FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) [2014] FCA 128

Citation:	Fair Work Ombudsman v AJR Nominees Pty Ltd (No 2) [2014] FCA 128
Parties:	**FAIR WORK OMBUDSMAN v AJR NOMINEES PTY LTD and PASQUALE MINNITI**
File number:	WAD 96 of 2012
Judge:	**GILMOUR J**
Date of judgment:	24 February 2014
Catchwords:	**INDUSTRIAL LAW** – pecuniary penalties following contravention of the *Fair Work Act 2009* (Cth) - considerations relevant to the assessment of penalty - previous conduct - distinction between deliberate conduct and mere inadvertence - post-contravention conduct - the relevance of the nature of the employer's business - specific deterrence - general deterrence - range of penalties - whether or not two contraventions arose out of a single course of conduct - the totality principle - whether or not all or part of penalty should be suspended.
Legislation:	*Fair Work Act 2009* (Cth) ss 44(1), 90(2), 96(1), (2), 117, 336(1)(a), 340, 343(1)(a), 539(2), 545(1), 546(1), (2), (3), 556 *Crimes Act 1914* (Cth) s 4AA(1)
Cases cited:	*Attorney-General v Tichy* (1982) 30 SASR 84 *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union* [2011] FCA 810 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* (2009) 189 IR 304 *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 *Construction, Forestry, Mining & Energy Union v Coal & Allied Operations Pty Ltd (No 2)* (1999) 94 IR 231

Construction, Forestry, Mining and Energy Union v Hamberger (2003) 127 FCR 309
Fair Work Ombudsman v AJR Nominees Pty Ltd [2013] FCA 467
Fair Work Ombudsman v Cleaners New South Wales Pty Ltd (2009) 186 IR 467
Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2) [2012] FCA 557
Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2) [2012] FCA 408
Finance Sector Union v Commonwealth Bank of Australia (2005) 224 ALR 467
Hamberger v Construction Forestry Mining & Energy Union [2002] FCA 585
Markarian v The Queen (2005) 228 CLR 357
McDonald v The Queen (1994) 48 FCR 555
Mill v The Queen (1988) 166 CLR 59
Pearce v The Queen (1998) 194 CLR 610
Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union (2008) 171 FCR 357
Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543
R v Gordon (1994) 71 A Crim R 459
Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61
Temple v Powell (2008) 169 FCR 169
Trade Practices Commission v CSR Ltd (1991) ATPR ¶41-076
United Group Resources Pty Ltd v Calabro (No 7) (2012) 203 FCR 247
Wong v The Queen (2001) 207 CLR 584

Date of hearing:	25 November 2013
Place:	Perth
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	80
Counsel for the Applicant:	Mr R Dagleish
Solicitor for the Applicant:	Fair Work Ombudsman
Counsel for the Respondents:	Mr N Marsh

Solicitor for the Respondents:	Swan River Law
Counsel for the Commonwealth:	Ms A Ladhams
Solicitor for the Commonwealth:	Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 96 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**AJR NOMINEES PTY LTD** **First Respondent**
	PASQUALE MINNITI **Second Respondent**

JUDGE: **GILMOUR J**
DATE OF ORDER: **24 FEBRUARY 2014**
WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. Pursuant to s 546(1) of the *Fair Work Act 2009* (Cth) (FW Act) the first respondent pay a penalty of:
   (a) $14,000 for the contravention of s 340 the FW Act;
   (b) $14,000 for the contravention of s 343(1) the FW Act;
   (c) $4,500 for the contravention of s 44(1) of the FW Act in respect of the National Employment Standard (NES) at s 117(2) of the FW Act; and
   (d) $2,500 for the contravention of s 44(1) of the FW Act in respect of the NES at s 90(2) of the FW Act.
2. Pursuant to s 546(1) of the FW Act the second respondent pay a penalty of:
   (a) $2,500 for the contravention of s 340 of the FW Act;
   (b) $2,500 for the contravention of s 343(1) of the FW Act;
   (c) $1,000 for the contravention of s 44(1) of the FW Act in respect of the NES at s 117(2) of the FW Act; and
   (d) $500 for the contravention of s 44(1) of the FW Act in respect of the NES at s 90(2) of the FW Act.

3. Pursuant to s 546(3) of the FW Act each of the respondents pay the amount of their respective penalties set out above to the Consolidated Revenue Fund of the Commonwealth within 90 days of these orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY
FAIR WORK DIVISION **WAD 96 of 2012**

BETWEEN:	**FAIR WORK OMBUDSMAN** **Applicant**
AND:	**AJR NOMINEES PTY LTD** **First Respondent**
	PASQUALE MINNITI **Second Respondent**

JUDGE:	**GILMOUR J**
DATE:	**24 DECEMBER 2013**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

Introduction

1 On 17 May 2013, the Court declared that the respondents contravened the following civil remedy provisions:

(a) s 340 of the *Fair Work Act 2009* (Cth) (the FW Act) by taking adverse action;

(b) s 44(1) of the FW Act in respect of the National Employment Standard (NES) at s 117(2) of the FW Act, by terminating John Bill's (Bill) employment without 5 weeks' notice or payment in lieu;

(c) s 44(1) of the FW Act in respect of the NES at s 90(2) of the FW Act, by failure to pay Bill's accrued annual leave when his employment ended on 3 February 2011;

(d) s 343(1)(a) of the FW Act by taking action against Bill with the intent to coerce him not to exercise a workplace right.

2 The applicant now seeks against the respondents:

(a) orders imposing pecuniary penalties pursuant to s 546(1) of the FW Act; and

(b) an order that the pecuniary penalties be paid to the Commonwealth under s 546(3) of the FW Act.

3 In accordance with ss 546(2) and 539(2) of the FW Act, the maximum penalty for each contravention by an individual is 60 penalty units. For a body corporate, the maximum penalty is 5 times that amount: s 546(2)(b).

4 A "penalty unit" at the time of the contraventions was $110: s 4AA(1) of the *Crimes Act 1914* (Cth). Accordingly, the maximum penalty for each contravention is:

(a) for the first respondent (AJR Nominees), $ 33,000; and

(b) for the second respondent (Minniti), $ 6,600.

5 The applicant seeks an order under s 546(3) of the FW Act that the pecuniary penalties imposed be paid to the Commonwealth within 28 days of the order.

General principles

6 The overriding principle is to ensure that the penalty is proportionate to the gravity of the conduct: *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93.

7 The purposes to be served by the imposition of penalties are threefold:

(a) punishment, which must be proportionate to the offence and in accordance with prevailing standards;

(b) deterrence, both personal (assessing the risk of re-offending) and general (a deterrent to others who might be likely to offend); and

(c) rehabilitation.

Ponzio v B & P Caelli Constructions Pty Ltd (2007) 158 FCR 543 at [93] per Lander J.

8 The task which a sentencing judge is faced with is one of "instinctive synthesis": *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [27] per Gray J and [55] per Graham J. A court is to take account of all relevant factors and arrive at a single result which takes due account of them all: *Wong v The Queen* (2001) 207 CLR 584 at [74]-[76]. This may require the balancing of different and sometimes conflicting features.

9 Proportionality to the gravity of the contravention and consistency commonly operate as final checks on the penalty assessed: *Australian Ophthalmic Supplies* at [54] per Graham J.

10 The authorities identify a range of factors which may be relevant to the assessment of penalties in the industrial context, for example, *Construction, Forestry, Mining & Energy*

Union v Coal & Allied Operations Pty Ltd (No 2) (1999) 94 IR 231 at [8]; *Construction, Forestry, Mining and Energy Union v Hamberger* (2003) 127 FCR 309 at [51], quoting Cooper J in *Hamberger v Construction Forestry Mining & Energy Union* [2002] FCA 585 at [15]. These are not to be regarded as rigid checklists.

> At the end of the day the task of the Court is to fix a penalty which pays appropriate regard to the circumstances in which the contraventions have occurred and the need to sustain public confidence in the statutory regime which imposes the obligations.
>
> *Australian Ophthalmic Supplies* at [91] per Buchanan J.

The courts now regard more seriously any contravention of industrial laws than has generally been the case in the past: *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (No 2)* (2010) 199 IR 373 at [12]. See also *Finance Sector Union v Commonwealth Bank of Australia* (2005) 224 ALR 467 at [72] and *Plancor Pty Ltd v Liquor, Hospitality and Miscellaneous Union* (2008) 171 FCR 357 at [61]-[62].

11 The maximum prescribed penalties are of great importance. The High Court said in *Markarian v The Queen* (2005) 228 CLR 357 at [31]:

> [31] … careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

Relevant considerations

12 The considerations relevant to the assessment of penalty for the contraventions of the FW Act in this case include:

(a) the nature and extent of the conduct which led to the contraventions;

(b) the circumstances in which that relevant conduct took place;

(c) the nature and extent of loss or damage sustained as a result of the contraventions;

(d) whether there had been similar previous conduct by the respondent(s);

(e) whether the contraventions 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 contraventions were deliberate;

(h) whether senior management was involved in the contraventions;

(i) whether the respondents have exhibited contrition;

(j) whether the respondents have since taken corrective action;

(k) whether the respondents cooperated with the regulator; and

(l) the need for specific and general deterrence.

Stuart-Mahoney v Construction, Forestry, Mining and Energy Union (2008) 177 IR 61 at [40].

Statutory scheme

13 With respect to the contraventions of ss 340 and 343 of the FW Act, the objects of Pt 3-1 (General Protections) include "to protect workplace rights": s 336(1)(a).

14 With respect to the two contraventions of s 44(1), it is an object of the FW Act under s 3(b) to ensure:

> … a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards…

15 The workplace rights sought to be protected in this case were fundamental and were all in the NES. The right to take personal leave (in this case sick leave) is a very basic workplace right. It is not unlimited, but 10 days per year: s 96(1) of the FW Act. If untaken, it accumulates over the years of employment: s 96(2) of the FW Act. Bill was a long-term employee of AJR Nominees, having commenced on 2 July 2001. As at 3 February 2011, the value of Bill's right to paid personal leave was $10,953.73.

16 The NES provide that accrued untaken annual leave should be paid when the employment ends: s 90(2) of the FW Act. In this case, it was withheld by AJR Nominees for some 12 months before it was paid: *Fair Work Ombudsman v AJR Nominees Pty Ltd* [2013] FCA 467 at [14] (the Judgment). This was despite the fact that it was payable whether Bill resigned or was dismissed. These facts are tempered by what was discussed between Minniti and Ms Ann Lucey, a Fair Work Inspector employed by the office of the Fair Work Ombudsman (the FWO).

17 Minniti testified during the trial that when he communicated to Ms Lucey that he was willing to pay the accrued annual leave she had informed him that he need not pay until the

investigation was completed. Ms Lucey had no recollection of the conversation, but stated if such did take place it would have occurred in August 2011. Accordingly, she did not deny that the conversation took place.

18 Further, Bill's right to a basic 5 weeks' notice of termination, or payment in lieu, is a NES provided for in s 117 of the FW Act.

The relevant conduct

19 I accept the submission of the applicant that the assessment of the gravity of the conduct should have regard to the following:

(a) Bill told Minniti on 23 December 2010 that he had blood cancer: [48] and [71] of the Judgment.

(b) From 23 December 2010 to 3 February 2011, Minniti placed pressure on Bill to resign: [50] of the Judgment.

(c) On about 20 January 2011, Bill told Minniti he needed to have chemotherapy: [49] and [94] of the Judgment.

(d) On either 19 or 21 January 2011, Minniti sought to persuade Bill to resign. When Bill refused, Minniti insisted that he resign: [52] of the Judgment.

(e) On 24 January 2011, Minniti telephoned Bill and demanded his resignation: [52] of the Judgment.

(f) On 3 February 2011, Minniti effectively accused Bill of making up his illness and then not only told him to leave, but threatened to physically throw him off the premises: [96], [97] and [102] of the Judgment.

The impact of the contraventions on Bill

20 The following impact of the unlawful conduct on Bill is also relevant:

(a) The contraventions resulted in Bill not receiving his employment entitlements, namely paid personal leave of $10,953.73 (as a result of the adverse action) and payment in lieu of notice of termination of $4,037.40. Also, Bill did not receive payment of $1,204 for his accrued annual leave until some 12 months after his employment ended.

(b) I am informed that as a result of the Court's compensation order, Bill has now received his paid personal leave entitlement under the NES and payment in

lieu of notice of termination in June 2013, rather than February 2011. It has been an arduous journey for him through the offices of the FWO involving, ultimately, the commencement of these proceedings and their prosecution including a trial.

(c) Bill was coerced and then dismissed at a time when he was most vulnerable, having recently been told that he had blood cancer. Bill told Minniti he had blood cancer on 23 December 2010. Minniti immediately told him he had to resign, and lose his accumulated sick pay. This pressure was not an isolated act - the pressure to resign was a concerted campaign by Minniti over the period 23 December 2010 to 3 February 2011. During that period, Bill had undergone a bone marrow test and been advised that his condition was known as "Waldenstorm's macroglobulinaemia".

(d) It was particularly upsetting for Bill to be accused of malingering by Minniti: first when Minniti rang him when he was at the bowling club and then in the office on 3 February 2011, when Minniti said to Bill that he did not believe there was anything wrong with Bill. This scepticism of Minniti was also apparent when he rang Bill's general practitioner and tried to get information as to Bill's medical condition.

(e) Bill suffered financially at the time when he was confronting his serious medical condition. He was about to start chemotherapy. Instead of receiving several months of sick pay that he had accumulated over 9 years of employment, he was dismissed by his employer and paid nothing - not even accrued annual leave (which was payable whether Bill had resigned or was terminated). There was no termination pay in lieu of notice, because Minniti wanted to maintain the façade of resignation rather than dismissal. Bill had to rely on Centrelink.

Minniti's character

21 Minniti has owned and operated his business for 25 years. It seems that there are no similar contraventions by the respondents of industrial legislation.

22 However, in early 2008, the Workplace Ombudsman (WO), the predecessor to the applicant, received a formal complaint from a former employee (an apprentice panel beater)

regarding non-payment for time worked at Hi-Lite Automotive Body Repairs. This is the business name of AJR Nominees. The complaint was resolved voluntarily.

23 A conviction is not the only way that similar previous conduct is relevant to the question of penalty. As Barker J said in *Australian Building and Construction Commissioner (No 2)* at [47]:

> [47] …The effect of prior contravening conduct is more cogent if it has been the subject of conviction. If not, the prior conduct is still relevant but perhaps of less weight…

24 Minniti has, since starting his business 25 years ago, provided work experience training and apprenticeships for a number of persons including students of Hampton Senior High School and Mount Lawley Senior High School.

25 His community service in providing apprenticeships for school children has been acknowledged and appreciated by the Western Australian Minister for Training.

26 References from some of AJR Nominees' employees were tendered.

27 However, Exhibit D records 3 convictions of Minniti in 2008 for serious offences of dishonesty and for which, during that year, he served a sentence of imprisonment for 9 months, namely:

(a) attempt to induce witness to give false testimony on 25 July 2006;

(b) false declaration (*Criminal Code* (WA) s 170) on 24 November 2005; and

(c) corruption (*Criminal Code* (WA) s 83(c)) on 29 September 2005.

28 This serious criminal record rather rebuts the contention that Minniti is of good character.

29 The applicant further submits that this record is relevant also because the respondents conducted a dishonest defence involving the manufacture of evidence, lying under oath and adducing dishonest evidence from one of Minniti's friends and associates. Nothing said by Dowsett J in *Temple v Powell* (2008) 169 FCR 169 at [64] assists the applicant's submission. The prior conduct to which his Honour was referred was that constituting previous contraventions. The contraventions in the present case did not involve dishonesty as an element of any of them. Minniti's conduct ultimately became dishonest as he manufactured false evidence and adduced false evidence at trial.

30 A number of very positive references were also tendered although the expressions of good character need to be tempered significantly by Minniti's record of prior convictions as well as his conduct of the respondents' defence in this proceeding.

Deliberate conduct

31 The overall nature of the respondent's conduct is relevant. As I observed in *Australian Building & Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2011] FCA 810 at [98], a factor to be weighed in the assessment of penalty is whether the contravening conduct was deliberate or part of a conscious act on the part of the contravener. Circumstances where someone had undertaken a deliberate strategy will weigh in favour of a higher penalty whereas mere inadvertence will generally bring about a lighter penalty.

32 There was nothing inadvertent about Minniti's conduct in this case. He did not proceed upon a mistaken view of the law.

33 It cannot be said that the respondents were unaware of the legal consequences of their conduct. Minniti knew that Bill was owed over 500 hours of sick (personal) leave as at 3 February 2011, and as I found, this is why Minniti demanded that Bill resign.

34 Minniti wanted to make it look as though Bill had resigned in order to avoid paying him his accumulated personal leave.

Post-contravention conduct

35 Any contrition, corrective conduct or cooperation with relevant enforcement authorities after the contravention will have relevance to penalty assessment.

36 Contrition may manifest itself in an expression of remorse. Minniti has apologised to Bill in a letter addressed to the Court dated 21 November 2013. He has also apologised to the Court for his conduct before and during the trial.

37 I accept this expression of remorse and contrition as genuine although it has been proffered very late, indeed too late in my view, to constitute a mitigating factor. I accept the observations and views of Mr Richard Boyd from the Energetics Institute who has been providing therapy and coaching to Minniti. He states that Minniti has made a clean break with his past and has been responding well to therapy and counselling. As he said of Minniti:

> He is sober and faces his past and his actions with regret but with honesty. He realises now he treated his worker [Bill] with indifference and anger borne out of his own frustrations with life.

38 It is to be hoped that this will enable Minniti to put his personal and business life on a stronger footing as well as enable him to confront and deal with the consequences of his serious contraventions, including the payment of any penalties.

39 Cooperation can be exhibited in a range of ways, such as agreeing on facts. The timing of any such agreement, and the impact it has on the conduct of the trial are relevant: *Stuart-Mahoney* at [52].

40 In these proceedings, there were some agreed facts, but liability in respect of each of the four contraventions was denied and the case was conducted by the respondents dishonestly in the way I have described. No aspect of these findings should be read as in any way attaching to the respondents' lawyers. Cooperation with the regulator was extremely limited.

Nature of AJR Nominees' business

41 The size of the entity which has contravened and the involvement of senior management of that entity will be a relevant consideration: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 75 FCR 238 at 240, citing *Trade Practices Commission v CSR Ltd* (1991) ATPR ¶41-076 at 52,152-52,153; *Australian Building & Construction Commissioner* at [108].

42 Minniti described himself at the time as "Managing Director" of AJR Nominees, which, as I have mentioned, traded as Hi-Lite Automotive Body Repairs, a panel beating and spray painting business in Bayswater.

43 The other director of AJR Nominees is Mrs Minniti, who acts as a receptionist and assists with clerical tasks. Each has an equal number of shares in the company. Minniti was at all material times the directing mind and will of AJR Nominees and there is no reason to distinguish between the respondents in terms of severity of penalty although there are, of course, different maximum penalties.

44 In *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd (No 2)* [2012] FCA 408, Buchanan J discussed whether the intimate connection between the first and second

respondent risked punishing the second respondent twice for the same conduct and should therefore be taken into account. Relevantly, at [8] he stated:

> [8] A submission was made by the respondents that some consideration should be given to reducing the amount of the penalty imposed on one or other of the respondents to account for the intimate connection between the actions of the first respondent and the conduct of the second respondent. As I understood the submission, it was that there was a risk of punishing twice for the same conduct – i.e. punishing both the first and second respondents for the conduct of the second respondent. The submission appeared to rely on the judgment of Mansfield J in *Australian Prudential Regulation Authority v Holloway* (2000) 45 ATR 278; [2000] FCA 1245, although I do not understand how it could do so. In that judgment Mansfield J fixed lesser penalties on Mr Holloway, the "alter ego" of Holloway & Co, than on Holloway & Co. In the legislative scheme which his Honour was applying no distinction was made between the maximum penalty that could be applied to corporations and the maximum penalty that could be applied to individuals. That is not the case here. The present legislative scheme fixes quite different (and much lower) penalties for individuals than for corporations. The culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case. I reject the suggestion, if this was what was intended, that either or both respondents might have the benefit of any reduction in penalty because they were jointly, as well as individually, culpable.

45 I accept that Minniti has, to some unspecified extent, become financially constrained and is under some degree of financial stress from his reduced income from the business. I cannot conclude however as to exactly what has caused this although no doubt his period of imprisonment in 2008 was a contributing factor. Minniti's fears that if the penalty imposed by the Court is unduly high that AJR Nominees will not be in a position to continue the business and will have to close it down resulting in loss of employment for current employees. However, I do not have sufficient evidence on this issue to conclude whether or not this outcome is likely.

46 There has been adverse media coverage of this case which I accept will have had some negative impact on the respondents both commercially and personally. I do not regard this as a mitigating factor. It is a common incident of the kind of unlawful conduct involved in this case.

47 Indeed, the publication of information about compliance activities is an important part of the applicant's role as a regulator of workplace laws. A statutory function of the applicant is to promote compliance with the Act. Publicity of penalty proceedings is intended to deter others from contravening workplace laws.

48 Federal Magistrate Driver said in *Fair Work Ombudsman v Cleaners New South Wales Pty Ltd* (2009) 186 IR 467 at [25]:

> [25] … Actions taken by the Fair Work Ombudsman to enforce compliance with the *Workplace Relations Act* are taken in part to create publicity in order to achieve a normative effect upon the behaviour of employers. That is appropriate. That publicity is no doubt an embarrassment to the company and that embarrassment is a penalty in itself. The bringing of proceedings in the Court, and the publicity attending those proceedings, are part of a general process for deterring contraventions of the *Workplace Relations Act*.

Deterrence

49 The penalty arrived at by the Court must reflect the need for specific and general deterrence: *Ponzio* at [93].

50 Specific deterrence is directed to ensuring that the contraveners are not prepared to embark upon the risk of re-offending.

51 In relation to specific deterrence, Gray J observed in *Plancor* at [37] that:

> [37] … 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 that party as to things like remorse and steps taken to ensure that no future breach will occur …

52 I am satisfied that Minniti, although belatedly, is now genuinely remorseful and contrite in respect of his contravening conduct. I do not consider there to be a significant risk of further such contraventions. Accordingly, the need for specific deterrence is not as weighty as it might have been.

53 General deterrence is directed to ensuring that the penalty will act as a deterrent to others who might be likely to act unlawfully. The penalty should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by like-minded persons. If it does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening: *R v Gordon* (1994) 71 A Crim R 459 at 468.

54 The applicant submits, and I accept, that the need for general deterrence in the present case is strong and the law should mark its disapproval of the respondents' conduct and impose a penalty at a level which will serve as a warning to like-minded employers. In *Fair Work Ombudsman v Maclean Bay Pty Ltd (No 2)* [2012] FCA 557, Marshall J observed at [29]:

> [29] …It is important to ensure that the protections provided by [the *Workplace Relations Act 1996* (Cth)] to employees are real and effective and properly enforced. The need for general deterrence cannot be understated. Rights are a mere shell unless they are respected …

55 The respondents' conduct in this matter, in dismissing an employee experiencing a serious illness in order to avoid paying his entitlement to personal leave, was objectively serious, and warrants a significant deterrent penalty.

56 In *Cahill v Construction, Forestry, Mining and Energy Union (No 4)* (2009) 189 IR 304, Kenny J said at [93]:

> [93] … There is also a distinct need for general deterrence, which requires a penalty to be set so to mark the law's disapproval of the conduct in question, and to act as a warning to others not to engage in similar conduct.

Range of penalties for each contravention

Adverse action under s 340

57 I consider that the circumstances of this contravention call for a penalty at the lower end of the mid to high range. It was a serious contravention. Bill, a long-standing employee with blood cancer, was dismissed in order to avoid paying him sick leave. The case was fully contested, with a defence based on manufactured evidence and lies.

Coercion under s 343

58 This too falls in my view at the lower end of the mid to high range. The factual basis of the Court's finding of coercion is set out at [143] of the Judgment. The coercion was not successful. Bill was able to resist the pressure put upon him to resign. On the other hand, the coercion to resign was a concerted campaign from 23 December 2010 to 3 February 2011, a period of 6 weeks. There is some overlap with the adverse action above, but it is not the same conduct in terms of s 556 of the FW Act. The dismissal only came after the pressure to resign had proved to be unsuccessful at the 3 February 2011 meeting.

Failure to make payment in lieu of notice of termination under ss 44 and 117

59 I regard this as falling in the low to mid-range. Five weeks' pay was involved, i.e. $4,037.40. This contravention followed from the finding that Bill did not resign but had been dismissed. It was arguably part of the financial motivation (together with avoiding payment

for personal leave) for Minniti insisting that Bill resign and then insisting that he had resigned.

Non-payment of accrued annual leave under ss 44 and 90

60 This I regard as coming within the low range. The amount of unpaid annual leave was not large: $1,204. It was paid eventually to the FWO on 20 January 2012, some 12 months after it was due. Minniti's reliance on what Ms Lucey may have said can only be an explanation for the period between August and 19 October 2011, leaving unexplained the periods 3 February 2011 to August 2011 and 19 October 2011 until 20 January 2012. On the other hand, on any view of how the employment relationship "ended", this payment was unlawfully withheld. As stated at [139] of the Judgment:

> The requirement to pay accrued annual leave in no way depends on whether Bill resigned or was dismissed. All that is needed is that the employment "ended".

Course of conduct

61 Section 557 of the FW Act relevantly provides:

> (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);
>
> . . .

62 This provision does not apply to contraventions of either s 340 or s 343 of the FW Act.

63 In this case, there are two contraventions of s 44(1) of the FW Act, but in respect of quite different NES - s 90(2) in respect of untaken annual leave and s 117(2) in respect of notice of termination or payment in lieu.

64 The Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) provides the following illustrations by way of explanation of s 557:

> **Clause 557 – Course of conduct**
>
> . . .
>
> 2189. For example, if a company contravenes a single term of a modern award in

> respect of ten employees, these ten contraventions are to be taken as a single contravention…
>
> 2190. Similarly, if a company contravenes five separate terms of a modern award in respect of ten employees, these 50 contraventions are taken to be five contraventions.
> . . .

65 The relevant principles on the question of whether two alleged contraventions should be treated as a "single course of conduct" are set out in *Construction, Forestry, Mining and Energy Union v Cahill* (2010) 269 ALR 1 at [35]-[47]. Justices Middleton and Gordon observed at [39]:

> [39] … The principle recognises that where there is an interrelationship between *the legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality" and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.
> (Original emphasis.)

66 Accordingly, two different contraventions of the NES, like contraventions of two different terms of an award, are to be treated as two separate contraventions.

67 It follows that the two contraventions of s 44 did not arise out of the same "course of conduct" in terms of s 557 of the FW Act.

Totality principle

68 The Court must fix a penalty appropriate for each individual contravention and then, at the end of the process, consider whether the aggregate is appropriate for the total contravening conduct: *McDonald v The Queen* (1994) 48 FCR 555 at 556, citing *Mill v The Queen* (1988) 166 CLR 59 at 62-63; *Pearce v The Queen* (1998) 194 CLR 610 at [45] per McHugh, Hayne and Callinan JJ.

69 The principle is designed to "ensure that the aggregate of penalties imputed is not such as to be oppressive or crushing": *Stuart-Mahoney* at [60].

Penalties

70 Having regard to all of the foregoing and subject to the question of totality, I would assess the following penalties for contraventions of the following sections of the FW Act

upon AJR Nominees for the respective contraventions and upon Minniti by reason of his being involved in those contraventions.

		AJR Nominees	**Minniti**
s 340		18,000	3,250
s 343(1)	(coercion)	18,000	3,250
s 44(1)	(failure to give 5 weeks' notice or pay in lieu)	6,000	1,250
s 44(1)	(failure to pay accrued annual leave)	3,000	550
		45,000	8,300

71 There was a degree of overlap in the conduct of the respondents across all four contraventions at least because the objective of each was to avoid paying Bill his statutory entitlement. Bearing this in mind and having regard to the principle of totality I would impose the following penalties.

		AJR Nominees	**Minniti**
s 340		14,000	2,500
s 343(1)	(coercion)	14,000	2,500
s 44(1)	(failure to give 5 weeks' notice or pay in lieu)	4,500	1,000
s 44(1)	(failure to pay accrued annual leave)	2,500	500
		35,000	6,500

Suspension of penalties

72 Pursuant to ss 545(1) and 546(1) of the FW Act, the Court can exercise its discretion to suspend all or part of a penalty imposed on a respondent: *United Group Resources Pty Ltd v Calabro (No 7)* (2012) 203 FCR 247 at [18]-[19].

73 The applicant opposes the suspension of any part of the penalty imposed on either of the respondents. In summary it is the applicant's position that:

(a) the FW Act provides for separate penalties to be imposed on corporate and individual contraveners and provides different maximum penalties for those two classes: s 546(2);

(b) the contraventions of the respondents in this matter are objectively serious and warrant the imposition of an immediate penalty that it is "meaningful", i.e. has the effect of both adequately punishing the respondents and deterring them and others from engaging in similar conduct in the future. This is a case in which a clear message must be sent to both respondents and the public at large that the conduct displayed in this case is deplorable; and

(c) there are no mitigating or other factors which would warrant any suspension.

74 The applicant submits that the courts have rarely exercised their discretion to suspend penalties in cases involving contraventions of the FW Act and that where this has occurred, the facts are far removed from the current proceedings: the limited cases have generally involved unlawful industrial action, some admission of liability, and a negotiated agreement as to penalty.

75 The respondents submit that the following facts are relevant to the Court's decision as to whether or not to suspend pecuniary penalty in this case:

(a) The second respondent, Mr Minniti, has co-operated with the authorities in settling with Mr John Bill on 20th January 2012. The Respondent agrees that he did pay the amount after the investigations were finalised but did so nevertheless due to Ms Anne Lucey informing the Respondent that he need not pay the amount due before investigations are completed. The second respondent was willing to settle the amount to be paid on a prior date and informed Ms Lucey of his intentions; the respondent's actions show contrition and willingness to correct his actions which the second respondent would have followed through with if he was allowed to make payments for the arrears.

(b) The second respondent agrees that he was previously notified by the Fair Work Ombudsman with regard to a workplace issue for which the second respondent took prompt action in settling with the employee. The Fair Work Ombudsman had not at that point done an investigation on the complaint, which if done would have led to the Fair Work Ombudsman identifying whether there was a contravention or not. As no such investigation had taken place the respondent should be given the benefit of the presumption of innocence unless proven otherwise. In *Stuart-Mahoney v Construction, Forestry, Mining and Energy Union* [2008] FCA 1426, in para 62 Tracey J states thus;

> "He has not previously been found to have contravened industrial legislation and he should be afforded the opportunity and provided with an incentive to demonstrate that he is willing to abide by statutory requirements …"

(c) The second respondent was undergoing a difficult time with his business and private life when the events as raised in the proceedings took place. The physical and mental status of the second respondent was such that he was

frustrated and unaware of his actions. The second respondent has since, sought to remedy his actions and his lifestyle by attending counselling sessions and attempting to regain his control in issues. The second respondent regrets his actions and ensures that he will abide by statutory requirements.

(d) The purpose of a penalty is threefold; punishment, deterrence and rehabilitation. The Courts should take into consideration the following in identifying what a fair penalty is with reference to the circumstances of the matter in hand.

(i) The second respondent's business and reputation has had a negative impact due to the high media coverage these proceedings attracted. The respondents submit that the negative and destructive effects of the public/media coverage are significant in that the respondent is struggling with his business and is criticised by the public and under pressure. The respondents submit that the above should itself be a warning for employers.

(ii) The second respondent is suffering from stress, anxiety, hypertension and is suffering from high blood pressure, which often results in blood vomiting. The second respondent's current physical and mental status and the fact that the second respondent is seeking coaching for proper management of his business and his life for betterment should be considered by the Courts.

(iii) The second respondent understands that his actions have resulted in grief to Mr John Bill and so many others. It should be noted that the second respondent's life was thrown into chaos as a result of his prior conviction and the amount of pressure the second respondent was under after his release to regain control of his life and the business was immense and such stress and pressure have led to the misjudgement of his actions. He understands this now and feels remorseful and apologises for the pain and anguish he caused Mr Bill.

(e) The second respondent's business (the first respondent) is currently performing poorly and has been in such status since 2008 when the second respondent was incarcerated for 9 months. The business has been struggling and will not survive in the event that the second respondent is ordered to pay an exorbitant penalty. In the event that the business is to close many employees would be affected and would be unemployed. The recognition the second respondent has in providing apprenticeships for training students is invaluable. Such services to the community will not be possible to maintain in the event that the business closes down.

(f) The respondents submit that suspension of penalty itself will give rise to specific and general deterrence, in that the respondents are warned against contravention of laws and similarly likeminded employers are warned against contravention.

76 There are significant difficulties with these submissions. I do not accept that Minniti demonstrated relevant contrition. I have explained why this is so earlier in these reasons. There is no evidence that, as Minniti contends, he was “unaware of his actions as a result of

his physical and mental condition". His mental condition, whatever in fact it may have been, did not prevent Minniti from seeking to deny Bill his lawful entitlements, forcing him to litigate and confront false and manufactured evidence.

77 The case was fully contested. Minniti ran, in the way I have earlier described, a dishonest defence. There was not, until after judgment in the trial on liability, any acceptance of wrongdoing by him. His expressions of remorse are belated and other than in relation to the question of specific deterrence I give no weight to them in my assessment of appropriate penalties.

78 As I observed before, I do not have sufficient evidence as to financial hardship of either respondent. There is no evidence that either of the respondents has insufficient funds to pay any penalty that is imposed.

Conclusion

79 I am not prepared to suspend any part of the penalties imposed on either of the respondents. Suspension of any part of the penalty to be imposed would undermine the deterrent effect of these proceedings, and would not reflect the seriousness of the contraventions and the particular circumstances which evidenced those contraventions.

Orders

80 There will be orders for the payment by each of the respondents of the several amounts set out above. Such payments, pursuant to s 546(3) of the FW Act, are to be paid, within 90 days of these orders, to the Consolidated Revenue Fund of the Commonwealth.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gilmour.

Associate:

Dated: 24 February 2014