

FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v LAY BROTHERS
(WHOLESALE) PTY LTD*

[2013] FCCA 2015

Catchwords:

INDUSTRIAL LAW – Fair Work – non-payment of employee entitlements – agreed statement of facts – penalty hearing.

Legislation:

Fair Work Act 2009, ss.44(1), 45, 90, 92, 100, 116, 535(1), 536(2)(b), 557.

Fair Work Regulations 2009, regs. 3.32, 3.33, 3.34, 3.40, 3.46.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009, sch.16, Items 2, 5, 6.

Workplace Relations Act 1996, ss.182(1), 235, 719

Workplace Relations Regulations 2006, regs.19

Cases cited:

Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith (2008) 165 FCR 560

Kelly v Fitzpatrick (2007) 166 IR 14

Mason v Harrington Corporation Pty Ltd [2007] FMCA 7

Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383

Rajagopalan v BM Sydney Building Materials Pty Ltd [2007] FMCA 1412

Re Trade Practices Commission v Mobil Oil Australia Limited [1984] FCA 363

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426

Yardley v Betts (1979) 22 SASR 108

Applicant:	FAIR WORK OMBUDSMAN
Respondent:	LAY BROTHERS (WHOLESALE) PTY LTD
File Number:	MLG1625 of 2012
Judgment of:	Judge F. Turner
Hearing date:	29 October 2013
Date of Last Submission:	29 October 2013
Delivered at:	Melbourne
Delivered on:	2 December 2013

REPRESENTATION

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the Respondent: Mr Wheelahan

Solicitors for the Respondent: Delliois West & Co.

THE COURT DECLARES THAT:

- (1) The respondent has contravened :
- (a) Section 182(1) of the *Workplace Relations Act 1996* (the “WR Act”) by failing to pay Chang Chong Lai (“Mr Lai”) the correct basic periodic rate of pay;
 - (b) Section 235 of the WR Act by failing to pay Mr Lai annual leave at the correct rate of pay;
 - (c) Regulation 19.4(1) of the *Workplace Relations Regulations 2006* (the “WR Regulations”) by failing to make records regarding Mr Lai’s employment that include information prescribed by the WR Regulations;
 - (d) Regulation 19.4(2) of the WR Regulations by failing to keep records regarding Mr Lai’s employment that include information prescribed by the WR Regulations;
 - (e) Regulation 19.8(1) of the WR Regulations by failing to make records that include the respondent’s name and that Mr Lai was employed on a full time basis;
 - (f) Regulation 19.9(1) of the WR Regulations by failing to make records that include the overtime hours worked by Mr Lai or his start and finish times;
 - (g) Regulation 19.11(1) of the WR Regulations by failing to make records that include Mr Lai’s rate of remuneration;
 - (h) Regulation 19.11(3) of the WR Regulations by failing to make records that include Mr Lai’s entitlement to overtime and penalty rates;
 - (i) Regulation 19.20(3) of the WR Regulations by failing to issue payslips to Mr Lai that include information prescribed by the WR Regulations;
 - (j) Regulation 19.21(1)(a) of the WR Regulations by failing to include on payslips the respondent’s name;

- (k) Regulation 19.21(1)(c) of the WR Regulations by failing to include on payslips the date on which the payment to which the payslip relates was made;
- (l) Regulation 19.21(1)(k) of the WR Regulations by failing to include on payslips the name of the fund into which the respondent made superannuation contributions for Mr Lai's benefit;
- (m) Clause 35 of the *Transport Workers Award 1998 [AP799474CNV]* (the "Pre-Modern Award") by failing to pay Mr Lai penalty rates for work performed on Sundays;
- (n) Clause 37.2 of the Pre-Modern Award by failing to pay Mr Lai overtime rates for overtime hours worked;
- (o) Clause 38.7 of the Pre-Modern Award by failing to pay Mr Lai annual leave loading;
- (p) Item 2(1) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the "Transitional Act") as a result of contravening:
 - (i) Clause 35 of the award-based transitional instrument derived from the Pre-Modern Award ("the Transitional Award") by failing to pay Mr Lai penalty rates for work performed on Sundays;
 - (ii) Clause 37.2 of the Transitional Award by failing to pay Mr Lai overtime rates for overtime hours worked;
 - (iii) Clause 38.7 of the Transitional Award by failing to pay Mr Lai annual leave loading;
- (q) Item 5 of Schedule 16 of the Transitional Act as a result of contravening s.182(1) of the WR Act (as continued in force by Schedule 9 of the Transitional Act) by failing to pay Mr Lai the correct basic periodic rate of pay;
- (r) Item 6(1)(a) of Schedule 16 of the Transitional Act as a result of contravening s.235 of the WR Act (as continued in force by Schedule 4 of the Transitional Act) by failing to pay Mr Lau annual leave at the correct rate of pay;

- (s) Section 44(1) of the *Fair Work Act 2009* (the “FW Act”) as a result of contravening:
 - (i) Section 90(1) of the FW Act by failing to pay Mr Lai annual leave at the correct rate of pay;
 - (ii) Section 90(2) of the FW Act by failing to pay Mr Lai annual leave at the correct rate of pay upon termination;
 - (iii) Section 92 of the FW Act by cashing out annual leave in circumstances where it was not permitted to do so;
 - (iv) Section 100 of the FW Act by cashing out personal leave in circumstances where it was not permitted to do so; and
 - (v) Section 116 of the FW Act by failing to pay Mr Lai wages whilst absent from work on public holidays;
- (t) Section 45 of the FW Act as a result of contravening:
 - (i) Clause 15.2 of the *Road Transport and Distribution Award 2010* (the “Modern Award”) by failing to pay Mr Lai the minimum base rate of pay;
 - (ii) Clause 27.1 of the Modern Award by failing to pay Mr Lai overtime rates for overtime hours worked; and
 - (iii) Clause 29.2(a) of the Modern Award by failing to pay Mr Lai annual leave loading’
- (u) Section 535(1) of the FW Act by failing to make or keep records relating to Mr Lai’s employment, including by failing to record on such records the following information prescribed by the following provisions of *the Fair Work Regulations 2009* (the “FW Regulations”):
 - (i) Regulation 3.32(a) – the respondent’s name;
 - (ii) Regulation 3.32(c) and (d) – that Mr Lai was engaged on a permanent basis;
 - (iii) Regulation 3.32(f) – the respondent’s Australian Business Number (“ABN”);
 - (iv) Regulation 3.33(1)(a) – Mr Lai’s rate of remuneration;

- (v) Regulation 3.33(3) – details of Mr Lai’s entitlement to overtime and penalty rates;
 - (vi) Regulation 3.34 – the number of overtime hours worked each day; and
 - (vii) Regulation 3.40 – details regarding the termination of Mr Lai’s employment; and
- (v) Section 536(2)(b) of the FW Act by failing to issue payslips to Mr Lai which included the following information prescribed by the following provisions of the FW Regulations:
- (i) Regulation 3.46(1)(a) – the respondent’s name;
 - (ii) Regulation 3.46(1)(d) – the date on which the payment to which the payslip related was made;
 - (iii) Regulation 3.46(1)(h) – the respondent’s ABN; and
 - (iv) Regulation 3.46(5) – the name of the fund into which the respondent was liable to make superannuation contributions for Mr Lai’s benefit

THE COURT ORDERS THAT:

- (2) A penalty of \$128,700.00 is imposed on the respondent.
- (3) Pursuant to ss.719(1) and 841 of the WR Act and s.546(3)(a) of the FW Act, the respondent pay \$128,700.00 into the Consolidated Revenue Fund of the Commonwealth in respect of the contraventions declared herein.
- (4) Such penalty be paid within 60 days.
- (5) The applicant have liberty to apply on 7 days’ notice in the event orders 2 and 3 are not complied with.
- (6) All extant applications are dismissed and the matter is removed from the list of pending cases.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT MELBOURNE**

MLG1625 of 2012

FAIR WORK OMBUDSMAN
Applicant

And

LAY BROTHERS (WHOLESALE) PTY LTD
Respondent

REASONS FOR JUDGMENT

1. This decision concerns an application by the Fair Work Ombudsman (the "FWO") under the *Workplace Relations Act 1996* (the "WR Act") and the *Fair Work Act 2009* (the "FW Act") for declarations, and the imposition of penalties on the respondent because of the underpayment of an employee.
2. The employee was employed by the respondent as a truck driver from about May 2001, until his employment was terminated on or about 6 December 2011.

Agreed Statement of Facts

3. The parties entered into an Agreed Statement of Facts ("ASOF") filed 5 July 2013, and a Supplementary Agreed Statement of Facts ("Supplementary ASOF") filed 26 July 2013, wherein the following is agreed:
 - The respondent contravened s.182(1) of the WR Act "*by failing to pay the correct basic periodic rate of pay*";
 - The respondent contravened s.235 of the WR Act "*by failing to pay annual leave at the correct rate of pay*".

- The respondent contravened regs.19.4(1) and 19.4(2) of the *Workplace Relations Regulations 2006* (the “WR Regulations”) by failing to make and keep records regarding the employees employment, that include prescribed information.
- The respondent contravened regs.19.8(1), 19.9(1), 19.11(1) and 19.11(3) by failing to make records that include other relevant information.
- The respondent contravened regs.19.20(3), 19.21(1)(a), (c) and (k) by failing to issue payslips and include prescribed information.
- The respondent contravened cls.35, 37.2 and 38.7 of the *Transport Workers Award 1998* (the “Pre-Modern Award”) by “failing to pay penalty rates for work performed on Sundays...”, “failing to pay overtime rates...” and “failing to pay annual leave loading”.
- The respondent contravened Item 2(1) of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the “Transitional Act”) by contravening:
 - “Clause 35 “of the award-based transitional instrument derived from the Pre-Modern Award (Transitional Award) by failing to pay penalty rates for work performed on Sundays;
 - Clause 37.2 of the Transitional Award by failing to pay overtime hours worked; and
 - Clause 38.7 of the Transitional Award by failing to pay annual leave loading.”
- The respondent contravened various other provisions of the Transitional Award and Act.
- The respondent contravened s.44(1) of the FW Act by failing to pay annual leave at the correct rate and upon termination, and by cashing out personal/annual leave.

- The respondent contravened s.45 of the FW Act by breaching the *Road Transport and Distribution Award 2010* (the “Modern Award”) by failing to pay the correct base, overtime and annual leave loading;
 - The respondent contravened s.535(1) of the FW Act by failing to make and keep records with the relevant information.
4. It is agreed that the underpayments to the employee amount to \$124,816.74.
 5. It is agreed that at all material times the respondent was bound by instruments including the Australian Fair Pay and Conditions Standard, the National Employment Standards and the Pre-Modern Award.
 6. It is agreed that between about January 2007 until June 2009 the respondent failed to pay the employee the correct base periodic rates of pay.
 7. It is agreed that the respondent failed to pay the employee for his guaranteed hours of work.
 8. It is agreed that from July 2009 to December 2009, the respondent failed to pay the correct basic periodic rate of pay.
 9. It is agreed that from January 2010 until December 2011 the respondent failed to pay the employee the base rate for hours or work on public holidays.
 10. It is agreed that between January 2007 and December 2011 the respondent failed to pay the employee correctly for overtime worked.
 11. It is agreed that between January 2007 and December 2009 the respondent failed to pay the employee the correct amount of pay for work on Sundays.
 12. It is agreed that the respondent allowed the employee, unlawfully to cash out personal leave.
 13. It is agreed that the respondent did not pay the correct amount for annual leave accrued by the employee.

14. It is agreed that the respondent failed to pay the employee correct entitlements upon termination of employment.
15. It is agreed that the respondent allowed the employee to unlawfully cash out his annual leave.
16. It is agreed between January 2007 to December 2011 the respondent failed to make and keep accurate records.

The complaint

17. The employee filed a complaint with the FWO in relation to his employment with the respondent. On 6 March 2013, the respondent agreed to rectify the underpayments by monthly instalments over 6 months.
18. On 13 May 2013, the parties agreed that the matter proceed to a hearing to determine penalties. At the date of the ASOF \$62,408.37 was still owing to the employee. At the date of hearing that money had been paid in full. A claim for interest thereon was not made.

Supplementary ASOF

19. It is agreed that the employee speaks a dialect of the Hakka language as his first language.
20. It is agreed that Ken Lay is the Managing Director of the respondent, and that he speaks Hakka Timorese (a Chinese dialect) and English.

Applicant's Written Submissions on Penalty

21. The applicant filed written submissions on penalty on 24 September 2013.
22. Section 719 of the WR Act provides:

Imposition and recovery of penalties

(1) An eligible court may impose a penalty in accordance with this Division on a person if:

(a) the person is bound by an applicable provision; and

- (b) *the person breaches the provision.*
- (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.*
- (4) *The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:*
- (a) *60 penalty units for an individual; or*
- (b) *300 penalty units for a body corporate.*
- (5) *If, in a proceeding under this section in relation to an ITEA, it appears to the eligible court that a party to the ITEA has suffered loss or damage as a result of a breach of the ITEA by the other party, the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.*
- (6) *Where, in a proceeding against an employer under this section, it appears to the eligible court that an employee of the employer has not been paid an amount that the employer was required to pay under an applicable provision (except a term of an ITEA), the court may order the employer to pay to the employee the amount of the underpayment.*
- (7) *Where, in a proceeding against an employer under this section, it appears to the eligible court that the employer has not paid an amount to a superannuation fund that the employer was required, under an applicable provision (except a term of an ITEA), to pay on behalf of a person, the court may order the employer to make a*

payment to or in respect of that person for the purpose of restoring the person, as far as practicable, to the position that the person would have been in had the employer not failed to pay the amount to the superannuation fund.

- (8) *Without limiting the generality of subsection (7), the eligible court may order that the employer pay to the superannuation fund referred to in subsection (7), or another superannuation fund, an amount equal to the amount (in this subsection called the unpaid amount) that the employer failed to pay together with such additional amount as, in the opinion of the court, represents the return that would have accrued in respect of the unpaid amount had it been duly paid by the employer.*
- (9) *An order must not be made under subsection (6) or (7) in relation to so much of an underpayment as relates to any period more than 6 years before the commencement of the proceeding.*
- (10) *A proceeding under this section in relation to a breach of an applicable provision must be commenced not later than 6 years after the commission of the breach.*

23. Section 557 of the FW Act provides:

Course of Conduct

- (1) *For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
 - (a) *the contraventions are committed by the same person; and*
 - (b) *the contraventions arose out of a course of conduct by the person.**
- (2) *The civil remedy provisions are the following:
 - (a) *subsection 44(1) (which deals with contraventions of the National Employment Standards);*
 - (b) *section 45 (which deals with contraventions of modern awards);**

- (c) *section 50 (which deals with contraventions of enterprise agreements);*
- (d) *section 280 (which deals with contraventions of workplace determinations);*
- (e) *section 293 (which deals with contraventions of national minimum wage orders);*
- (f) *section 305 (which deals with contraventions of equal remuneration orders);*
- (g) *subsection 323(1) (which deals with methods and frequency of payment);*
- (h) *subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);*
- (i) *subsection 325(1) (which deals with unreasonable requirements to spend amounts);*
- (j) *subsection 417(1) (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.);*
- (k) *subsection 421(1) (which deals with contraventions of orders in relation to industrial action);*
- (l) *section 434 (which deals with contraventions of Ministerial directions in relation to industrial action);*
- (m) *subsection 530(4) (which deals with notifying Centrelink of certain proposed dismissals);*
- (n) *subsections 535(1) and (2) (which deal with employer obligations in relation to employee records);*
- (o) *subsections 536(1) and (2) (which deal with employer obligations in relation to pay slips);*
- (p) *subsection 745(1) (which deals with contraventions of the extended parental leave provisions);*

(q) section 760 (which deals with contraventions of the extended notice of termination provisions);

(r) subsection 785(4) (which deals with notifying Centrelink of certain proposed terminations);

(s) any other civil remedy provisions prescribed by the regulations.

(3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

24. The Court is therefore called on to decide whether any of the contraventions constitute a single course of conduct or a single contravention.

25. The applicant submits that the contraventions should be grouped into the seven groups set out in Annexure "A" to the applicant's written submissions on penalty. This was not contested in the respondent's written submissions filed 21 October 2013 nor at the hearing. Indeed at [15] of the respondent's written submissions it is agreed that the seven groupings proposed by the applicant are appropriate.

26. The Court accepts the grouping proposed by the applicant. There are therefore seven penalties to be considered.

27. The Court finds the maximum penalties are as follows:

Group No.	Grouping	Max .Penalty
1.	Minimum wage contraventions	\$33,000.00
2.	Public holiday contraventions	\$33,000.00
3.	Overtime contraventions	\$33,000.00
4.	Sunday penalty rate contraventions	\$33,000.00
5.	Cashing out leave	\$33,000.00

6.	Annual leave contraventions	\$33,000.00
7.	Record keeping and payslip contraventions	\$16,500.00
Total		\$214,500.00

28. The applicant seeks that the Court, impose penalties totalling between \$115,830.00 and \$135,135.00; the respondent submits that penalties totalling no more than between \$53,625.00 and \$75,075.00 should be imposed.
29. The penalties imposed by the Court should be an appropriate response to what the respondent has done: see *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [46]. Here the respondent under paid an employee \$124,816.74 over 6 years. In total he was paid over those years only 57% of his full entitlements. The employee was entitled to be paid \$292,058.72 but was paid \$167,241.98. That is a gross underpayment of entitlements.
30. The respondent's Managing Director seeks to downplay the seriousness of the conduct by saying that the employee was his out-of-work cousin, who like him, speaks English as his second language. One would be forgiven for thinking that if an employer is aware that an employee/member of the family, is not very familiar with the English language and has limited ability to read documents that set out their statutory entitlements, then the employer has a heightened obligation to ensure that the correct entitlements are paid. Withholding such a large amount of pay from a vulnerable employee is a serious offence.

Respondent's written submissions on penalty

31. The respondent filed written submissions on penalty on 21 October 2013.
32. The respondent submits that a lower range of penalty than that sought by the applicant (\$115,830.00 to \$135,135.00) is appropriate given:
- Admissions to the contraventions;

- Restitution to the employee;
 - The apology to the Court;
 - Steps taken to improve governance of the respondent; and
 - That there are no relevant prior convictions.
33. The respondent seeks to rely on the fact that the employee and the Managing Director of the respondent are related and do not speak English as their first language. The Court finds those factors to be adverse to the respondent (*supra*).
34. The Court notes that the Managing Director obviously does not consider that an apology should have been given to the employee. This does not show a genuine regret for the way the employee was treated.
35. The respondent submits that the breaches occurred through apparent ignorance of the relevant legislation. Ignorance of the law is no excuse. An employer must ascertain the correct entitlements and accord them.
36. The respondent submits that the Court should disregard the applicant's submissions about the need for a truck driver to rest to facilitate road safety. The Court finds that those submissions are not determinant of penalty here.
37. The respondent seeks a significant discount in penalty for contrition, corrective actions and cooperation. The penalty the Court is imposing is 60% of the maximum, which results from a large discount (*post*).
38. The respondent seeks a discount of between 65% and 75%, to a penalty range of \$53,625.00 to \$75,075.00. A discount of those magnitudes is not justified in the circumstances.
39. The Court refers to the decision in *Mornington Inn Pty Ltd v Jordan* (2008) 168 FCR 383 where at [75] Stone and Buchanan JJ described 25% as the maximum discount available for an early plea of guilty. That decision has some bearing on whether a 60-75% discount should be given here. The respondent's admissions were made 6 months after the proceedings were commenced, and rectification of the breaches did not commence until March 2013 which is four months after the

proceedings were commenced. The Court finds no basis for a 75% discount sought here.

40. The respondent submits that the breaches were not deliberate. The Court finds that at best they were negligent.

Factors Relevant to Penalty

41. A list of some of the relevant factors that should be considered when assessing penalties is set out in *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 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 conduct;
- d) Any similar previous conduct by the respondent;
- e) Whether the breaches were properly distinct or arose out of one course of conduct;
- f) The size of the business involved;
- g) Whether the breaches were deliberate;
- h) Whether senior management was involved;
- i) Whether the party committing the breach has exhibited contrition;
- j) Whether the party committing the breach has taken corrective action;
- k) Whether the party committing the breach has cooperated with the enforcement authorities;
- l) The need to ensure compliance with minimum standards by providing effective means for investigation and enforcement of employee entitlements; and
- m) The need for specific and general deterrence.

42. The applicant submits that:

"This summary above was adopted by Tracey in Kelly v Fitzpatrick (2007) 166 IR 14 at [14] and Stuart-Mahoney v Construction, Forestry, Mining and Energy Union [2008] FCA 1426 at [40]. Whilst 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."

The nature and extent of the conduct which led to the breaches

43. There were 27 breaches that resulted in underpaying an employee \$124,816.74 over a period of 6 years. It was such a large sum that it must have diminished the financial situation of that employee, throughout those years. There is no proof that the underpayments were deliberate, but at best they must have resulted from a failure by the respondent to enquire about the correct entitlements; therefore they resulted from negligence.

The circumstances in which the conduct took place

44. As mentioned above, the employee was vulnerable in that his first language was not English. He was a cousin of the respondent's Managing Director – he was entitled to trust him – that trust was breached to a very serious extent.

The nature of any loss or damage sustained

45. The employee was deprived of the benefit of \$124,816.74 progressively over 6 years. He has now been paid in full.

Any similar previous conduct by the respondent

46. None is alleged.

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

47. The breaches arose out of the same sustained course of conduct and properly fall into seven groups.

The size of the business involved

48. The Court has been provided with limited information about the size of the business. However, the employees of small businesses are entitled to as much protection as those of large businesses. The respondent does not claim incapacity to pay (respondent's written submissions [23]).

Whether the breaches were deliberate

49. As stated above, it is not alleged that the breaches were deliberate, but at best they resulted from negligence.

Whether senior management was involved

50. The Managing Director of the respondent was involved.

Whether the party committing the breach has exhibited contrition

51. The respondent has paid the employee his entitlements, after a complaint by him and after notification from the FWO. The Business Manager of the respondent has apologised to the Court in an Affidavit. No-one has apologised to the employee.
52. The respondent employed a Business Manager in August 2011 to take the respondent *"towards high level corporate governance"*. This does not show *'contrition'* as defined in the Macquarie Dictionary as *"sorrow with a true purpose of amendment"*. The respondent has also engaged an auditor, but is unaware whether the auditor will check on compliance with industrial regulation.
53. There has been no evidence of substantial contrition, only of a reaction to having been caught.

Whether the party committing the breach has taken corrective action

54. The amounts withheld have been paid, and some action has been taken to prevent future breaches.

Whether the party committing the breach has cooperated with the FWO

55. The respondent has been cooperative and has entered into the ASOF and the Supplementary ASOF.

The need to ensure compliance with minimum standards

56. Penalties must be imposed to achieve this objective.

The need for specific and general deterrence

Specific Deterrence

57. The penalties enacted in the legislation are an attempt to put a price on contraventions that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene the Act: *Re Trade Practices Commission v Mobil Oil Australia Limited* [1984] FCA 363. The Court finds that principle applicable to the WR Act and the FW Act.
58. The Acts provide total maximum penalties of \$214,500.00 which shows the seriousness with which Parliament regards breaches of industrial regulation. To impose a total penalty of between \$53,625.00 (25% of the maximum) and \$75,075.00 (35% of the maximum) as proposed by the respondent would not lie easily with the amount of money withheld from the employee.
59. \$124,500.00 is 58.2% of the maximum penalty of \$214,500.00. The Court finds a penalty around that figure to be appropriate. The Court imposes a penalty of \$128,700.00 (60% of the maximum).

General Deterrence

60. The Court considers that a penalty slightly larger than the entitlements withheld here is likely to act as deterrence to others who might be likely to offend: see *Yardley v Betts* (1979) 22 SASR 108. There is no evidence that the penalty will crush the respondent or its Managing Director. The respondent does not claim incapacity to pay (*supra*).
61. The Court refers to the decision of *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 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.[13] Obligations by employers for adherence to industrial instruments arise regardless of their size. Such a factor should be of limited relevance to the Court’s consideration of penalty”

62. The Court finds that size of the enterprise is not relevant here.
63. A penalty of 60% of the maximum provides a very large discount for actions by the respondent to cooperate with the FWO and rectify the underpayments; after having been caught. 60% of the maximum for each contravention is an appropriate response to what the respondent did.
64. The Court considers that \$128,700.00 is an appropriate aggregate penalty for the conduct that led to the breaches: *Kelly* (supra) at [30]. An employer should lose more than they stood to gain from their illegal conduct. That is a very powerful general deterrent.
65. The Court concludes that an aggregate penalty of \$128,700.00 is an appropriate response to the conduct that led to the breaches and is not oppressive or crushing.
66. The Court makes the declarations as sought in the Minutes of Proposed Orders presented by the applicant as set out (supra)

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Judge F. Turner

Associate:

Date: 2 December 2013