

# FEDERAL CIRCUIT COURT OF AUSTRALIA

*FAIR WORK OMBUDSMAN v BUNDABERG SECURITY [2014] FCCA 592  
PTY LTD & ANOR*

Catchwords:

INDUSTRIAL LAW – Application for imposition of pecuniary penalties,  
grouping of contraventions.

Legislation:

*Fair Work Act 2009* (Cth), ss.45, 536(1)(b), 539(2), 545(2)(b), 546(1), 550(2),  
557(1), 728(2),

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
(Cth), items 2(1) and 5 of Schedule 16,

*Workplace Relations Act 1996* (Cth), ss.182(1), 185(2)

*Workplace Relations Regulations 2006* (Cth), reg.19.20

Cases cited:

*Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2)*  
[2012] FMCA 586

*Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd &  
Anor* [2012] FMCA 258

*Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503

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

Applicant:	FAIR WORK OMBUDSMAN
First Respondent:	BUNDABERG SECURITY PTY LTD
Second Respondent:	RODNEY LYNN HARRIS
File Number:	BRG 469 of 2013
Judgment of:	Judge Jarrett
Hearing date:	4 March, 2014
Date of Last Submission:	4 March, 2014
Delivered at:	Brisbane
Delivered on:	25 March, 2014

## **REPRESENTATION**

Counsel for the Applicant: Ms Garner

Solicitors for the Applicant: Office of the Fair Work Ombudsman

Counsel for the First Respondent: Mr Ebert

Solicitors for the First Respondent: Finemore Walters & Story

Counsel for the Second Respondent: Mr Ebert

Solicitors for the Second Respondent: Finemore Walters & Story

## **THE COURT DECLARES THAT:**

- (1) During the period from 1 July, 2007 to 30 June, 2009 the First Respondent contravened:
  - (a) s.182(1) of the *Workplace Relations Act 1996* (Cth) in that it failed to pay Jason Ramett the minimum wage to which he was entitled;
  - (b) s.185(2) of the *Workplace Relations Act* in that it failed to pay Jason Ramett casual loading to which he was entitled;
  - (c) cl.6.7 of the *Notional Agreement Preserving a State Award derived from the Security Industry (Contractors) Award-State 2004* in that it failed to pay Jason Ramett penalty rates for permanent night work to which he was entitled;
  - (d) cl.6.8 of the *Security Industry NAPSA* in that it failed to pay Jason Ramett penalty rates for work performed on a Sunday to which he was entitled;
  - (e) cl.7.6.5 of the *Security Industry NAPSA* in that it failed to pay Jason Ramett penalty rates for work performed on public holidays to which he was entitled;

- (2) During the period from 1 July, 2007 to 30 June, 2009 the First Respondent contravened reg.19.20 of the *Workplace Relations Regulations 2006* (Cth) by failing to give payslips to Jason Ramett during the said period;
- (3) During the period from 1 July, 2009 to 31 December, 2009 the First Respondent contravened:
  - (a) item 5 of Schedule 16 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) in that it failed to pay Jason Ramett the minimum wage, casual leave loading, Sunday penalty rates, public holiday penalty rates and permanent night work allowances to which he was entitled; and
  - (b) item 2(1) of Schedule 16 of the Transitional Act by failing to give payslips to Jason Ramett during the period of his employment;
- (4) During the period from 1 January, 2010 to on or about 1 September, 2012, the First Respondent contravened:
  - (a) s.45 of the *Fair Work Act 2009* (Cth) in that it failed to pay Jason Ramett the minimum wage in accordance with cll.14.1 and A.2 of the *Security Services Industry Award 2010*;
  - (b) s.45 of the Fair Work Act in that it failed to pay Jason Ramett casual loading in accordance with cll.10.5(b) and A.5 of the Security Award;
  - (c) s.45 of the Fair Work Act in that it failed to pay Jason Ramett penalty rates for permanent night work in accordance with cll.22.3 and A.5 of the Security Award;
  - (d) s.45 of the Fair Work Act in that it failed to pay Jason Ramett penalty rates for work performed on a Sunday in accordance with clauses 22.3 and A.6 and A. 7 of the Security Award;
  - (e) s.45 of the Fair Work Act in that it failed to pay Jason Ramett penalty rates for work performed on public holidays in accordance with cll.22.3 and A.6 and A.7 of the Security Award;

- (f) s.536(1)(b) of the Fair Work Act by failing to give payslips to Jason Ramett during the period of his employment from 1 January, 2010 to 1 September, 2010.

**THE COURT ORDERS THAT:**

- (5) Pursuant to s.545(2)(b) of the Fair Work Act the First Respondent pay Jason Ramett the amount of \$32,394.59.
- (6) Pursuant to s.546(1) of the Fair Work Act the First Respondent pay a penalty of:
  - (a) \$50,000 in respect of each of the contraventions declared in paragraphs (1) hereof; and
  - (b) \$4,400 in respect of each of the contraventions declared in paragraph (2) hereof.

**THE COURT FURTHER DECLARES THAT:**

- (7) The Second Respondent was involved in each of the First Respondent's contraventions identified in paragraphs 1 - 4 above.

**THE COURT FURTHER ORDERS THAT:**

- (8) The Second Respondent pay a penalty of:
  - (a) \$10,000 in respect of each of the contraventions declared in paragraphs (1) hereof;
  - (b) \$2,640 in respect of the contravention declared in paragraphs (2) hereof.
- (9) All penalties payable under this order be paid into the Consolidated Revenue Fund of the Commonwealth.
- (10) The penalties imposed by this order and the payment of any unpaid monies to Jason Ramett be paid as follows:

- (a) by monthly instalments of \$2,500 to be paid to Jason Ramett by the 20<sup>th</sup> day of each month up to and including 20 November, 2014;
- (b) the remainder of the unpaid monies to be paid to Jason Ramett by 20 December 2014; and
- (c) in the event that the First Respondent is in default on orders outlined in 9(a)(i) and 9(b)(ii) above the unpaid money will become immediately due and payable.

**FEDERAL CIRCUIT COURT  
OF AUSTRALIA  
AT BRISBANE**

**BRG 469 of 2013**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**BUNDABERG SECURITY PTY LTD**  
First Respondent

**RODNEY LYNN HARRIS**  
Second Respondent

**REASONS FOR JUDGMENT**

1. These proceedings are about the imposition of pecuniary penalties on the first and second respondents for breaches of the *Workplace Relations Act 1996* (Cth), *Workplace Relations Regulations 2006* (Cth), *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) and the *Fair Work Act 2009* (Cth) in certain respects. The first respondent admits the contraventions alleged against it. The second respondent admits that he was involved in those breaches and so also liable to the imposition of pecuniary penalties for the contraventions.
2. The first respondent operates a business concerned with the provision of security services in and around Bundaberg, Queensland. The second respondent is the sole director, secretary and the only shareholder of the first respondent. At the time of the relevant contraventions, and currently, he was the manager of the first respondent's business.

3. The first respondent employed Jason Ramett to perform security service work in the Bundaberg and surrounding area from 24 March, 2005 to 1 September, 2010. His duties included:
  - a) security patrols;
  - b) patrols in a vehicle of separate establishments to undertake security checks;
  - c) escorts of persons to their car at night; and
  - d) taking cash deposits to bank safes.
  
4. By way of a Statement of Agreed Facts filed on 21 January, 2014 the applicant and the respondents have set out the facts agreed between them for the purposes of these proceedings. Relevantly, the parties agree that:
  - a) until 31 December, 2009 Mr Ramett's employment was governed, inter alia, by a Notional Agreement Preserving a State Award derived from the *Security Industry (Contractors) Award – State 2004*;
  - b) from 1 January, 2010 Mr Ramett's employment was governed, inter alia, by the *Security Services Industry Award 2010*;
  - c) Mr Ramett fell within the classification of Security Officer Level 2 under the Security Industry NAPSA and the Award;
  - d) over the period of his employment the first respondent underpaid Mr Ramett \$40,394.59;
  - e) The underpayment arose because the first respondent adopted a flat rate of pay of \$900 per fortnight for Mr Ramett regardless of the shifts worked by him.
  
5. The table below sets out the contraventions alleged by the Fair Work Ombudsman and admitted by the first and second respondents. It also includes the maximum penalties that might be imposed upon the respondents:

<b>Provision</b>	<b>Contravention</b>	<b>Underpayment</b>	<b>Max. penalty for corporation</b>	<b>Max. penalty for individual</b>
s.182(1) of the Workplace Relations Act	Failure to pay basic periodic rate of pay.	\$ 728.81	\$33,000.00	\$6,600.00
s.185(2) of the Workplace Relations Act	Failure to pay required casual loading.	\$ 2,360.49	\$33,000.00	\$6,600.00
cl.6.7 of the Security Industry NAPSA	Failure to pay permanent night work shift allowance.	\$ 5,661.78	\$33,000.00	\$6,600.00
cl.6.8 of the Security Industry NAPSA	Failure to pay Sunday penalty rate.	\$11,261.58	\$33,000.00	\$6,600.00
subclause 7.6.5 of the Security Industry NAPSA	Failure to pay public holiday penalty rates.	\$ 2,699.00	\$33,000.00	\$6,600.00
Reg.19.20 of the Workplace Relations Regulation	Failure to issue payslips	n/a	\$5,500.00	\$1,100.00
Item 5 of Sch 16 of the Transitional Act	Failure to pay the basic periodic rate of pay.	\$ 553.41	\$33,000.00	\$6,600.00
Item 5 of Sch 16 of the Transitional Act	Failure to pay the required casual loading.	\$ 1,961.42	\$33,000.00	\$6,600.00
Item 5 of Sch 16 of the Transitional Act	Failure to pay permanent night work shift allowance.	\$ 1,917.21	\$33,000.00	\$6,600.00
Item 5 of Schedule 16 of the Transitional Act	Failure to pay the Sunday penalty rate.	\$ 2,440.85	\$33,000.00	\$6,600.00
Item 5 of Schedule 16 of the Transitional Act	Failure to pay the applicable public holiday penalty rate.	\$ 400.75	\$33,000.00	\$6,600.00

Act				
cl.14.1 of the Security Modern Award	Failure to pay the required minimum wage rate.	\$ 1,086.52	\$33,000.00	\$6,600.00
Subclause 10.5(b) of the Security Modern Award	Failure to pay the required casual loading.	\$ 2,499.96	\$33,000.00	\$6,600.00
cl.22.3 of the Security Modern Award	Failure to pay permanent night penalty.	\$ 2,570.08	\$33,000.00	\$6,600.00
cl.22.3 of the Security Modern Award	Failure to pay the applicable Sunday penalty.	\$ 2,949.28	\$33,000.00	\$6,600.00
cl.22.3 of the Security Modern Award	Failure to pay the applicable public holiday penalty.	\$ 1,303.45	\$33,000.00	\$6,600.00
s.536(1) of the Fair Work Act	Failure to give payslips 1 January, 2010 to 1 September, 2010.	n/a	\$16,500.00	\$3,300.00
<b>Totals</b>		<b>\$40,394.59</b>	<b>\$517,000.00</b>	<b>\$103,400.00</b>

6. Each of the above-mentioned contraventions itself involves numerous breaches of the NAPSA or the Award. A single failure to pay the correct basic periodic rate of pay did not occur in relation to the whole of Mr Ramett's employment period. A separate and distinct contravention occurred each time the first respondent failed to pay Mr Ramett the correct basic rate of pay. So too, with the first respondent's failure to pay the required casual loading, the night work shift allowance, the Sunday penalty rate, the public holiday penalty rate and the failure to issue payslips. There are innumerable contraventions of each separate and distinct term of Mr Ramett's employment.
7. However, s.557(1) of the Fair Work Act (as modified by Schedule 16 of the Transitional Act) provides that where two or more contraventions of a civil remedy provision referred to in s.557(2) are committed by the

same person and the contraventions arose out of a course of conduct by that person, the multiple contraventions are taken to constitute a single contravention.

8. Each of the provisions set out in the table above is a civil remedy provision to which s.557(1) of the Fair Work Act applies. Accordingly, although there are numerous breaches of each of the particularised provisions, those multiple breaches are to be treated as a single contravention of the relevant statutory provision because they are committed by the same person (the first respondent) and they have arisen, I accept, out of a course of conduct by the first respondent.
9. The applicant submits that where a legislative change, or a change in industrial instrument coverage, has meant that separate contraventions have been alleged under different legislation or different instruments it is necessary for the Court to consider whether there was in fact a single course of conduct or a common element straddling the contravention periods for the purpose of determining penalty.
10. The contraventions by the first respondent are essentially the same throughout the period over which the relevant legislative provisions have changed. The first respondent has failed to pay the correct basic rate of pay, and any loadings or shift entitlements to which Mr Ramett was entitled. Although it is not entirely clear from the submissions (both written and oral) made on behalf of the applicant, if the applicant contends that s.557(1) authorises the aggregation of contraventions of different legislative provisions (for example, contraventions of the Workplace Relations Act and the Fair Work Act), I do not accept that submission. Section 557(1) only authorises the aggregation of two or more contraventions of the *same* civil remedy provision.
11. Whilst s.557(1) requires the Court to treat multiple contraventions of the same provision as one contravention in the circumstances set out in that section, there is also a discretion to further group together contraventions (not otherwise to be treated as one pursuant to s.557(1) of the Fair Work Act) to the extent that two or more contraventions have common elements. Where that is so, those common elements might be taken into account when considering what is an appropriate penalty in all the circumstances for each contravention or course of conduct. It is open to the Court to group separate contraventions

together where those various contraventions may be said to overlap with each other and involve potential punishment of the respondents for the same or similar conduct: *Fair Work Ombudsman v Kensington Management Services Pty Ltd (No.2)* [2012] FMCA 586 at [16] – [19].

12. Where contraventions are grouped together in such a way, the contraventions remain (unlike a grouping under s.557(1) where the contraventions are treated as one contravention alone), but different penalties might be fixed for different contraventions within the group so that any overlap or commonality is taken into account. Accordingly, a penalty might be imposed for one contravention and no penalty or different penalties (usually lesser in amount) imposed for the others.
13. It may be that it is to this discretion that the applicant is referring when the applicant submits that there was in fact a single course of conduct or a common element in the separate contraventions that straddled the coverage of the various legislation and instruments that are relevant in this case. I accept the applicant's submissions that the respondents should not be penalised more than once for essentially the same conduct which has led to multiple contraventions but which have arisen because of changes in the relevant legislation or covering instrument.
14. The applicant submits that the contraventions can be grouped into the following six groupings:
  - a) The failure to pay the correct minimum rate of pay under s.182 of the Workplace Relations Act and cl.14.1 and A.2 of the Award (no 1, 7 and 12 in the table at paragraph 5 above). I accept that, at least by inference, those failures arose of one decision by the first respondent to pay Mr Ramett a wage other than that prescribed as the minimum.
  - b) The failure to pay the required casual loading under s.185(2) of the Workplace Relations Act and cl.10.5(b) and A.5 of the Award (no 2, 8 and 13 in the table at paragraph 5 above). I accept that, at least by inference, those failures arose of one decision by the first respondent to pay Mr Ramett a flat rate of remuneration rather than remuneration calculated in accordance with the prescribed rates (including loadings).

- c) The failure to pay the applicable permanent night work shift allowance/loading under cl.7.6 of the Security Industry NAPSA and cl.22.3 and A.5 of the Award (no 3,9 and 14 in the table at paragraph 5 above). I accept that, at least by inference, those failures arose of one decision by the first respondent to pay Mr Ramett a flat rate of remuneration rather than remuneration calculated in accordance with the prescribed rates (including loadings).
  - d) The failure to pay the applicable Sunday penalty rate under cl.6.8 of the Security Industry NAPSA and cl.22.3 and A.6 and A.7 of the Award (no 4, 10, 15 in the table at paragraph 5 above). I accept that, at least by inference, those failures arose of one decision by the first respondent to pay Mr Ramett a flat rate of remuneration rather than remuneration calculated in accordance with the prescribed rates (including loadings).
  - e) The failure to pay the correct public holiday penalty rate under cl.7.6.5 of the Security NAPSA and cl.22.3 and A.6 and A.7 of the Award (no. 5, 11 and 16 in the table at paragraph 5 above). I accept that, at least by inference, those failures arose of one decision by the first respondent to pay Mr Ramett a flat rate of remuneration rather than remuneration calculated in accordance with the prescribed rates (including loadings).
  - f) The failure to provide Mr Ramett with payslips as required under reg.19.20 of the Workplace Relations Act and Regulations and s.536(1) of the Fair Work Act which arose out of one decision not to provide Mr Ramett with payslips.
15. The Respondents submits that the contraventions should be separated into two groups for the purpose of penalty. They argue that the contraventions “*by the way they occurred descend into two (2) distinctive groupings*”. The respondents point out that the first group of contraventions relate to the first respondent’s failure to pay the appropriate wages, loading and penalties because of the alleged agreement with Mr Ramett for him to be paid a flat rate. The second group relate to the first respondent’s failure to supply Mr Ramett with the payslips, which it is argued, also arose due to the agreement about a flat rate of pay of \$900.00 per fortnight.

16. The respondent submits that all contraventions that have a common element relating to underpayment should be grouped collectively as they overlap. They suggest that the loadings and penalties are all “*in accordance with the wage contraventions relating to the conduct of consistent shifts by*” Mr Ramett.
17. However, I reject both the applicant’s and the respondent’s submissions about the relevant groupings because:
  - a) The obligations to pay basic rates of pay, casual loading, holiday and Sunday penalty rates and permanent night shift allowances are all separate and distinct obligations arising under separate and distinction statutory or legislative provisions. The 17 separate contraventions set out in the table above represent the contraventions with which the Court has to deal, after the application of s.557(1) of the Fair Work Act.
  - b) Whilst the contraventions might be further aggregated into groups, that further grouping is for the purpose of fixing an appropriate penalty in respect of each of the contraventions. The further aggregation is not undertaken for the purpose of defining each contravention with which the court has to deal.
18. Having regard to s.557(1) of the Fair Work Act, I am satisfied that I should approach the matter on the basis that the first respondent and the second respondent have contravened each of the obligations set out in the table above. There are seventeen separate contraventions with which to deal.
19. The maximum penalties that may be imposed upon the respondents are set out in the table above. Because I have not accepted the submissions of either party about how the contraventions should be grouped, the maximum penalties that might be imposed are higher than those contended for by the parties.
20. I accept the applicant’s submissions that the admitted contraventions represent a serious failure to afford an employee important minimum entitlements under the Workplace Relations Act and Fair Work Act. The contraventions relate to Mr Ramett’s most basic entitlements as an employee – the entitlement to be paid the correct minimum wage rate;

a casual loading rate; a permanent night work shift allowance/penalty rate; a Sunday rate and a public holiday rate pursuant to the relevant industrial instruments. He is also entitled to be provided with payslips.

21. The contraventions took place over a period of six years. That is a significant period during which Mr Ramett was underpaid an amount of \$40,394.59. I accept that this underpayment arose because the first respondent and the second respondent, a director with significant experience working in the security industry, chose not to pay in accordance with the applicable industrial instruments instead applying a flat rate of \$900.00 per fortnight. It is not to the point that the rate of remuneration might have been agreed between the first and/or second respondent and Mr Ramett.
22. The respondents did not admit the extent of the underpayment without the initiation of proceedings in this matter. It is of some moment to note that the majority of the underpayments might be attributable to the first respondent's failure to pay penalty rates and shift allowances. Penalty rates applied to much of the work done by Mr Ramett because of the times at which he performed his work. The total underpayment for work undertaken on Sundays, public holidays and at night is \$31,203.98, or 77.25% of the total underpayments.
23. The first respondent had the benefit of the underpayment and continues to have the benefit of it.
24. The applicant and respondents have agreed for the underpayment to be paid by way of a payment plan as follows:
  - a) \$8,000 be paid to Mr Ramett by 20 February, 2014;
  - b) monthly instalments of \$2,500 to be paid to Mr Ramett by the 20<sup>th</sup> day of each month up to and including 20 November, 2014;
  - c) the remainder to be paid to Mr Ramett by 20 December, 2014; and
  - d) in the event that the first respondent is in default on the payment plan any unpaid amount will become immediately due and payable by the first respondent unless the parties have agreed in writing to amend that payment plan prior to the default.

25. Although the applicant submits that Mr Ramett was a vulnerable employee in the sense that he was low skilled and had limited other options in the Bundaberg job market, I am not persuaded that Mr Ramett might properly be described as a “vulnerable” employee.
26. The applicant submits that that the failure to provide payslips effectively further disempowered Mr Ramett. In that respect I was referred to *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 at [67]:
- 67. Whilst the record keeping obligation with respect to pay slips only appears in Regulations, its central importance in industrial matters cannot be underestimated. Proper pay slips allow employees to understand how their pay is calculated and therefore easily obtain advice. Pay slips provide the most practical check on false record keeping and underpayments, and allow for genuine mistakes or misunderstandings to be quickly identified. Without proper pay slips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated.*
27. I accept that those remarks are equally apposite to this case.
28. The first respondent has not previously been the subject of proceedings brought by the applicant or its predecessors for contraventions of workplace laws. However, the first respondent has previously been the subject of investigation by the applicant and its predecessors for the underpayment of wages to employees. Through those investigations, the earliest of which appears to have commenced in March, 2008 the respondents have been made aware of their obligations to pay correct wages.
29. The first respondent is a small employer. At the time of the contraventions it employed 10 or less employees. But in my view that is of little importance. The employees of small concerns are entitled to the protection of the relevant industrial laws just as much as are employees of large concerns. Any sanction should be imposed at a meaningful level irrespective of the size of the employer.
30. As was pointed out in *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 at [27] - [29]:

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

31. The financial circumstances of the first and second respondents are relevant. They led evidence at the penalty hearing about the financial position of each of them. A company tax return was tendered (exhibit 2) which purports to cover the period 1 October, 2013 to 31 October, 2013. That tax return establishes that for that period the first respondent had a total income of \$2,501,405. It had expenses for the same period of \$2,438,287 and thus, a total income of \$63,118. The tax return purports to thereafter calculate the quote taxable income or "loss" of the company. The return purports to demonstrate that the company has a loss for the relevant period of \$675. No attempt to explain how that came about was made by the second respondent when he gave oral evidence. He was unable to explain that document at all.
32. I place no weight on exhibit 2. The document is confused and confusing. On its face it relates to only a one-month period of operation for the first respondent. The document establishes that for that period of time the company had a profit of \$63,118. That hardly demonstrates that the first respondent is in a difficult financial position.
33. The second set of documents relied upon by the respondents were financial statements for the first respondent for the year ended 30 June, 2012 (exhibit 1). The profit and loss statement demonstrated an increase in total income between the years 2011 and 2012 of more than \$500,000. It also demonstrated an increase in the company's expenses for the same period by about the same amount. The profit from ordinary activities before income tax for the year ended 30 June, 2012 was a little over \$7200. The company's balance sheet as at 30 June, 2012 demonstrated that it had made considerable loans to directors in both 2012 and 2011. There were also loans to an entity described as "Harris & Mills Family Trust". There was no explanation given about those loans.
34. Despite the company income tax return being prepared and presented for the period I have described above, no financial statements of the

company were presented for the same period. In those circumstances, the weight to be attached to exhibit 1 which relates to the 2011/2012 financial year can only be minimal.

35. In any event, financial hardship that an employer may be experiencing is a matter of limited utility. In *Lynch v Buckley Sawmills Pty Ltd* (1984) 3 FCR 503 at 508, Keely J said:

*In this connection it is important that the respondent – and other employers bound by the award or by other awards under the Act – understand the importance of complying with an award and it follows that any decision taken by them which is regarded as affecting their obligation to comply with particular provisions of the award or the award generally should only be taken after careful consideration. They must not be left under the impression that in times of financial difficulty they can breach an award made under the Act either with impunity or in the belief that no substantial penalty will be imposed in respect of a breach found by a court to have been committed.*

36. I accept that the conduct of the first respondent was deliberate. It appears to have been more than merely reckless. The second respondent has been a principal of security businesses since 2000. At the time of the contraventions he had significant experience as a manager in the security industry. I am prepared to infer that through his experience in the security industry he was aware that penalty rates and loadings applied to work undertaken during certain hours and on weekends and that wages were to be calculated for employees on an hourly rate. Further, the respondents had been made aware of the obligations to pay correct wages through the investigations by the applicant that commenced in 2008.

37. The first and second respondents contend that the flat rate of remuneration paid to Mr Ramett was paid at his request. The second respondent alleges that Mr Ramett requested to be paid \$900 per fortnight as he was earning too much money and that was affecting his Centrelink payments. Mr Ramett denies the allegations.

38. I enquired of the respondents' solicitor if it was necessary to determine that factual dispute before I could determine the penalties to be imposed upon the respondents. I was told that it was not necessary and that the respondents, whilst not resiling from the allegations, accepted their culpability.

39. Whatever be the case, it is clear that the first respondent, through the second respondent, consciously determined to pay Mr Ramett a flat rate of pay which the second respondent knew to be below the required rate.
40. There is no dispute that the second respondent was involved in each of the contraventions by the first respondent and the he was the directing mind and will of the first respondent.
41. The applicant acknowledges that the respondents have demonstrated co-operation as the application now proceeds upon the basis of an agreed statement of facts. The applicant began investigating Mr Ramett's complaints against the respondents in October, 2012. These proceedings were commenced June, 2013. The respondents defended the proceedings on the basis that notwithstanding the contraventions, there was no underpayment of the Mr Ramett of any of his entitlements. It has been clear that the respondents accepted responsibility for the alleged contraventions, but disputed the amount that might be owing to Mr Ramett.
42. I accept that the first respondent co-operated during the investigation by providing documents at the request of the applicant. The second respondent did not participate in a record of interview during the investigation but did authorise solicitors to deal with the applicant on his behalf.
43. The applicant submits that both the first respondent and the second respondent should be afforded a 15–20% discount on penalty for their admissions and co-operation with the applicant.
44. I accept that there is no evidence of contrition. Despite the respondents filing evidence in the matter, there is no statement of regret or remorse by the first respondent or the second respondent. Whilst there is an agreement in place for the payment to Mr Ramett of the underpayment, that is nothing more than a recognition of the reality of the situation.
45. I accept that the contraventions in these proceedings concern the removal of key employment entitlements from Mr Ramett. There is a need for the penalty to be imposed to have a deterrent effect generally. Employers should be left in no doubt that the withholding of such basic

entitlements from employees is not something tolerated by the community.

46. Moreover, the applicant submits that the nature of the security industry is such that it involves unskilled labour and therefore it is more likely to attract vulnerable workers. As a result, it is particularly important to deter other employers from committing similar contraventions in this industry. No issue was taken with those submissions by the respondents.
47. The applicant points out that in 2009 and 2011, the Fair Work Ombudsman produced two reports following a National Security Industry Campaign and audit. The findings of the reports highlight the high need for general deterrence in the security industry and include the following findings:
  - a) in 2009, 33% of Queensland employers subject to the audit were found to be in contravention with 19.30% of those employers found to have monetary contraventions in respect of underpayment of wages, penalty rates and allowances;
  - b) in 2009 the primary finding from the campaign across all states was the common practice of employers paying flat rates;
  - c) in 2011, that 22% of Queensland employers subject to the audit were found to be in contravention with 18% of those employers found to have monetary contraventions;
  - d) in 2011 that it was a common contravention in Queensland for casuals not to receive loadings and penalty rates; and
  - e) that some employers were failing to comply with Australian workplace obligations in an attempt to win contracts.
48. The evidence of Ms Rossow, the investigator in this case, establishes that there are large volumes of complaints and investigations in the security industry and as such there is a need, in this industry, to send a message to all employers that harsh penalties will apply if they contravene the workplace laws.

49. The first respondent continues to operate its business and employ others. The second respondent also continues to be the director of the first respondent and continues to work in the business. The first respondent's business has been investigated before. There is unchallenged evidence that by letter dated 7 March, 2008 the applicant wrote to the first respondent (for the attention of the second respondent) pointing out that following an audit of the first respondent's records a number of breaches of the relevant applicable industrial laws had been identified. Those breaches were specified in the letter and the first respondent was requested to rectify the breaches and "ensure that the requirements of the Award and the Regulations are met and that all future Award requirements are followed...".
50. The penalties must bring home to these respondents that contravention of the industrial laws, particularly those of such a base nature as the present contraventions, are serious.

## **Penalties**

51. As I have set out above the applicant contends that to the extent that there are separate contraventions that have come about because of a change in the relevant legislative instruments covering Mr Ramett's employment, those contraventions that relate to the same types of obligations should be dealt with as one contravention. For example the contraventions relating to the failure to pay the basic rate of pay pursuant to the Workplace Relations Act, the Transitional Act and the Security Award should be dealt with as a single contravention. The contraventions relating to the failure to pay penalty rates and shift allowances should each be dealt with similarly. I accept those submissions.
52. For the first contravention relating to the failure to pay the basic rate of pay for the period covered by s.182(1) of the Workplace Relations Act, I consider a penalty of 40% of the maximum (after a discount of 15% for co-operation), or \$13,200 is appropriate for the first respondent. In respect of the contraventions for failure to pay the basic rate of pay for the periods covered by Item 5 of Sch 16 of the Transitional Act and cl.14.1 of the Security Award, I impose no further penalty.

53. Initially, I was attracted to the argument made by the respondents that the offending conduct in this case was the single act or course of conduct constituted by setting of a flat rate of remuneration for Mr Ramett. It was argued that the failure to pay the correct casual loadings and other allowances was a failure to comply with obligations which substantially overlap with the obligation to pay the correct rate of pay. It is important that the first respondent not be penalised for the same offensive conduct more than once.
54. However, on reflection, it seems to me that the argument has no substance when one considers and gives weight to the evidence of Ms Rossow set out at paragraphs 22 – 30 of her affidavit filed on 18 February, 2014. Her evidence concerning the audit conducted of the first respondent's business in 2008, the identification of breaches similar to those now the subject of complaint in these proceedings revealed by that audit and the very clear requirements that the first respondent undertake a review of its records for past and present employees to identify and rectify any breaches suggests that the first and second respondents must have consciously decided to continue contravening the relevant provisions when it came to Mr Ramett.
55. There were also subsequent investigations, the identification of other breaches and letters requiring corrective action sent to the first and second respondents.
56. In respect of the contravention relating to the failure to pay casual leave loading for the period covered by s.185(2) of the Workplace Relations Act I consider a penalty of 40% of the maximum (after a discount of 15% for co-operation), or \$13,200 is appropriate for the first respondent. In respect of the contraventions for failure to pay casual leave loading for the periods covered by Item 5 of Sch 16 of the Transitional Act and cl.10.5(b) of the Security Award, I impose no further penalty.
57. In respect of the contravention relating to the failure to pay permanent night work shift allowance for the period covered by cl.7.6 of the Security Industry NPSA I consider a penalty of 40% of the maximum (after a discount of 15% for co-operation), or \$13,200 is appropriate for the first respondent. In respect of the contraventions for failure to pay permanent night work shift allowance for the periods covered by Item

5 of Sch 16 of the Transitional Act and cl.22.3 of the Security Award, I impose no further penalty.

58. In respect of the contravention relating to the failure to pay Sunday penalty rates for the period covered by cl.6.8 of the Security Industry NPSA I consider a penalty of 40% of the maximum (after a discount of 15% for co-operation), or \$13,200 is appropriate for the first respondent. In respect of the contraventions for failure to pay Sunday penalty rates for the periods covered by Item 5 of Sch 16 of the Transitional Act and cl.22.3 of the Security Award, I impose no further penalty.
59. In respect of the contravention relating to the failure to pay public holiday penalty rates for the period covered by cl.7.6.5 of the Security Industry NPSA I consider a penalty of 40% of the maximum (after a discount of 15% for co-operation), or \$13,200 is appropriate for the first respondent. In respect of the contraventions for failure to pay public holiday penalty rates for the periods covered by Item 5 of Sch 16 of the Transitional Act and cl.22.3 of the Security Award, I impose no further penalty.
60. In relation to the contravention for failing to supply pay slips a penalty of 60% is in my view appropriate. Even if there was an agreement between the first respondent and Mr Ramett about his rate of pay, the provision of payslips was required. That contravention has not been explained by the first respondent.
61. As to the contraventions alleged against the second respondent, the respondents submit that the second respondent as sole director of the business was the alter ego of the first respondent company. He was the person involved in the negotiation with Mr Ramett as to the pay rate. In those circumstances, the respondents suggest that *“the apportionment of penalty between the First and Second respondents is somewhat an artificial exercise as ultimately there is an acknowledged breach of the legislation by an employer and to issue a full penalty against that employer then add an additional penalty to its Director when they are in essence, one and the same it is submitted does not serve the interests of justice in the terms of penalty.”*

62. However, in my view, that the Fair Work Act specifically provides for the liability of a person who was involved in the contraventions committed by another (s.557(1) of the Act) demonstrates an intention that generally speaking the imposition of two penalties, one on the primary contravener and another on a person involved in the contravention, is appropriate. As the applicant submits, the culpability of each respondent must be assessed individually and in the context set by the maximum penalty prescribed in each case.
63. I adopt a similar approach to that taken to the contraventions committed by the first respondent. For the contraventions relating to the failure to pay the basic rate of pay, casual loading, public holiday loading, permanent night shift allowance and Sunday penalty rates I consider a penalty of 40% of the maximum (after the discount for co-operation) is appropriate for the second respondent in each case. In relation to the contravention for failing to supply pay slips a penalty of 60% is appropriate.
64. In summary, the penalties are as follows:

s.182(1) of the Workplace Relations Act	Failure to pay basic periodic rate of pay.	\$13,200	\$2,640
Item 5 of Sch 16 of the Transitional Act	Failure to pay the basic periodic rate of pay.	No further penalty	No further penalty
cl.14.1 of the Security Award	Failure to pay the required minimum wage rate.	No further penalty	No further penalty
s.185(2) of the Workplace Relations Act	Failure to pay required casual loading.	\$13,200	\$2,640

Item 5 of Sch 16 of the Transitional Act	Failure to pay the required casual loading.	No further penalty	No further penalty
cl.10.5(b) of the Security Award	Failure to pay the required casual loading.	No further penalty	No further penalty
cl.7.6 of the Security Industry NAPSA	Failure to pay permanent night work shift allowance.	\$13,200	\$2,640
Item 5 of Sch 16 of the Transitional Act	Failure to pay permanent night work shift allowance.	No further penalty	No further penalty
cl.22.3 of the Security Award	Failure to pay permanent night penalty.	No further penalty	No further penalty
cl.6.8 of the Security Industry NAPSA	Failure to pay Sunday penalty rate.	\$13,200	\$2,640
Item 5 of Schedule 16 of the Transitional Act	Failure to pay the Sunday penalty rate.	No further penalty	No further penalty
cl.22.3 of the Security Award	Failure to pay the applicable Sunday penalty.	No further penalty	No further penalty
cl.7.6.5 of the Security Industry NAPSA	Failure to pay public holiday penalty rates.	\$13,200	\$2,640
Item 5 of Schedule 16 of the Transitional Act	Failure to pay the applicable public holiday penalty rate.	No further penalty	No further penalty
cl.22.3 of the Security	Failure to pay the applicable	No further penalty	No further penalty

Modern Award	public holiday penalty.		
Reg.19.20 of the Workplace Relations Regulations	Failure to issue payslips	\$4,400	\$2,640
s.536(1) of the Fair Work Act	Failure to give payslips 1 January, 2010 to 1 September, 2010.	No further penalty	No further penalty
<b>Totals</b>		<b>\$70,400</b>	<b>\$15,840</b>

65. Having fixed an appropriate penalty for the contraventions, the Court should take a final look at the aggregate penalty for contraventions of a similar nature, to determine whether it is an appropriate response to the conduct which led to the breaches, and is not oppressive or crushing. The total penalty to be imposed upon the first respondent in respect of the remuneration contraventions (that is, excluding the wage slip contravention which is not of a similar nature to the other contraventions) is \$66,000. The total penalty to be imposed upon the second respondent is \$13,200.
66. Whilst the contraventions relate to only one employee, they cover a significant period of time. They cover a period during which the first respondent was advised to undertake a review of its compliance with workplace laws on more than one occasion. The amount by which the relevant employee was under paid is also significant. The totality principle does not demand that the aggregate penalty be reduced in every case.
67. However, notwithstanding those matters, I have come to the conclusion in this case that the aggregate penalty to be imposed upon the first respondent might be seen to be out of proportion to the first respondent's offending. A total penalty of \$50,000 in respect of the remuneration contraventions is an appropriate response to the first respondent's offending.

68. The total penalty to be imposed upon the second respondent for the remuneration offences should be similarly reduced to \$10,000.
69. I make the orders set out at the commencement of these reasons.

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**I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of Judge Jarrett**

Associate:

Date: 26 March 2014