period from 1 January 2010 to 19 February 2011 in contravention of subclause 22.3 of the Security Modern Award;

(k) Section 45 of the FW Act, by failing to pay the Employees the applicable MA Public Holiday Span penalty rate during the period from 1 January 2010 to 19 February 2011 in contravention of subclause 22.3 of the Security Modern Award;

(l) Section 45 of the FW Act, by failing to pay the Employees the applicable overtime penalty rate during the period from 1 January 2010 to 19 February 2011 in contravention of subclause 23.3 of the Security Modern Award; and

(m) Section 45 of the FW Act, by failing to pay the correct call back rate to Adam Reddell during the period from 1 January 2010 to 19 February 2011 in contravention of subclause 21.5 of the Security Modern Award.

(2) The second respondent, Mr Raymond Eric Bryant, was involved in each of the contraventions committed by the first respondent (within the meaning of subsection 728(2)(c) of the WR act and subsection 550(1) of the FW Act) as set out at paragraph 1 above.

THE COURT ORDERS THAT:

(3) The first respondent is to pay penalties pursuant to subsection 719(1) of the WR Act and subsection 546(1) of the FW Act to a total amount of $108,240.00 in respect of the first respondent's contraventions listed in paragraph 1 above, which is made up of:

(a) A penalty of $10,560.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(a);

(b) A penalty of $10,560.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(b);

(c) A penalty of $18,480.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(c) and 1(i);

(d) A penalty of $18,480.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(d) and 1(j);

(e) A penalty of $10,560.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(e) and 1(k);

(f) A penalty of $18,480.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(f) and 1(l);

(g) A penalty of $10,560.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(g) and 1(m); and

(h) A penalty of $10,560.00 be imposed on the first respondent, in respect of its contravention set out in paragraph 1(h).

(4) The second respondent is to pay penalties pursuant to subsection 719(1) of the WR Act and subsection 546(1) of the FW Act to a total amount of $21,648.00 in respect of the second respondent's involvement in the contraventions of the first respondent listed in paragraph 1 above, which is made up of:

(a) a penalty of $2,112.00 be imposed on the second respondent, in respect of his involvement in the contravention set out in paragraph 1(a);

(b) a penalty of $2,112.00 be imposed on the second respondent, in respect of his involvement in the contravention set out in paragraph 1(b);

(c) a penalty of $3,696.00 be imposed on the second respondent, in respect of his involvement in the contraventions set out in paragraph 1(c) and 1(i);

(d) a penalty of $3,696.00 be imposed on the second respondent, in respect of his involvement in the contraventions set out in paragraph 1(d) and 1(j);

(e) a penalty of $2,112.00 be imposed on the second respondent, in respect of his involvement in the contraventions set out in paragraph 1(e) and 1(k);

(f) a penalty of $3,696.00 be imposed on the second respondent, in respect of his involvement in the contraventions set out in paragraph 1(f) and 1(l);

(g) a penalty of $2,112.00 be imposed on the second respondent, in respect of his involvement in the contraventions set out in paragraph 1(g) and 1(m); and

(h) a penalty of $2,112.00 be imposed on the second respondent, in respect of his contravention set out in paragraph 1(h).

(5) Pursuant to section 841 of the WR Act and subsection 546(3) of the FW Act that all pecuniary penalties imposed by the court be paid to the Consolidated Revenue Fund of the Commonwealth by six equal monthly instalments payable no later than 15th of each month commencing on 15 November 2013. In the event that any one payment is outstanding for a period of seven days then the whole of the balance outstanding shall become immediately due and payable.

(6) The applicant have liberty to apply on seven days' notice in the event that any of the preceding orders are not complied with.

FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY

SYG 2809 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

ALARCORP PTY LTD
(ACN 003 349 184)
First Respondent

RAYMOND ERIC BRYANT
Second Respondent

REASONS FOR JUDGMENT

1. There comes before the court an application by the Fair Work Ombudsman ("FWO") for penalties for a series of contraventions of the *Workplace Relations Act 1996* (Cth) (WR Act) and its successor the *Fair Work Act 2009* (Cth) (FW Act) by the first respondent, a company owned and controlled by the second respondent and his wife. The contraventions took place during a period commencing on 1 December 2006 through to 19 February 2011. They involve underpayment of wages and penalty rates for weekend work and public holidays, call back rates, over time and a gun allowance to seven casual security guards employed by the first respondent. The total under payment of the employees was $62,616.66.

2. The applicant became involved in this matter after complaints were made to it by employees of the first respondent in 2011. On 30 November 2012 the FWO lodged an application with this court seeking penalties for the contraventions that it had investigated. It is one of the more pleasing aspects of this type of litigation that the court

frequently finds that the parties are able to come to considerable agreement about the factual matrix within which the contraventions took place and that these agreements are capable of being articulated in an Agreed Statement of Facts (ASOF). This has occurred here. But the parties have gone even further. They have independently considered the contraventions which have been admitted and come to an agreed view as to the appropriate penalty to be imposed against the first respondent as the principal contravener and the second respondent as a person involved within the meaning of s.728(2)(c) of the WR Act and sub-s.550(1) of the FW Act. The parties come to the court with a set of draft orders which take into account these agreements and seeks the court's determination. Each party has provided the court with submissions and the court has taken into account the ASOF.

3. The position of the court faced with an agreement on penalties was considered by a Full Bench of the Federal Court Branson, Sackville and Gyles JJ in *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72 where the principles discussed in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at [298-299] per Burchett and Keifel JJ were endorsed. Those principles were applied by a Full Court in relation to the determination of penalties in an industrial context in *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 at [57] and [129].

4. The applicant in her helpful written submissions has summarised these matters in the following form at [131]:

> "(a) it is the responsibility of the court to determine the appropriate penalty;
>
> (b) determining the amount of a penalty is not an exact science, within a permissible range, the courts have acknowledged that a particular figure cannot necessarily be said to be more appropriate than another;
>
> (c) there is a public interest in promoting settlement of litigation, particularly where it is likely to be lengthy;
>
> (d) the view of the regulator, as a specialist body, is relevant, but not a determinative, consideration;
>
> (e) in determining whether the proposed penalty is appropriate, the court examines all of the circumstances of the case; and

(f) where the parties have jointly proposed a penalty, it will not be useful to investigate whether the court would have arrived at that precise figure in the absence of agreement. The question is whether that figure, in the court's view, is appropriate in the circumstance of the case. In answering that question, the court will not reject the agreed figure simply because it would have been disposed to select some other figure. It will be appropriate if it is within the permissible range."

5. The court should also take note of the views expressed by Jessup J in *Wells v Locarno Management Pty Ltd* [2008] FCA 1034 at [23] where his Honour said:

> "The court is not bound by the agreement of the parties as to the level of penalty which should be imposed in a case such as the present. However, the court will not depart from an agreed figure merely because it might otherwise have been disposed to award some other figure. The predictability involved in the resolution of penal proceedings in accordance with a pre-trial agreement reached by the parties is something which should, as a matter of public policy, be regarded as beneficial. Only where the agreed penalty falls outside the permissible range should the court depart from the figure agreed by the parties. In this context, the permissible range is the range which would be permitted by the court, that is, a range within which the penalty is neither manifestly inadequate nor manifestly excessive."

6. The matters that the court should take into account when considering the imposition of a penalty under the WR and FW Acts were summarised by Mowbray FM in *Mason v Harrington Corporation Pty Ltd t/as Pangaea Restaurant & Bar* [2007] FMCA 7. This summary was adopted by Tracey J in *Kelly v Fitzpatrick* (2007) 166 IR 14 at [30] and has been consistently used ever since. The court acknowledges that the summary is a convenient checklist but does not prescribe or restrict the matters which may be taken into account in the exercise of its discretion; *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 per Gray, Graham and Buchanan JJ.

7. It is the court's view that in cases such as this where there is an ASOF and agreement on penalty the court is to look at the parties' submissions as submissions as to why the agreed penalties are appropriate in all the circumstances. To the extent that the parties may disagree in respect of certain submissions, as they have in this case, the court looks at the individual submissions as representing that party's reasons for the agreement rather than determining the merits of the individual submissions. This is because even though one party may be

saying, for example, "this is a mitigating factor" and the other party says "no it is not" the fact is that by taking those matters into account they have managed to reach an agreement. This is the way the court will deal with those conflicting submissions.

8. The factors which this court will take into account when considering the appropriateness of the agreed penalty in this particular case are dealt with below:

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

9. The first respondent is a company that employs approximately fifteen people or full time equivalents that has been operating in the Lismore area for over twenty years. Mr Bryant has been in the security business for thirty years and was a hands on director out and about dealing with clients and company business. The company did not employ anyone with particular industrial relations expertise and appears to have relied to some extent upon the Australian Security Industry Association Limited with details of the rates of pay etc. provided to members. The company provided security services to a number of businesses including some government organisations in the Lismore area. The company appeared to have a flat hourly rate system of pay which did not include payment of any penalty for weekend work until October 2008 when a flat rate for all work performed on weekends was paid. In relation to public holidays the company paid different rates to employees depending on whether they worked during the day or night on a public holiday. The company did not pay overtime but banked overtime paid at normal hour rates in subsequent weeks when an employee may not have had a full week's work. It provided a fixed sum of $25.00 for call backs being the amount paid by the customer to the company rather than an amount based upon when the call back occurred and the hourly rate involved at that time. Frequently the rates of pay were under the minimum rate of pay payable under the Security NAPSA and Security Modern Award, which were the applicable awards during the relevant period.

10. A rather unusual aspect of the company's method of payment of its employees was that the employees were paid more (a figure consistent with the award) when they were working at government sites. This has

not been satisfactorily explained and appears to indicate some knowledge that higher rates of pay were appropriate. The existence of this anomaly is one of the reasons why the court believes that the penalties, which would be found to be between the top of the lower range and the upper part of the mid range are appropriate. The court also notes that although the respondents have produced some information provided by the ASIOL this is information from 2010 onwards when the breaches have been going back to 2006. Whilst there are clearly problems with the figures that are found in those documents they do clearly show that penalty rates are required to be paid. The court finds it difficult to accept that the second respondent would have been blind to the fact that employees in an industry working at night, at weekends and on public holidays would expect to be paid some penalties for working those unsocial hours.

11. Another matter that the court takes into account is the length of time over which these contraventions occurred at a time during which the question of industrial relations was very much to the fore in Australia.

The nature and extent of any loss or damage sustained as a result of the breaches.

12. Although the underpayments were substantial they have now been totally rectified. A substantial rectification in excess of $45,000.00 was made in 2011 – early 2012 and the balance by July 2013. However, the loss to individual employees was quite considerable. There were three employees who were underpaid over $10,000.00 and three who were underpaid over $5,000.00. It is beyond doubt that these were significant sums to people who could ill afford it. The rectification came many years after the original losses.

Whether there had been any similar previous conduct by the defendant

13. There is no record of any previous contraventions by either respondent.

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

14. There were originally thirteen counts pleaded against the respondents but by utilisation of the course of conduct provisions and legislative changes that took place during the time these contraventions were

being committed, they were reduced to eight. The details of the grouping of contraventions are set out in some detail in [30 – 36] of the applicant's written submissions which have been placed with the papers. It is not necessary to rehearse them in these reasons.

The size of the business enterprise involved

15. Although the applicant commenced her submissions by suggesting this was a large company it clearly is not. With only fifteen full time employee equivalents it would to my mind be classed as small to medium enterprise.

Whether or not the breaches were deliberate

16. This is one of the areas in which the parties have differing views. The applicant says that it came to its views as to the correctness of the penalty on the basis that it considered the breaches were deliberate or at least caused by the respondents having a reckless disregard for the proper method of calculating wage rates. The respondents say that they agreed to the penalties on the basis that they considered it reflected the fact that the breaches were inadvertent based upon the wrongful information from ASIOL. The court is of the view that a respondent properly advised, as it believes these respondents were, would have appreciated the difficulties in making out a defence of inadvertence or reliance upon others in the particular circumstances. This seems to the court to be reflected in the agreement on penalties.

Whether senior management was involved in the breaches

17. The second respondent is the senior manager of the first respondent.

Whether the party committing the breaches exhibited contrition

18. Again there is some disagreement between the parties about this. Suffice to say that what is clear from the ASOF is that a full restitution has been made and that restitution payments began soon as some clarification as to the total amounts owed occurred. The respondents co-operated with the applicant to the extent of employing legal practitioners to assist them and to produce the ASOF and the agreement as to penalties. Some contrition has been expressed to the court and in

the court's view it is unlikely the respondent would be parties to any further contraventions.

Whether the party committing the breach had taken corrective action and co-operated with the enforcement authorities

19. The respondents have rectified the underpayments and they did co-operate with the applicant as set out above.

The need to ensure compliance with minimum standards

20. This need goes without saying. The award rates in this industry are not high, barely above the minimum rate. It is important that the courts act on these applications in order to protect the vulnerable.

The need for specific and general deterrence

21. The applicant submits that in this particular industry there is a specific need for general deterrence. It argues that this is a very competitive industry employing vulnerable people at the bottom of the wage scales. One of the methods of competing with other providers of the services is to cut costs by underpaying workers. This provides an unfair advantage to those companies who participate in such arrangements over those who pay in accordance with the law. The operator should also be deterred from undertaking this type of activity because those whom it affects are not in a strong bargaining position and need to be protected. The imposition of penalties for these contraventions should also encourage others to ensure that they are aware of their legal obligations under the relevant modern awards. The applicants informed the court that there is an education program underway in this particular industry and that is cause for congratulation. The court is of the view that the education should be aimed both at suppliers of the services and purchasers. If the applicant was able to give an indication to purchasers of the true costs of the services those purchasers might be less likely to accept tenders at rates which are inconsistent with such minimum payments.

22. When the application in this case was first filed the applicants issued a press release. The respondents believe that that release was unfair to them and damaged them in their reputation. The gravamen of the complaint is that by the time the press release was issued a very

substantial amount of the underpayments had been rectified and that this was not properly recognised in the press release. The respondents deny this, they point to the fact that the press release indicates that some rectification was being made although it did not say how much. The applicants argue that they are entitled to issue press releases on matters of importance such as this application and that the nature and extent of the press release should not go towards consideration of appropriate penalties. This court has in the past expressed some concern about press release; *Fair Work Ombudsman v New Image Photographics Pty Ltd & Anor (No 2)* [2013] FCCA 209 at [43 – 47] per Judge Jarrett where his Honour took into account what he considered to be the "misleading nature of the media release" in assessing penalty. I can only note the fact that in agreeing to the penalty the respondents took into account what they considered to be unreasonable in the press releases. The most this court is prepared to say is that it would have appeared fairer if the applicant had indicated that the rectifications had been made some two years prior to the issue of the release.

23. The respondents also took issue with some suggestions in the applicant's submissions that they acted with reckless disregard. This has already been discussed in these Reasons and the court notes that is a factor which the applicants took into account in agreeing the penalties.

24. It would be rare indeed if the court, in assessing penalties for eight contraventions by two respondents, would come to the same figures as those agreed. But this is not the test. The test is whether the figures that were agreed are within the range for the contraventions established in the circumstances found in the ASOF. I believe that in this case they are. I believe that the penalties proposed and agreed reflect the serious nature of the contraventions, in particular the amount of money involved, persons who lost that money and the requirement to deter others from emulating these respondents. I would therefore make the orders requested in the draft orders, subject only to amending Order 5 to provide for payment of the penalties by instalments over a period of six months which I believe is an appropriate time given what I have been told about the financial circumstances of the respondents.

25. The court will order pursuant to s.841 of the WR Act and sub-s.546(3) of the FW Act that all pecuniary penalties imposed by the court be paid to the Consolidated Revenue Fund of the Commonwealth by six equal monthly instalments payable no later than the 15 of each month commencing on 15 November 2013. In the event that any one payment is outstanding for a period of seven days then the whole of the balance outstanding shall become immediately due and payable.

I certify that the preceding twenty five (25) paragraphs are a true copy of the reasons for judgment of Judge Raphael

Associate: S Brant

Date: 31 October 2013